

[27th August 1833.]

DUNCAN MACDOUGALL, Appellant.—*Lord Advocate*
(*Jeffrey*).

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JEAN CAMPBELL and others, Representatives of the late
ARCHIBALD CAMPBELL, Respondents.

Triennial Prescription.—Held (affirming the judgment of the Court of Session), that the triennial prescription applies to the wages of a servant. Question, Whether that prescription applies to the purchase of cows singly and forming part of an account current?

Payment—Presumption.—Circumstances under which payment was presumed from lapse of time.

THE appellant, on the 26th of January 1829, brought an action before the Court of Session against the late Archibald Campbell, alleging that the latter was “justly
“ addebted, resting, and owing to the pursuer the sum
“ of 161*l.* sterling, being the amount of an account of
“ wages for servitude performed by the pursuer for
“ behoof and on account of the said Archibald Camp-
“ bell, from the term of Whitsunday 1811 to the term
“ of Whitsunday 1822; item, the value of nine stirks
“ furnished and sold by the pursuer to the said Archi-
“ bald Campbell at the rate of 3*l.* each; item, cash
“ payments made by the pursuer or others on his
“ account to the said Archibald Campbell, all conform
“ to a particular account thereof rendered to the said
“ Archibald Campbell, to be produced in process, and
“ herein held as repeated *brevitatis causa*.” The
conclusion was for payment, under deduction of such

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sums as Campbell could show he was entitled to deduct. The latter denied resting owing, and pleaded prescription as to the wages; admitted that he had got the stirks, but denied that they were of the value alleged, and pleaded compensation; and in regard to the cash, he denied that he had ever got it, and maintained that the reverse could be proved only by his writ or oath.

The Lord Ordinary, on the 3d of March 1830, sustained the plea of prescription, assoilzied the defender from the conclusions of the action, and of consent of the defender found no expenses due. To this interlocutor the Court, on the 22d of June 1830, adhered, but remitted to the Lord Ordinary to allow the appellant to make a reference to oath if he saw fit.* The appellant declined to do so, and appealed. No appearance was made for Campbell, who had in the meantime died, and was succeeded by his son and daughter.

Appellant.—Although it may be true that the triennial prescription applies to the wages of servants, yet, if the constitution and non-payment be admitted, it is not necessary to have recourse to a reference to oath. In the present case, a certificate of character by Mr. Campbell in favour of the appellant was produced, which on fair construction imports an admission that the appellant had been in the service of Mr. Campbell for the period libelled; and it was admitted on the record, that the appellant had resided in a cottage on Mr. Campbell's farm, and been occasionally employed to work on it. On the other hand, it was not alleged that any wages had been paid.

'The plea of prescription does not apply to that part

* 8 S., D., & B., 959.

of the claim which relates to the stirks*, for although they form part of the account, and were delivered at separate times, yet each sale must be regarded as a separate and distinct transaction, and not of the nature of an ordinary account current. But even if the plea of prescription were competent (and in fact it was not pleaded) it would be elided by the fact that the appellant, during the currency of it, was in a state of insanity. This was stated by the respondents themselves, although it was done for the purpose of making the Court believe that the claim was altogether a delusion.

By the judgment the respondent was assoilzied simply in respect of the triennial prescription; but such a plea is inapplicable to the case of loans of money, and therefore it ought to be reversed.

LORD CHANCELLOR.—My Lords, the last case that stands for your Lordships judgment to-day is the case of Macdougall v. Campbell, which was argued before your Lordships on one side only by the learned counsel for the appellant. It was not argued on the other side of the bar, the respondents being unwilling, I suppose, to incur the expense of appearing; and I do not at all regret the course taken, as it has saved unnecessary expense. In advising your Lordships to affirm the interlocutors complained of, as no counsel has appeared for the respondents, but only on the part of the appellant, it is unnecessary to call your attention minutely to the facts of the case; but I will shortly state the grounds upon which I think the interlocutors may well stand, with a certain slight alteration which I will suggest to your Lordships.

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* Bell's Principles, p. 152; Baird, February 16, 1688, Mor. 11,092; Tait on Evidence, 457.

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The subject matter of the claim, as stated in the appellant's case, was of a threefold description: 1st, a claim for wages; 2dly, for money advanced; and, 3dly, for the price of certain beasts or stirks sold by the one party to the other; and the questions brought before your Lordships, with respect to this claim, are, first, a question raised by the plea of prescription; and there can be no doubt, indeed it hardly seems to be denied, that this is a good plea, if there is no admission of liability, or any thing else to repel the defence. Indeed, the argument of the appellant abandoned that point, as it applied to 120*l.* out of 161*l.* upon one calculation, and out of 154*l.* upon the other, according as you take the money paid to be 7*l.* or 14*l.* But at all events, taking either of the calculations, it leaves a very small matter in contest between the parties; and I cannot help thinking that it is truly lamentable to see a claim of 20*l.* or 30*l.* come before your Lordships, and occupy your time to the inevitable injury of the parties, whichever way it is decided; because, even should we reverse the decision, the costs out of pocket must put the appellant to an expense, if he had not been a pauper, that would have exceeded any thing he could have got, even if the extraordinary course had been pursued of giving him his costs of the appeal. The next part of the claim is for 7*l.* or 14*l.* alleged to have been paid by the appellant to the respondent, but not admitted by him. Now, the defence to this does not rest upon prescription, but on the ground that there is not the kind of evidence required by the law of Scotland, and that it cannot be proved by parole evidence, but only scripto vel juramento; and there are in this case neither. We are, therefore, now brought to the only other remaining matter,—the money alleged

to be due for the nine stirks. To this prescription was pleaded; and the reply was, that the delivery of goods is not within the triennial prescription: neither is it, clearly. At the same time, if I deliver a horse, or a cow, or a parcel of goods in one transaction, the triennial prescription can be pleaded as a plea to a demand for those goods. But it is not true, at least I cannot discover, that prescription was pleaded to this part of the demand. The defender may have used the lapse of time as an argument, and a stronger cannot well be used to rebut the claim, by raising the presumption of payment; but I do not think that the triennial prescription is pleaded to that part of the demand, though there is something said of it in the judgment of the Lord Ordinary; and to that I shall call your Lordships attention, in the alteration I would suggest. It may, however, be observed, in passing, that even if such a plea had been pleaded, this is not a case in which it is so plainly excluded as it is assumed to be; for we have not here a single transaction, but a part of a course of dealing extending through a number of years, and I doubt much whether it does not come under the head of “merchants accounts.” But there is no necessity to decide that either way. The pursuer’s claim is met with the lapse of time on the part of the respondent, not as grounding upon it a plea of prescription, but as affording strong evidence against the truth of his case. I fully stated, on the argument at the hearing, the grounds upon which a party must almost always fail as to the fact, in making a court believe his statement, when he allows that he lay by for a long period of time during which there were other dealings. The authorities on the doctrine of the taciturnity of parties, if we may call it a legal doctrine, though it can

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hardly be said to be so, are to be found in Erskine's Institutes, the 7th title, and the 29th section of that title; and the reported cases on presumed payment entitle us to say that this doctrine of common sense, on which all juries in England act, with the approval of all judges, and which is, in truth, not a principle of law so much as one of natural reason applied to the weight of evidence, is fully recognized in the administration of the law of Scotland. Were this case sent back, and ultimately tried by a jury, who can doubt the result? But the account seems also against the party that makes the claim; for, including the sum for rent, and including the payment by Dr. Crawford, there is a balance of 5*l.* or 6*l.* against him, after allowing 27*l.* for the nine stirks. I therefore have no hesitation in recommending to your Lordships to affirm the interlocutors complained of, but of course, in a pauper case, without costs.

My Lords, the alteration I wish to suggest is, as I before stated, with respect to the mention of prescription. The Lord Ordinary, in the interlocutor of the 3d of March 1830, and which is appealed from, states,—
“ Having heard counsel for the parties, sustains the plea
“ of prescription:”—his Lordship certainly does give room to suspect that there had been generally a defence upon that plea, though I cannot find it as to the whole, though certainly with respect to part, the great bulk of it no doubt, it was pleaded: “ —sustains the plea of pre-
“ scription; assoilzies the defender from the conclusions
“ of the action, and decerns; and of consent of the de-
“ fender, finds no expenses due;” but the part relating to the prescription I should wish to have struck out, leaving it thus, “ assoilzies the defender.” Then, in the

interlocutor of their Lordships, of the 22d of June 1830, it is stated, “ The Lords having heard this note, and heard “ parties thereon, adhere to the Lord Ordinary’s inter- “ locutor reclaimed against, and refuse the reclaiming “ petition, but remit to the Lord Ordinary to receive and “ consider a reference to oath, if the pursuer shall be “ disposed to make one,” which he declined to do. Now, the alteration I should suggest is this, “ adhere “ to the Lord Ordinary’s interlocutor reclaimed against “ in so far as it assoilzies the defender.” This will be all that is necessary. Part of the demand of the pursuer, the present appellant, was subject to be dealt with as coming within the law of prescription. To that part of the claim the plea of prescription was properly pleaded, and from that part of the demand the respondent was properly assoilzied upon the ground of prescription; as to the rest there is a doubt. It is by no means clear that the prescription was pleaded, and it appears to me by no means clear that it was a valid plea. Therefore as to that part, the 27l. for the stirks, though the defender, upon the other grounds stated, ought to be assoilzied, he should not be assoilzied upon the ground of prescription. All possibility of mistake as to the law of prescription, arising from the judgment below, will be prevented by directing it to be thus reformed. With this alteration, then, I shall move your Lordships that the interlocutors be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

SYDNEY BELL, Solicitor.

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