

this manner for three years, without a furnishing on the part of the creditor. After this period, according to the plea now maintained, the debtor may sue for payment of the articles furnished, not only within the three years, but at any distance of time during which his account has continued current; when, on the other hand, the person who is truly the creditor, not having furnished any thing within the three years, can neither sue for his payment, nor defend himself from the demands of the other party.

THE LORDS gave opposite judgments; but finally "found the prescription run, and assolzied."

Lord Ordinary, *Westhall*.
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Act. *Elphinston*.

Alt. *Geo. Wallace, Craig*.

Clerk, *Orme*.

Fol. Dic. v. 4. p. 107. Fac. Col. No 57. p. 90.

1784. November 19, JOHN ROSS against ALEXANDER SHAW.

Ross having pursued Shaw for payment of an account of goods furnished twelve years before, produced, in order to obviate the plea of the triennial prescription enacted by the statute of 1579, c. 83, certain letters of the defender's commissioning the goods. The defender admitted the furnishing, but asserted that payment had been made; and

Pleaded; An order for merchandise, given in writing, can never be construed into a written obligation in the terms of this statute; since it affords no proof of the goods being actually furnished, or, in other words, that any debt has been created. The present case then comes not within the exception of the statute; and, as that enactment is founded on the presumption of payment, the acknowledgement of furnishing alone is of no consequence.

Answered; The act of Parliament in question contains an express declaration, that it extends not to debts founded on written obligations; from which it is probable, that its object is the proof of constitution of debt; the plain language of the whole enactment being, that the accuracy of testimony in such matters is not to be confided in after three years from their date shall have elapsed. Hence the common idea of this statute's having established, on the expiration of that period, a presumption of payment which is not to be elided except *scripto vel juramento*, seems to be contradicted by its terms; the presumption thus introduced being truly against the constitution of debt, if not otherwise ascertained than by parole evidence. In the present case, however, the letters must remove the hazard arising from the lubricity of testimony, so as to render it admissible, according to Lord Stair, 5th July 1681, *Dickson contra Macaulay*, No 288. p. 11090. But in fact, the defender, by acknowledging the furnishing consequent on the written commission, has given to it the same effect as if at the time he had added in writing a declaration of the same import.

No 319.

No 320.

The triennial prescription of an account, not obviated by a written commission for the goods, joined to a judicial acknowledgement of the furnishing.

No 320.

The LORD ORDINARY “repelled the defence of prescription, and found the defender liable in payment of the sums libelled.”

But the opinion of the Court was, That the prescription was not excluded, and so far they altered the Lord Ordinary’s interlocutor; but found the defender liable on a different ground.

Lord Ordinary, *Svinton*.Act. *J. Pringle*.Alt. *Russell*.Clerk, *Robertson*.

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Fol. Dic. v. 4. p. 108. Fac. Col. No 276. p. 277.

1794. November 18.

WILLIAM DOUGLAS against MARY GRIERSON.

No 321.

An account of furnishing, although instructed by a commission in writing from the purchaser, and by the carrier’s receipt for them, found to fall under the triennial prescription,

WILLIAM DOUGLASS, factor for a Company of soap-boilers at Leith, sued Mary Grierson, as representing her deceased husband Thomas Hislop at Wanlockhead, for the price of a quantity of soap, alleged to have been furnished to him.

In support of his claim, he produced a letter holograph of Hislop, ordering the soap; to which was subjoined, a receipt by the carrier, to whom it was delivered on his account.

The defender contended, that the account fell under the triennial prescription. The pursuer, on the other hand,

Pleaded; The sole object of the act 1579, c. 83, was to prevent the uncertainty which would attend the admission of parole proof as to facts of a remote date. The lapse of the three years, therefore, creates no presumption against the subsistence of the debt, but only a limitation as to the mode of proving its constitution. Before the three years are expired, it may be proved *prout de jure*, afterwards only *scripto vel juramento*; Stair, b. 2. tit. 12. § 30.; Ersk. b. 3. tit. 7. § 16.—18.; Mackenzie’s Observations; Bankton, b. 2. tit. 12. § 34. If the act proceeded upon a presumption of payment, it would follow, that no writing granted within the three years, could bar the prescription, because the debt might have been afterwards paid? and, contrary to the evident intention of the legislature, there would be no distinction during that period, between written and parole evidence.

That the act was meant to apply only to the constitution of the debt, is farther evident, from the different terms employed by the legislature, in the acts 1579, c. 81, 82, where a proper prescription was intended, and also from the act 1669, c. 9, which, in so far as it relates to the stipends of ministers, mulctures, and mails and duties, requires a proof of resting owing; but in so far as it relates to bargains concerning moveables, as it had a similar object with the act now in question, is framed nearly in the same terms.

Accordingly, in questions upon the triennial prescription, the point in dispute has been not so much whether the debts being constituted in writing, barred the application of the statute, as, whether the particular writings founded