

respect of the pursuers' tender, and in respect such approval and decree were not necessary to enable the defender to extract the former decree in his favour.

Counsel for Appellants—Pearson. Agent—J. Campbell Irons, S.S.C.

Counsel for Respondent—Mackintosh—Jameson. Agent—George M. Wood, S.S.C.

Saturday, February 4.

## FIRST DIVISION.

[Sheriff of Midlothian.]

AYTOUN v. STODDART.

*Triennial Prescription Act (1579, c. 83)—Law-Agent's Account—Fictitious Entries to Elude Application of Statute.*

In an account-current if it shall appear that the final entries are inserted by contrivance so as to exclude the plea of prescription, the Court will sustain that plea. Circumstances which were held to negative any contrivance of this kind.

William Aytoun, designing himself writer in Edinburgh, raised this action against Thomas Stoddart, executor of the deceased Mrs Stoddart or Hamilton, widow of Robert Hamilton, for payment of £100, 11s. 8d., being the *cumulo* amount of two sums of £57, 15s. 4d. and £41, 16s. 4d., of which the former was alleged to be the balance due to the pursuer on a business account between him and Mr Hamilton, and the latter to be the balance of a business account between him and Mrs Hamilton. The pursuer alleged that for the amount of the account due by Mr Hamilton, Mrs Hamilton, as his sole executrix and universal legatory, became liable. Mr Hamilton died on 26th May 1875, and the account against him was for the period between July 1865 and May 1875. Mrs Hamilton died on 17th May 1878. The account against her began 31st May 1875, and ended on 16th May 1878. The last two items of it (being the only items after 1st May 1878) were:—"16th May 1878—Attendance with Mr Robert Bruce, and afterwards with Mr Shanks, as to payment of rent of shop now due, £0, 0s. 0d. To postages and incidents, £0, 10s. 0d." This account was rendered in these terms in August 1878 to the defender's agent.

The action was raised on 14th May 1881. With regard to the entries just quoted, the pursuer made this explanation on record—"The last entry in this account relates to business done for Mrs Hamilton, who died on the following day. The pursuer did not enter in his account a charge for that work, although he was engaged more than an hour in her business, and paid a cab hire amounting to 2s. 6d., necessarily incurred in the performance of the said business. This is included in the incidents of 10s. forming the last item of the account."

The defender pleaded, *inter alia*, the triennial prescription.

On 20th July 1881 the Sheriff-Substitute (HALLARD) pronounced this interlocutor and note:—The Sheriff-Substitute having heard parties' procurators on the closed record and

productions, Finds that this is an action to recover payment of certain lawyers' accounts alleged to have been incurred to the pursuer, designed therein as 'Writer, Edinburgh.' Finds that the last item of said accounts is dated 16th May 1878, and that the present action was served upon the defender on 14th May 1881: Finds that the item immediately preceding 16th May 1878 is dated 1st May in said year, and that under said date of 16th May there are two items, to one of which no charge in money is annexed; while the second is in these terms—"To postages and incidents, 10s.:" Finds that said last items are insufficient to bar the application of the Statute 1579, c. 83, to the present action: Finds that said statute applies accordingly: And with this finding appoints the cause to be enrolled for further procedure.

"*Note.*—Only two days stand between the accounts libelled and the immediate and obvious application of the statute. If the two last items, both dated on 16th May 1878, be struck out, the statute applies. In this situation it is thought that an item to which no pecuniary charge is annexed, and an item so vague as 'postages and incidents,' are insufficient to prevent that result. The 2s. 6d. cab-hire mentioned in the record, if it can competently be looked at, gives very doubtful support to the pursuer's plea. But the Sheriff-Substitute thinks that the question must be determined on the account as it stands, and that this is a case for the application of that severity with which a last item of such an account in such circumstances is always scrutinised. An item in so doubtful a position is worthless without clear and definite detail, and has every appearance of having been stated to prevent the application of the statute."

The Sheriff (DAVIDSON) on appeal pronounced this interlocutor:—"Hoc statu reveals the interlocutor appealed against, and opens the record for the purpose of allowing the pursuer to amend the account libelled, by explaining, on the margin thereof, the particulars of the first item, under date May 16, 1878; and also, that the last item under the said date means that the 'postages and incidents' there stated refer to the whole account, and not specifically to the said date."

The pursuer then added to his account this explanatory note:—"It having been agreed between you and me, after my meeting with you on 1st instant, that I should attend you in Portobello on Saturday the 18th instant, to sign the will and sub-lease by you both above mentioned, and that I should arrange with Mr Neilson, the sub-tenant of your premises in Blair Street, that he should pay to the landlord the half-year's rent due yesterday by you of the premises in Blair Street; and Mr Robert Bruce, your nephew, having called on me to-day to say that you were ill, and that payment of the rent had been applied for—To attendance in a cab at your premises in Blair Street to induce Mr Neilson to pay the said rent in order to avoid legal proceedings at the instance of the landlord. Mr Neilson was out. Thereafter, attendance in the cab on Mr David Shanks, house agent, Hamilton Place, Stockbridge, Edinburgh, the factor of the landlord, to solicit delay in the payment of the rent. Mr Shanks was out; interview with his representative. I requested through him the favour of a call by Mr Shanks in

the evening: receiving call from Mr Shanks at my house accordingly: conference with him, when I undertook that the rent would be paid on the following Tuesday, and he agreed to give the delay requested. The last item, under date 16th May 1878—'To postages and incidents, 10s.'—means that 7s. 6d. of that sum refers to the period prior to the said 16th of May 1878, and that the remaining 2s. 6d. of said sum was the fare paid by me for the cab attending at Blair Street and at Mr Shanks' premises as before detailed."

Thereafter the Sheriff pronounced this interlocutor:—"Finds that the statement now made on the account libelled as to the last items in the said account, under date May 16, 1878, is not a sufficient statement of employment as on the said date, and is insufficient to bar the application of the Statute 1879, c. 83: Finds accordingly that the said statute applies, and appoints the cause to be enrolled for further procedure."

The pursuer having declined to proceed further under this interlocutor, the defender was assoltized, and the pursuer then appealed to the Court of Session, and argued—The first account (that incurred by Mr Hamilton) was, it must be admitted, prescribed, but that incurred by Mrs Hamilton was not. No doubt no charge was made for the work said to have been done on 16th May, but it was the Auditor's duty to add the proper charges when the account was taxed, just as he might strike off excessive charges—*Reeve v. Dykes*, 21st May 1829, 7 S. 632. Besides, the principle is not charge, but continuation of employment, as shown by the account. The plea of prescription is one applicable to a closed account. Napier on Prescription, pp. 737 and 767, and *dictum* of Lord President Blair in the case of *Leslie v. Mollison*, there referred to. [LORD PRESIDENT—*Ex facie* of the account the statute does not apply. It is settled ever since the case of *Alcock v. Easson*, Dec. 20, 1842, 5 D. 356, that in *initio litis* the Court must look at the account sued on, and if *ex facie* of the account the statute does not apply the plea of prescription cannot be sustained. The only question therefore is, Are these last entries fictitious?] These entries were not even suspicious, since their *bona fides* was established by the fact that they had occurred in exactly the same terms in a copy of the pursuer's account rendered within three months of Mrs Hamilton's death, and long before the plea of prescription could have been raised.

Argued for defender—This charge of "incidents," which was a general charge intended to spread over the period of the account, was not a charge which could be fairly made to elide the plea of prescription. The last two charges were clearly fictitious, and intended to elide the plea of prescription, and must therefore be put out of view in considering that plea, which thus fell to be sustained—*Stewart v. Scott*, Feb. 28, 1844, 6 D. 889.

At advising—

LORD PRESIDENT—This is an action for payment of an account alleged to have been incurred to the pursuer as a law-agent. *Ex facie* of the account and summons, the account begins on 31st May 1875 and ends on 16th May 1878. The action was raised on 14th May 1881, and consequently within three years of the last item

in the account. The defender pleaded the triennial prescription. *Ex facie* of the account and summons, the statute introducing the triennial prescription does not apply. But the defender avers that the last two items are fictitious, and are just put into the account to elide the plea of prescription. If that is made out, then the statute may apply, because the last two items will then be disregarded, as has been done by the Sheriff-Substitute and by the Sheriff. The rule of that matter is quite settled, and there is no better illustration of it than the case of *Stewart v. Scott*, to which the defender's counsel referred. A single sentence in Lord Moncreiff's opinion in that case states the law exactly—"On the case itself it appears to me to be very clear, as a matter of fact, that this account has been made up by contrivance to exclude prescription. I can give no countenance to this." That is the question here. Has this account been made up by contrivance to elide the plea of prescription? The best answer to that question consists in the pursuer's showing that in the account he rendered for the same services in August 1878, within three months after the death of his client, these two items were included in exactly the same manner as they now stand in the account here sued for. The sum thus charged may or may not be recovered in this action. That is not the question before us. The question here is, Whether this appears on the face of the account to be a fair and *bona fide* entry, or a mere trick to elide the statute? I have no hesitation in saying that it is not the latter, and accordingly, judging as I do, merely with reference to the plea of triennial prescription, I am of opinion that that plea is not applicable, and am therefore for repelling the plea of prescription and remitting the case to the Sheriff for further procedure.

LORD DEAS—If it be conceded to the defender that even a strong suspicion as to these last items would be enough, the answer would be sufficient, that the opposite is demonstrated. These last two entries were contained in an account rendered within three months after the client's death. It is thus not only not proved that the entries were made for the purpose of eliding the plea of prescription, but it is proved that they were not.

LORD MURE concurred.

LORD SHAND was absent, being engaged in taking a proof remitted to his Lordship by the First Division.

The Court recalled the interlocutor of the Sheriff-Substitute of 20th July 1881, and all subsequent interlocutors, repelled the plea of prescription as regarded the account against the deceased Mrs Hamilton, and remitted to the Sheriff to proceed with the cause.

Counsel for Pursuer — Dickson. Agent — D. Turner, S.L.

Counsel for Defender — Guthrie. Agent — James Gow, S.S.C.