on any longer in the position in which she had placed herself, deliberately jumped off the car. Mr Macquisten submitted that that was the lesser of two evils, the other evil being that she might be jerked off the car as its speed increased and sustain worse injuries than she suffered.

Now I think it has been here relevantly averred that the driver failed to comply with the instructions that he received from the conductress of the car, but then I do not think that that was the true cause of the accident. The duty of a passenger in a car is to remain in a place of safety until the car is stopped. We know it is the every-day practice for the young and active to anticipate the stopping of the car by crowding the passage and going on to the platform and down on to the step. But I cannot affirm, any more than was done in the case to which we were referred, that the passenger is entitled as a matter of right to go on to the platform and from the platform on to the step, and then if anything happens to him either on the platform or on the step, to say that he is not to be blamed for going there.

In the ordinary case it is an exceedingly small risk that a person runs by doing what the passenger here did. But the risk was not so small in the case of a woman who was in a condition of pregnancy and burdened with a heavy child as the pursuer was. I cannot think that she was justified in these circumstances in leaving her seat in anticipation of the car stopping, but that she ought to have waited until it came to a stop, at all events, before she descended on to the step of the platform.

On the matter of contributory negligence I think it is also difficult to suppose that she had only the two alternatives figured—that she could not have placed the child on the platform and then, with the assistance of the conductress, regained the platform, or held the child a little longer until she could have asked the conductress to repeat the signal. But I found my judgment mainly upon this, that the fault averred is something which was not the cause of the accident to the pursuer, and I think the case is therefore irrelevant.

LORD GUTHRIE was not present.

The Court, holding the pursuer's averments irrelevant, dismissed the action.

Counsel for the Pursuer—Macquisten. Agents—Manson & Turner M'Farlane, W.S.

Counsel for the Defenders—Horne, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Friday, January 12.

FIRST DIVISION.

[Lord Hunter, Ordinary.

JOHNSON *v.* TILLIE, WHYTE, & COMPANY.

Prescription—Triennial—Proof—Act 1579, *c.* 83—*Competency of Writ of Debtor Dated within the Triennium to Prove Resting-Owing of Debt.*

The defenders in an action for payment of an account pleaded compensation, and founded on a debt which came admittedly under the provisions of the Act 1579, c. 83. The defenders were therefore limited to writ or oath on reference in proving the constitution and resting-owing of this debt, and in proof they founded upon letters of the pursuer, the last of which was dated within the period when prescription was running. The writs established the constitution of a debt. The pursuer averred that they instructed an agreement whereby the defenders agreed to accept goods of the pursuer in full settlement of their counter-claim. The defenders averred that the agreement was to accept merely the amount the goods realised in reduction *pro tanto* of their counter-claim. *Held* (*dis.* Lord Johnston; *sus.* Lord Ordinary Hunter) that the writs though dated within the *triennium* were competent to prove the resting-owing of the debt, that they proved resting-owing, and that, the plea of prescription being elided by the writs produced, the parties should be allowed a proof *habili modo* of their respective averments.

Henry Johnson, Selby, Yorkshire, *pursuer*, brought on July 12, 1916, an action against Tillie, Whyte, & Company, *defenders*, for payment of £179, 5s. 8d.

The *facts* of the case were as follows:—The sum sued for was the price of potatoes, peas, and bags bought by the defenders from the pursuer. The defenders averred that the peas were not of merchantable quality and had been rejected by them. That was denied by the pursuer. The defenders further averred that on 5th March 1913 they sold and delivered to the pursuer a quantity of peas, and the sacks for their conveyance, to the amount *in cumulo* of £173; that after pressing for settlement of that account they were approached by the pursuer to accept goods of his in settlement of his debt to them; that they refused to accept the goods in full settlement of their account unless the goods realised the sum of £173, and that if the goods on realisation fell short of that sum they were to look to the pursuer to make good the balance; that the pursuer forwarded the goods to them; that they sold them, the net proceeds amounting to £52, 11s. 2d., and that the pursuer was still due and resting-owing to them the sum of £120, 8s. 10d. Those averments were denied by the pursuer.

The pursuer pleaded—"4. The amount counter-claimed for by the defenders being prescribed, can only be proved by the writ or oath of the pursuer."

The defenders pleaded—"2. The pursuer being due and resting-owing to the defenders the sum of £120, 8s. 10d., in respect of goods sold and delivered to him by the defenders, the defenders are entitled to compensate the sum sued for to that extent."

On 7th November 1916 the Lord Ordinary (HUNTER) of consent sustained the fourth plea-in-law for the pursuer, and appointed the defenders to lodge in process the writ or writs on which they founded, and sent the case to the procedure roll.

The writs lodged by the defenders were in the form of a correspondence containing letters from the pursuer. None of the letters, &c., bore a date later than 29th October 1914. On 25th November the Lord Ordinary found the plea of prescription was elided by the writs produced and allowed the parties a proof *habili modo* of their respective averments.

Opinion.—"... The question I have to determine at this stage is concerned with a counter-claim made by the defenders against the pursuer. It seems that on 5th March 1913 the defenders sold and delivered certain goods to the pursuer. They maintained that the account therefor has not been paid. The pursuer pleads that this account is prescribed in terms of the Act 1579, c. 83, and of consent I have sustained this plea. The defenders have, however, lodged certain writs which they maintain elide the prescription. In particular, they found upon a number of letters passing between the parties. These letters prove the constitution of the debt. They also show that certain goods belonging to the pursuer were sent to the defenders and realised by them. According to the pursuer, the defenders accepted these goods in settlement of the account due by him to them. This the defenders deny, and maintain that the price realised by them for the goods was to extinguish *pro tanto* the pursuer's indebtedness to them, leaving the balance to be paid. I do not see why a proof of this alleged agreement should be excluded. If the defenders are right in their contention, the resting-owing, so far as the balance is concerned, would be established by the writings produced. I propose to find that the plea of prescription is elided by the writs produced, and to allow parties a proof *habili modo* of their averments."

The pursuer reclaimed, and argued—The correspondence admittedly established the constitution of a debt due by the pursuer to the defenders, but the defenders must also prove the resting-owing of the debt. That must be proved by the writ or oath of the debtor. Here the defenders had chosen to prove resting-owing by the writ of the pursuer. The only writ competent to prove resting-owing was a writ of the debtor dated subsequent to the expiry of the period of prescription—Bell's Comm. (M'Laren's ed.), i, 349; Dickson, Evidence, sections 455 and 516; *Stevenson* v. *Kyle*, 1849, 11 D. 1086, 1850, 12 D. 673, *per* Lord Ivory at p. 675; *Alcock* v. *Easson*, 1842, 5 D. 356, *per* Lord Justice-Clerk Hope at p. 363. *Davidson* v. *Hay*, 1806, Hume's Dec. 460, was not an authority to the contrary, for it proceeded upon the view, now discredited, that once the constitution of the debt had been proved, the debtor was bound to prove that the debt had been discharged. *Thomas* v. *Stiven*, 1868, 6 Macph. 777, 5 S.L.R. 504, was not a decision on that point, and the dicta of Lord Deas at p. 782 should not be followed as they proceeded upon an admission of counsel and were emitted in a case in which it was thought that the Act 1579, c. 83, did not apply. After the three years had expired the *onus* was on the person suing for the debt to prove that the account was still due and that *onus* was not shifted to the other party by proof of the constitution of the debt—*Robertson* v. *Royal Association of Contributors to the National Memorial of Scotland*, 1840, 2 D. 1343, *per* Lord Fullerton at p. 1345—and that *onus* could not be discharged by a writ dated within the three years and establishing resting-owing then. Similar principles applied to the sexennial prescription—Dickson on Evidence (*cit.*); *Russel* v. *Fairie*, 1792 M. 11,130; *Lindsay* v. *Moffat*, 1797, M. 11,137; *Darnley* v. *Kirkwood*, 1845, 7 D. 595. Here no writ dated subsequent to the expiry of the three years was founded on. [The above line of argument was abandoned by senior counsel for the pursuer, but is reported in view of the opinions of the Court.] Further, the writs founded on did not establish the resting-owing of a debt; they merely admitted the constitution of the debt, but clearly stated that it had been extinguished by the defenders taking over goods of the pursuer in settlement of it. If such evidence had been given in an oath on reference, the reference would be held to be negative—*Law* v. *Johnston*, 1843, 6 D. 201; *Cowbrough & Company* v. *Robertson*, 1879, 6 R. 1301, 16 S.L.R. 777. The same principle must be applied to a proof by writ. But in any event the Lord Ordinary was wrong. After finding that the Act 1579, c. 83, applied, he allowed a proof *habili modo*; whereas if the Act applied, then the proof was limited to writ or oath both as regards the constitution and the resting-owing of the debt. It was incompetent to hold that a debt had been admitted and to allow a proof *habili modo* to determine whether the defenders had agreed to accept goods from the pursuer in full of the debt or in part payment thereof, and if the latter, how much was still resting-owing. *Alcock* v. *Easson* (*cit.*); *Mitchell* v. *Ferrier*, 1842, 5 D. 169; *Cullen* v. *Smeal*, 1853, 15 D. 868, *per* Lord Justice-Clerk Hope at p. 875; Napier, Prescription, p. 730; *Mackay* v. *Ure*, 1849, 11 D. 982; *Stevenson* v. *Kyle* (*cit.*); and *Fiske* v. *Walpole*, 1860, 22 D. 1488, merely established that both sides of a correspondence about the debt must be considered. In *Smith* v. *Falconer*, 1831, 9 S. 474, and *Macandrew* v. *Hunter*, 1851, 13 D. 1111, proof supplementary to the debtor's writ or oath was allowed, but those decisions were contrary to the Act. Further, proof had been limited to writ or oath, of consent,

and the Lord Ordinary could not thereafter allow a proof *habili modo* — *Paterson* v. *Kidd's Trustees*, 1896, 23 R. 737, *per* Lord President Robertson at p. 738, 33 S.L.R. 568.

Argued for the respondents—None of the writs founded on were dated after the expiry of the prescriptive period, but the defenders were not limited to proof by writ dated after the expiry of the three years. The words of the Act of 1579 drew no distinction between a writ dated within the prescriptive period and one dated subsequent to its expiry, and such a distinction was not supported by principle or authority. Napier, Prescription, p. 786, disapproved of that argument. *Davidson* v. *Hay* (*cit.*) was not followed or commented on judicially, for after it was decided it was thought that the Act of 1579 raised presumptions as to payment and non-payment of the debt. Bell's Comm. (*cit.*) proceeded upon the same erroneous theory. The theory of presumptions was finally disapproved of in *Cullen* v. *Smeal* (*cit.*), *per* the Lord Justice-Clerk Hope at pp. 869, 870, and 874, Lord Rutherfurd at p. 882, and Lord Robertson at p. 888; *Alcock* v. *Easson* (*cit.*); *Darnley* v. *Kirkwood* (*cit.*), *per* Lord Fullerton at p. 600; Ersk. Inst., iii, vii, 18. Dickson on Evidence, section 516, derived no support from the authorities to which he referred, viz., *M'Laren* v. *Buik*, 1829, 7 S. 483; *Watson* v. *Johnston*, 1846, 18 S.J. 598. Lord Deas in *Thomas* v. *Steven* (*cit.*) expressly stated that a writ dated within the prescriptive period was sufficient. The law was as stated in Napier Prescription (*cit.*) that it was not the date but the nature and contents of the writ that were of importance. The theory of presumptions having been repudiated, *Davidson's* case (*cit.*) again became a good authority. Indeed the Act itself did not require proof of resting-owing by writ or oath, it dealt with debts not founded on writing, and so far as its terms went it merely compelled a pursuer to prove by writing the constitution of a debt such as was not necessarily or usually embodied in writing. Proof of resting-owing was introduced as the result of judicial interpretation, to which such ancient statutes were specially open—*Clyde Navigation Trustees* v. *Laird & Son*, 1883, 10 R. (H.L.) 77, *per* Lord Watson at p. 83, 20 S.L.R. 869. The cases cited on the sexennial prescription were not in point, for the terms of the statute were different—*Alcock's* case (*cit.*), *per* the Lord Justice-Clerk at p. 365; *Miller* v. *Miller*, 1898, 25 R. 995, *per* Lord Kincairney at p. 997, 35 S.L.R. 769. The writs produced admittedly established the constitution, and this also established resting-owing of a debt; if so, the requirements of the Act of 1579 had been satisfied, and it was competent to prove *prout de jure* the identity and amount of the debt and how far if at all the agreement of parties had operated to extinguish it—*Smith* v. *Falconer* (*cit.*); *Stevenson* v. *Kyle* (*cit.*); *Macandrew* v. *Hunter* (*cit.*). *Paterson's* case (*cit.*) was not in point, for there after consent to a particular mode of proof one of the parties wished to repudiate his consent, whereas here it was admitted of consent that the Act 1579 applied but that did not amount to a consent to any limitation of proof other than that imposed by that Act. The Lord Ordinary had rightly held the plea of prescription elided and allowed a proof *habili modo* — *Fiske* v. *Walpole* (*cit.*); *Wilson* v. *Scott*, 15 S.L.T. 948.

At advising—

LORD PRESIDENT—As this case was ultimately presented to us it raises no question of general interest in the law of Scotland, but inasmuch as the points debated and ultimately conceded are important, and at an earlier stage in the proceedings were represented as controversial, I think it right to state my reasons for concurring as I do in the judgment of the Lord Ordinary.

The defenders counterclaimed against the pursuer for payment of the balance of an account for goods sold and delivered, alleged to have been so sold and delivered on 9th March 1913. It is common ground that the counter-claim had undergone the triennial prescription, and consequently that the defenders had no action for their debt unless they proved both the constitution and the resting-owing by the writ or oath of the pursuer. Accordingly of consent the Lord Ordinary sustained the pursuer's fourth plea-in-law and appointed the defenders to lodge in process the writings on which they found. These writings are before us in the form of a correspondence, the latest date of which is, I think, the 24th October 1914.

It is conceded that the writings produced establish the constitution of the debt, but junior counsel for the reclaimer argued that they were inadmissible to prove resting-owing because they were all dated well within the period of three years. This argument was rested on the authority of a passage in Bell's Commentaries, i, p. 349, followed in Mr Dickson's work on Evidence, secs. 455 and 516. The case of *Davidson* v. *Hay*, (1806) Hume's Dec., 460, and the opinion of Lord Deas in the case of *Thomas* v. *Stiven*, (1868), 6 Macph. 777, 5 S.L.R. 504, were founded on to a contrary effect. Senior counsel for the pursuer, however, declined to support this argument. Accordingly I think it may now be taken as conceded that the true doctrine is this, that it is the character of the writ and not its date, before or after the lapse of the three years, which is the proper test of its sufficiency to prove both the constitution and present subsistence of the debt. The law is so stated in Mr Napier's work on Prescription, p. 786, and is followed by the latest writer on that subject. I think it correctly represents the sound doctrine of the law of Scotland. It has this conspicuous merit, that it is in harmony with the words of the old Act which says nothing about presumptions of payment or dates of writing, although at one period of our law it was supposed that it did. But as Lord Fullerton observed in the case of *Darnley* v. *Kirkwood*, (1845) 7 D. 595, at p. 600—"It seems to have been assumed that the Act 1579 . . . introduced certain presumptions of payment which might or might not receive effect according

to the circumstances of each case. With great submission there appears to me no foundation for such a view. Whatever general presumptions or probabilities may have weighed with the Legislature in passing these statutes, they introduce no presumptions, but enact certain specific and imperative rules on the subject of probation." Lord Justice-Clerk Hope observed in the case of *Cullen* v. *Smeal*, (1853), 15 D. 868, at p. 872—"The statute, in fact, only declares and prescribes what proof shall be necessary and alone competent and sufficient if the action is raised after the lapse of three years. The limitation of the kind of proof which shall be competent, of course makes it more difficult to prove that the debt is unpaid, than when every kind of evidence and presumption might be admissible. . . . But there is no warrant for allowing any presumptions of payment or of non-payment to bear on the construction of the statute, or to regulate its operation. . . . This statutory regulation is not dependent on, nor does it set forth, any presumptions of any kind as to payment or non-payment. It lays down a plain and peremptory rule." That being so, it could scarcely be disputed that the writings before us, which confessedly establish the constitution of the debt, do not also establish the resting-owing, because they disclose an attempt on the part of the pursuer to settle the claim by handing over certain goods to the defenders—he says in full settlement of the counter-claim, they say in part payment.

Now I think that if the writings establish, as I think they do, both the constitution and the resting-owing *prima facie*, then the defenders undoubtedly must prove *prout de jure* the amount of their debt, and at the same time show that it was not settled by the handing over of the goods. And the pursuer must have an opportunity of showing, if he can, that although *prima facie* the writings are against him, nevertheless he did settle the claim by handing over these goods to the defenders. That opportunity the Lord Ordinary has given the parties by the interlocutor before us. In the long run, indeed, the sole controversy between the parties turned upon the question whether or no the interlocutor of the Lord Ordinary was contrary to the agreement between them. It was said that inasmuch as he had sustained of consent the plea of prescription, it necessarily and inevitably followed that nothing but a proof by writ or oath could be allowed. That argument was founded on the authority of the case of *Paterson* v. *Kidd's Trustees*, (1896) 23 R. 737, 33 S.L.R. 568, where a proof before answer having been of consent allowed, an appeal for jury trial was held to be incompetent. The complete answer, however, in the present case seems to be that the interlocutor of the Lord Ordinary is one which is sanctioned by precedent wherever the writings prove the constitution and resting-owing of the debt, but something else requires to be proved before the creditor can obtain decree. And accordingly the Lord Ordinary's interlocutor is the interlocutor which ought in the ordinary course to follow the sustaining of the plea of prescription wherever something else requires to be proved before the case comes to an end. If the case of *Paterson* v. *Kidd's Trustees* (*cit.*) is inapplicable to this case, then I do not understand it to be contended that the Lord Ordinory's interlocutor should not stand.

LORD JOHNSTON—The two points which in my opinion are raised in this case on the application of the Triennial Prescription Act of 1579 are (1) whether under proof by writ it is sufficient to produce a writ the date of which is within the three years, and (2) whether in any view the Lord Ordinary's further allowance of proof was justified.

The case may be cleared of complexity by ignoring the fact that the statute is pleaded in answer to a counter-claim, and taking it as if the defenders A & Co. were suing the pursuer B for recovery of their counter account. So doing the facts may be stated thus—A & Co. are a firm of seedsmen in Edinburgh. B is a grower and dealer in agricultural seeds, &c., at Selby in Yorkshire. A & Co. and B have had a course of business dealing since 1910. On 5th March 1913 A & Co. sold and delivered to B pea seeds and sacks to the value as alleged of £173. This sum A & Co. may be said to sue for by their counter-claim under deduction of £52, 11s. 2d., realised by the sale of certain goods sent by B—but on what footing, if of any relevancy, is disputed—to meet A & Co.'s claim against him, leaving on A & Co.'s contention £120, 8s. 10d. due. If A & Co.'s counter-claim is good it reduces B's primary claim against A & Co. to a comparatively small sum, which A & Co. offer to pay, under deduction of the value of a small quantity of the goods rejected.

The action was raised on 12th July 1916, and therefore three years had elapsed since the transaction on which the counter-claim was based, and it was the last item supplied by A & Co. to B. Against A & Co.'s counter-claim B has pleaded that it is prescribed and can only be proved by writ or oath. There was no question but that the triennial prescription applied, and accordingly the plea was sustained, and A & Co. were appointed to lodge in process the writ or writs on which they founded. This A & Co. did. These writs consist of a correspondence beginning with 6th March 1913, dropping on 5th April 1913, taken up again on 22nd November 1913, and terminating on 24th October 1914. It is pretty evident that the correspondence is not complete, but A & Co. have made no motion for diligence to recover, and they stand at present on what has been produced. The case is therefore in an unsatisfactory position, and there is, moreover, no proper circumduction of proof in any terms.

A & Co. maintain that the letters of March-April 1913 are sufficient to constitute the debt, and that those from October 1913 onwards prove its resting-owing, or at least entitle them to proof *prout de jure* in explication or supplement—I do not know which—to establish the resting-owing. I think the first point may be conceded to A & Co., viz., that subject to ascertainment of amount

the early letters do sufficiently constitute the debt. But the nature of the rest of the correspondence is this—It shows admission by B of *an* account due as at October-November 1913, and negotiation following, spread over the next six months and more, for settlement, or *pro tanto* settlement—it is a question which—of *this* account by the transfer for sale of certain moveable articles not in the line of trade of the parties by B to A & Co. The object of B throughout the negotiation was to get this transfer of goods accepted as in settlement of his account, that of A & Co. to restrict the operation of the transfer to settlement *pro tanto*, the extent to depend on realisation. Which gained their point in negotiation is, I assume, for the present an open question, but is in my opinion immaterial. But it must be kept in mind that the correspondence began and ended during the three years of the Act—indeed eighteen months before their lapse.

The case has taken a course somewhat difficult to follow. The Lord Ordinary has found the plea of prescription to be elided by the writs produced, and then has allowed "the parties a proof *habili modo* of their respective averments." What he means by "*habili modo*," and what he means by "respective averments," I am at a loss to understand, unless it is that he thinks by the use of these terms he is not committing himself to the approval of a proof at large of the whole case. It is quite true that there is a question of rejection relating to B's claim against A & Co. which requires to be cleared up by proof *prout de jure*, and so far there can be no objection to a general proof. The rest of the Lord Ordinary's judgment relates to the counter-claim, and discloses that it was no mere minor matter of amount or charges that he was sending to proof, and that he had no idea of anything but an open proof on the larger question in supplement of the correspondence. But to what end he does not make clear. Referring to the correspondence he thus expresses himself in his judgment—"These letters prove the constitution of the debt. They also show that certain goods belonging to the pursuer were sent to the defenders and realised by them. According to the pursuer (*i.e.*, B) the defenders (*i.e.*, A & Co.) accepted these goods in settlement of the account due by him to them. This the defenders deny, and maintain that the price realised by them for the goods was to extinguish *pro tanto* the pursuer's indebtedness to them, leaving the balance to be paid. I do not see why a proof of this alleged agreement should be excluded. If the defenders are right in their contention, the resting-owing so far as the balance is concerned would be established by the writings produced. I propose to find that the plea of prescription is elided by the writs produced, and to allow parties a proof *habili modo* of their averments." Unfortunately his interlocutor does not put any limitation on the proof allowed. His Lordship's fallacy lies, I think, (1st) in these words—"I do not see why a proof of this alleged agreement should be excluded;" and (2nd), in determining that on the defenders' (A & Co.) contention the "resting-owing so far as the balance is concerned would be established." He has there gone in my opinion against both the policy and the terms of the Act of 1579.

But it was conceded by the parties that the Lord Ordinary did not have brought before him, at least with any prominence, what I think is the primary question, viz., whether the correspondence being within the three years can be accepted as satisfying the requirements of the statute. For how with writs insufficient in themselves to satisfy the requirements of the statute he can hold the plea of prescription "elided," as he calls it, and how if it is not by the writs themselves "elided" the proof he allows can be competent I fail altogether to understand. I am fully aware that Mr Sandeman in his reply jettisoned the argument propounded by his learned junior on this head and disclaimed the authorities he cited. But where a principle of law is at stake I think that it is for the Court and not for counsel to determine the law on which their judgment is to proceed.

What the statute says is that merchants' accounts and other the like debts "that are not founded upon written obligations, be persewit within three zeires, utherwise the creditour sall have na action except he outher preif be write or be aith of his partie." We had an exhaustive citation of authorities from the junior counsel on both sides on the interpretation and application of the Triennial Prescription Act 1579. It is unnecessary to examine all those quoted, for the majority of them bore upon the subject generally, and only two or three upon the special question we have here. However a few words on the general question may be conveniently said.

In the leading case of *Alcock* v. *Easson*, 1842, 5 D. 356, it was held that no averment of payment or discharge was required to ground the plea of prescription. But the case is chiefly of value for the judgment of Lord Justice-Clerk Hope, authoritatively directing attention, for the intent and application of the statute, to the terms of the statute itself, from which the Courts had prior to that date been inclined to wander. In the still more important Whole Court case of *Cullen* v. *Smeal*, 1853, 15 D. 868, which determined that the death of the immediate debtor made no difference in the applicability of the statute, the same learned Judge in giving the leading opinion again exhaustively examined the statute and the authorities, and again focussed attention on the precise terms of the statute itself. Quoting from his own opinion in *Campbell* v. *Grierson*, 1848, 10 D. 364, he says (at p. 871)—"The true object of the enactment is the same as that adopted by the Scotch Legislature in various analogous cases, to preserve a party after a certain period of time from claims for money founded on old claims of a loose nature, and to be made out by the slippery or faithless or dishonest statements of witnesses. To protect against demands for payment of old debts is the object of all the enactments, and to throw the *onus* of establishing the same on the pursuer by a

certain specified and very safe mode of proof." And then he adds in *Cullen* v. *Smeal* (*cit.*), at p. 971—"Under the statute neither more nor less is to be proved after the three years than during the three years—although what the pursuer has during the three years to make out may be much more easily done, and by evidence or presumptions, which after the lapse of the three years are excluded by the statute. In all such actions of debt (as the statute well describes them) the pursuer must establish, even when the action is pursued within the three years, that the sum sued for is due to him and unpaid. True, that may easily be done in most cases. . . . But still the Court must be satisfied that the debt is due and unpaid, else they cannot give decree for the same. So when after the three years the party brings his action of debt, he must prove by the writ or oath of his party (that is, of the defender whom he sues) that the debt is resting-owing."

It may here be noted that in the same case (*cit.*), at p. 875, the Lord Justice-Clerk Hope took occasion to correct what he seems to have considered an error in the construction of the statute into which Lord President Blair had fallen in *Leslie* v. *Mollison*, Nov. 15, 1808, F.C. This case of *Leslie* v. *Mollison* (*cit.*) has something rather apocryphal about it. It is reported as of date the day before Lord President Blair is stated in the same volume of F.C. to have taken his seat. And, further, in the collections of Blair's Papers in the Faculty Library he appears as Dean of Faculty to have been counsel in the case, which would seem to have been heard and taken to avizandum on the 12th May previous to the date of the report. This does not seem to enhance its value as authoritative. However, "the Lord President" is in the Faculty Collection reported to have said that the Act established no "presumption that accounts were paid during the currency of them. . . . The presumption it creates is that the account has been paid during the years that have run since it was closed. On that presumption the prescription of that Act rests." I cannot avoid thinking that whoever was the presiding judge the report is incorrect, and that his Lordship must have said, not "during the currency *of them*," *i.e.*, accounts, but during the currency of the statutory period of three years. And consequently meant by the words "since it was closed," since the three years expired. It is remarkable that Lord Justice-Clerk Hope does not advert to the fact that in his own judgment in *Alcock's* case (*cit.*), at p. 365, he had himself accepted and founded on the doctrine of *Leslie* v. *Mollison* (*cit.*), attributing it as he did in the later case to Lord President Blair, and stating it thus—"Payment after the lapse of three years being the legal presumption." In this, by the way, he supports my view of the necessary correction of the report, who's ever was the observation. In his latter judgment, *Cullen* v. *Smeal* (*cit.*), at p. 875, however, Lord Justice-Clerk Hope, without reference to what he had himself said ten years before, says, referring to the same observation in *Leslie* v. *Mollison* (*cit.*)—"But the mistake, with deference, is in stating that the statute proceeds on any presumptions as to payments, which can be allowed to affect or limit its operation." I am by no means certain that there is really such discrepancy between the view attributed to Lord President Blair and that of Lord Justice-Clerk Hope as might appear. We have, of course, a very brief note of *Leslie* v. *Mollison* (*cit.*) in the Faculty Collection. The Lord President is reported to have said the presumption which the Act "*creates*." This is by no means an inapt description of the result of the Act, particularly if it be added, as I have no doubt was meant and probably said, "creates after the lapse of three years." That is precisely the presumption at that date created by the statute, which can under the statute only be redargued by proof by writ or oath. On the other hand Lord Justice-Clerk Hope speaks of the Act being assumed *to proceed* on presumptions as to payments, and rejects the idea that it *proceeds* on any such as can "affect or limit its operation." There is to my mind no necessary conflict between the views expressed when the difference of the language used by the two learned Judges respectively is properly regarded. I have referred to this matter at some length because it has an important bearing on the opinion of Professor Bell, to which I shall immediately advert. But I ought also before leaving this point to make reference to Lord Fullerton, who when commenting on the case of *Leslie* v. *Mollison* (*cit.*) in *Darnley* v. *Kirkwood*, (1845) 7 D. 595, at p. 600, says (assuming, as I venture to think wrongly, that the Court in *Leslie's* case (*cit.*) read the Act of 1579 as proceeding on certain presumptions of payment)—"With great submission there appears to me no foundation for such a view. Whatever general presumptions or probabilities may have weighed with the Legislature in *passing* these statutes, they *introduce* no presumptions, but enact certain specific and imperative rules on the subject of probation." It appears to me that Lord Fullerton also hardly appreciates the limitation of the alleged expression of Lord President Blair. But Lord Fullerton's emphatic statement that what the Act did was to "enact certain specific and imperative rules on the subject of probation" is the key to the whole subject.

Before leaving the leading authorities I need only add two things—(1) They frequently advert to the fact that to speak of the triennial prescription is misleading. It is a convenient phrase but there is no "prescription" in the true sense, but only, as Lord Fullerton and others have shown, a definite limitation or restriction of proof; (2) it is equally inaccurate to speak as the Lord Ordinary does here of the plea of prescription being elided. The proper finding is that employed for instance in the case of *Macandrew* v. *Hunter*, (1851) 13 D. 1111, at p. 1112, viz., "That the writs produced and founded on by the pursuers are sufficient to satisfy the requirements of the said statute both as regards the constitution and subsistence of the debt."

If, then, I had nothing but the Act to guide

me, and applying the light which the judgments to which I have adverted throw upon its intent and application, I should be prepared without hesitation to hold that what the statute does is to say that when the creditor in a debt such as those which it specifies has failed to exact payment or take a written obligation for it within three years from its date or the date of its last item, he shall be denied the aid of the Court to recover unless he prove his debt to the satisfaction of the Court by the limited means, either of writing, though not necessarily an obligatory document, under the hand of his debtor or of his debtor's oath. If, then, one takes the terms of the Act even without and certainly with the aid of the judicial interpretation which it has received, it is clear that what has to be proved after the three years just as before is the debt, that is, that there is a debt and that it is due and unpaid, and surely due and unpaid at the time when this has to be proved, that is, when it is sought to enforce it. The constitution and the resting-owing of the debt have been sometimes spoken of as if they were two separate matters to which the statute may apply in different manner and degree. But they are just parts of one and the same thing, viz., proof of the debt. A debt cannot be due and unpaid unless it was originally contracted. Therefore its contraction must be proved, and *ex hypothesi* its contraction must be at the point of time or in the case of a current account before the point of time from which the triennial period runs. Hence so far as constitution goes the writ founded on not being a document of debt, but only one adducible *in modum probationis*, may be dated before, within, or without the three years. But when it comes to proof that the debt so constituted is still unpaid attention must be given to the fact that the action is one to enforce a debt after the lapse of the three years, and that therefore the proof must establish that it is still due at the date of the action. It is no sufficient proof to show that at some day within the three years it was still unpaid. *Quomodo constat* that it has not been paid since. A contention such as I am opposing must meet even an extreme instance. Suppose then that a tradesman's account commences with a written order dated 1st January 1910 to supply goods regularly till further notice, and at the end of the half-year, 30th June 1910, an account is rendered in relation to which the customer writes stopping the supplies, acknowledging receipt of the account, but pointing out sundry errors; suppose further that no further correspondence passes, the three years are allowed to elapse, and no action is raised—could it by any possibility be held that when action is raised after 30th June 1913 the customer's letters of January and July 1910, though they proved the constitution, also proved the resting-owing of the debt so far as to satisfy the requirements of the Act? They do indeed prove resting-owing at 30th June 1910, but they prove nothing more, and so the question of resting-owing remains open to the date of action, but when the creditor comes to prove it after the lapse of the three years he is at once met by the Act and his proof is limited to writ or oath. The writ of 30th June 1910 does not prove the debt for which he is suing to be at the date of action due and unpaid. A writ of 29th June 1913 would not even do that. You must have something at any rate after the lapse of the three years or you have not proved your debt to be due and unpaid when your action is brought. If it were a case of reference to oath, the oath must and can be brought down to the date of the action and indeed of the deposition. But if the proof is by writ, that is practically an impossibility, and hence I think that the Lord President in *Leslie* v. *Mollison* (*cit.*) had more sound meaning than has been attributed to him either by the reporters of the Faculty Collection or by Lord Justice-Clerk Hope. What as I have said I believe he meant and probably said was that the statute creates a presumption that the account has been paid during the currency of the triennial period. The antitheses of the reporter "during the currency of them" is nonsense. An account cannot be paid during its currency. What the Lord President must have said is "paid during the currency of the triennial period." This makes a reasonable interpretation of the Act. Produce a writ dated after the lapse of the *triennium* and the debt is established to be due at a point of time beyond the statutory period. The presumption of payment, not on which the enactment proceeds but which it creates, is redargued and the *onus* is shifted to the debtor to prove discharge.

This certainly was the opinion of Professor George Joseph Bell, Comm., 5th ed., p 332—"As to the subsistence of the debt it is necessary to distinguish, respecting proofs in writing, whether they are dated subsequently to the expiration of the three years or within that time. If the writing is dated after the expiration of the three years, provided it plainly evinces the then subsistence of the debt, it will be a sufficient answer to the plea of triennial prescription as counteracting the statutory presumption of payment" (that is, on the lapse of the three years). "If the writing is dated within the three years it is not held enough that it shows the debt to have been in existence during the three years, since the presumption of payment" (that is, on the lapse of the three years) "still remains." Professor Bell's doctrine is apparently disputed and has been jettisoned by Mr Sandeman, but unless it is sound I cannot see how the requirements of the Act are to be satisfied and the object of the Act at the same time secured.

Against my view there is adduced the case of *Davidson* v. *Hay* in 1806, only reported in Hume, p. 460. I confess that the report does not read like a very sound judgment on the statute in question, and I do not wonder that it has not apparently, so far as I know, been noticed since except by Mr Napier, who, though he has an elaborate argument founded on it, doubts its authority. Action was raised in 1800

for a writer's account closed in June 1786. Three letters were produced of dates 1785, 1786, and 1787, the last dated nearly two years before the lapse of the *triennium*. And so far they proved the constitution and possibly, as at August 1787, the resting-owing. In these circumstances the Lord Ordinary (Methven) found it sufficiently instructed by these letters that the agent was employed and that his account remained outstanding in 1787. He then went on to find that no proof was produced or offered by the defender that the account claimed had been paid since that time, and therefore decerned for the payment. It is true that prior to the period of Lord Justice-Clerk Hope—5 to 15 Dunlop, or 1842 to 1853—the Act had not been so carefully interpreted or so correctly applied as it was in the cases to which he was a party and since. But this case of *Davidson* v. *Hay*, 1806, Hume's Dec. 460, seems to me to be a very travesty of its provisions. Its doctrine is, however, subscribed to by Lord Deas in the later case of *Thomas* v. *Stiven*, 1868, 6 Macph. 777, 5 S.L.R. 504. Lord Deas' opinion was certainly not *obiter* so far as he was concerned, for it was his ground of judgment. But it was not accepted by the Court, who leave his point severely alone. There is nothing to show that it was even pleaded. The Lord Ordinary found that the case did not fall within the provisions of the Act. The Inner House held that the defender was barred by actings from taking advantage of the statute. Lord Deas takes a line of own as above stated. I note, however, that he claims Mr Shand, the junior counsel for the respondent, as acceding to his view. But neither is there in the report nor by Lord Deas reference to Bell's Commentaries or to the case of *Davidson* v. *Hay* (*cit.*). It is a not unlikely surmise that Lord Deas, whose reliance on Hume is matter of notoriety, did have the case of *Davidson* v. *Hay* (*cit.*) in his recollection. If so, my comment is that professional opinion of Hume's Reports is not so high as was Lord Deas' respect for his Notes of Hume's Lectures, and that it is remarkable that in M'Laren's edition of Bell's Commentaries, published in 1870, just two years after Lord Deas' opinion in *Thomas* v. *Stiven* (*cit.*) there is no indication (at vol. i, p. 349) that the learned editor considered that Bell's doctrine was shaken either by the case of *Davidson* v. *Hay* (*cit.*) or by Lord Deas' opinion in *Thomas* v. *Stiven* (*cit.*) There is no reference by him to either.

I therefore conclude that to satisfy the provision of the Statute of 1579 the writ or writs founded on to show that the debt is still owing and unpaid must be dated after the lapse of the *triennium*. If so A & Co. have failed to counter the plea of the triennial prescription, and their counter-claim fails. Nothing more is required. I come to this conclusion without regret, for there has been sharp practice, if not more, on both sides.

Accordingly I hold that the Lord Ordinary was not well founded in determining that the plea of prescription was "elided," and ought not to have allowed further proof.

There remains to consider the second point which I noted at the outset, viz., the propriety of the Lord Ordinary's allowance of further proof. If instead of pleading prescription B had simply alleged discharge, and founded his allegation upon the correspondence of November 1913 to October 1914, I could have understood an allowance of proof of such averments. Discharge forestalls prescription. But B nowhere takes up that attitude, and discharge is inconsistent with his pleadings. This therefore cannot be the explanation of the Lord Ordinary's interlocutor. What line of thought then is he following? He holds (1st) that the documents referred to elide prescription, that is, satisfy the provisions of the statute. I have shown that they do not do so of themselves because of their date. No general proof to supplement them could be allowed, because writ alone can be looked at, and not a mixed proof by writ or oath. If then A & Co. have failed to satisfy the statute their counter-claim is gone. No proof of any agreement which these documents demonstrate would save it. Moreover, I should have thought that they spoke for themselves. If on the other hand I am wrong in my view of the intent and application of the Act, and these documents of 1913-14 do satisfy its requirements, they need and can admit of no proof in supplement. No amount of proof that A & Co. are right in their contention that they prove the agreement which A & Co. maintain will enable the writings any more to establish resting-owing than they do themselves. To suggest such proof is to throw doubt on the statute having been, as the Lord Ordinary phrases it, elided. The knot into which the Lord Ordinary's interlocutor gets things seems to me to be a sufficient confirmation of my view that the requirements of the statute have not been satisfied.

When they have been satisfied the only thing that can be then sent to proof is the matter of account. Parties may then "go into the charges." In the cases of *Smith* v. *Falconer*, 1831, 9 S. 474, and *Fiske* v. *Walpole*, 1860, 22 D. 1488, cited, as also I think it will be found of all others reported, in which proof going to amount due merely was allowed, the documents proving resting-owing were dated not only after but well after the lapse of the three years.

LORD MACKENZIE—The pursuer here sues for £165 for potatoes. The defenders counter claim for £173 for peas. The pursuer pleads the triennial prescription—"The amount counterclaimed for by the defenders being prescribed, can only be proved by the writ or oath of the pursuer." The only controversy is in regard to the counter-claim. The debt is one of the class to which the Act applies. The peas were delivered on 5th March 1913. The three years ran out on 5th March 1916. The action in which the counter-claim is pleaded was not brought until 12th July 1916. In these circumstances the Lord Ordinary on 7th November 1916 pronounced this interlocutor, viz.—"Of consent sustains the fourth plea-in-law for

the pursuer; appoints the defenders to lodge in process by Tuesday, the 14th inst., the writ or writs on which they found; and appoints the cause to be put to the procedure roll." Certain writs were lodged of dates between 6th March 1913 and 29th October 1914. The Lord Ordinary on a consideration of these found that the plea of prescription was elided by the writs produced, and allowed the parties a proof *habili modo* of their respective averments. It was argued, on the authority of *Paterson* v. *Kidd's Trustees*, (1896) 23 R. 737, 33 S.L.R. 568, that the previous interlocutor being of consent, the allowance of proof in the latter was incompetent. The consent, however, only means that it was agreed the account is prescribed, which cannot be disputed. These letters undoubtedly prove the constitution of the debt. The amount of the debt resting-owing is in dispute. The pursuer says it was extinguished because the defenders accepted goods in settlement which they realised. The defenders say that it is only to the extent of the price realised for the goods that the pursuer's debt to them is extinguished. It is a proof of this alleged agreement that has been allowed by the Lord Ordinary.

The argument for the pursuer is that the defenders must prove the constitution and resting-owing of the debt by writ, and that on the writs produced they have failed to do so. The defenders' reply is that they have proved both, and that the only remaining question is one of accounting, which relates solely to the *quantum* of the debt.

It is settled that not only constitution but resting-owing must be proved by writ or oath—*Robertson*, 2 D. 1343. We heard a good deal of argument from junior counsel founded on the doctrine contained in Bell's Commentaries (i, p. 349), repeated in Dickson on Evidence (secs. 455, 516), to the effect that writs dated within the three years will not suffice. Senior counsel, however, declined to argue this point. No authority supports the dictum of Professor Bell, and it is contrary to what is decided in *Davidson* v. *Hay*, (1806) Hume's Dec. 460, and *Thomas* v. *Stiven*, (1868) 6 Macph. 777, *per* Lord Deas, at p. 781, 5 S.L.R. 504. It may therefore be taken as established that it is the character of the document, not its date, that matters. A consideration of the results which would flow from an opposite view shows that the established rule is founded on reason. Unless it were the rule, then a letter dated one day before the expiry of the three years admitting that the debt was due would be of no avail, though action was raised the day after the *triennium* expired; whereas a letter dated one day after the statutory period would be sufficient though action was not raised for years afterwards. The fallacy in Bell's Commentaries may be traced to the countenance given to a view of the statute prevalent at the time the learned author wrote, in 1826, that it was intended to create a legal presumption of payment. This view was discredited finally by the decision in *Cullen* v. *Smeal*, (1853) 15 D. 868. In the opinion of the Lord Justice-Clerk (Hope) it is stated (at p. 872) that there is no warrant for allowing any presumption of payment to bear on the construction of the statute—the rule is simply the statute itself. As, however, is the case with other Acts of the Scots Parliament, the effect of the Act depends to a great extent upon the interpretation put upon it by the Court—*Clyde Navigation Trustees* v. *Laird & Son*, (1883) 10 R. (H.L.) 77, *per* Lord Watson, at p. 83, 20 S.L.R. 869. The Act says that unless the debt be sued for within three years the creditor shall have no action except he either prove by writ or by oath of his party. It has been decided that it is not necessary there should be an out-and-out admission to the full extent. If there is an admission of an unsettled claim this is sufficient to elide prescription. The *quantum* of the debt is another matter. This is the result of the two stages of *Stevenson* v. *Kyle*, (1849) 11 D. 1086, and 12 D. 673, taken along with *Smith* v. *Falconer*, (1831) 9 S. 474. The decision in the latter case does not appear to conflict with *Bertram & Company* v. *Stewart's Trustees*, (1874), 2 R. 255, 12 S.L.R. 156, for the term "party" may receive a different construction according to whether there is to be a reference to oath or proof by writ. The writ of an agent may be writ of the party, though a reference to the oath of the party would not cover the oath of his agent. In the present case proof *prout de jure* is therefore plainly competent to clear up the amount of the account. The question of difficulty is whether when the alleged debtor contends that his writ states that by agreement the debt has been extinguished any further proof, other than a reference to his oath, is competent. If what the Court were called upon to do were to construe the import of an oath on reference which embodied the terms of the pursuer's letters here (the pursuer being the alleged debtor) then the law applicable would be that laid down by Lord Deas in three propositions in *Cowbrough* v. *Robertson*, (1879) 6 R. 1301, at p. 1312, 16 S.L.R. 777. The second of them is as follows, viz.—"That if the debtor depones to an express subsequent agreement to hold the debt satisfied or extinguished by some other specific mode than payment in money, that other mode will be a competent and intrinsic quality of the oath, although not stipulated for when the debt was contracted." Now in the present case, if the pursuer's writ had contained an unequivocal statement that the account was no longer resting-owing, having been paid, the defenders would have been limited to a reference to his oath. Proof *prout de jure* would then have been incompetent. The letters, however, do not bear this construction. As I construe the letters of the pursuer they are an admission that the debt is due unless the agreement to settle is made out. The question at issue between the parties is whether a part of the debt is due, and if so, how much; or whether the taking of the goods extinguished the debt altogether. This, as it appears to me, ought to be cleared up in the manner pointed out by the Lord Ordinary's interlocutor, which ought to stand.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Sandeman, K.C.—W. T. Watson. Agents—P. Morison & Son, W.S.

Counsel for the Defenders (Respondents)—Moncrieff, K.C.—Wark. Agents—J. & A. Hastie, Solicitors.

Tuesday, January 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

FITZGIBBON *v.* HOWDEN & COMPANY AND OTHERS.

Process—War—Jury Trial—Sheriff—Remit for Jury Trial—Unsuitability of Case for Jury Trial, Depending on Conditions Arising out of the War—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

The pursuer in a sheriff court action of damages at common law for £100 for personal injury, required the case, under section 30 of the Sheriff Courts (Scotland) Act 1907, to be remitted to the Court of Session for trial by jury. The Court, after consultation with the Judges of the Second Division, *refused* the application, holding that while the case would in ordinary circumstances have been considered suitable for jury trial, the conditions arising out of the war rendered it unsuitable, and case *remitted back* to the sheriff court for proof.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 30, enacts—"In cases originating in the sheriff court . . . where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof . . . it shall, within six days thereafter, be competent to either of the parties who may conceive the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the sheriff."

Michael Fitzgibbon, *pursuer*, brought an action in the Sheriff Court at Glasgow against James Howden & Company, Limited, Glasgow, and others, *defenders*, concluding for £100 damages for personal injuries.

The pursuer averred that he was touched on the clothing by a motor vehicle driven by servants of the defenders; that he jumped back in alarm, breaking his leg in so doing; that the accident took place in a public street in Glasgow, and was due to the fault and negligence of the servants of the defenders, for which they were liable.

He further *averred*—"(Cond. 5) Pursuer was taken to the Glasgow Royal Infirmary on the date of the accident, and remained there until 1st December 1915. He was resident in the Royal Infirmary for six weeks and was at a convalescent home afterwards for two weeks. His health has been impaired since and he has not been able to earn what he would have earned if the accident had not happened, and he is permanently injured by the accident. Pursuer estimates his loss of earnings and the damage caused him at the sum of £100."

He pleaded—"1. Pursuer having been injured by the negligence of both defenders' employees in driving vehicle for them as aforesaid is entitled to decree with expenses."

On 16th December 1916 the Sheriff-Substitute (A. S. D. THOMSON) allowed a proof. The pursuer required the case to be remitted to the Court of Session for jury trial.

In the Single Bills counsel for the defenders moved that the case be remitted back to the sheriff, and *argued*—The case was unsuitable for jury trial as the averments were involved, and the relevancy of the action was doubtful. Further, the averments as to injuries were not such as to form reasonable grounds for an award of over £50. Jury trial was therefore unsuitable—*Barclay* v. *Smith & Company*, 1913 S.C. 473, 50 S.L.R. 308. "Unsuitable" covered more than "not appropriate," which was the terminology of the Judicature (Scotland) Act 1825 (6 Geo. IV, cap. 120), section 28—*Greer* v. *Corporation of Glasgow*, 1915 S.C. 171, *per* Lord Johnston at p. 172, 52 S.L.R. 109—and the purpose of the proviso in the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 30, was to save expense in small cases—*per* the Lord Justice-Clerk Macdonald in *Barclay's* case (*cit.*) at p. 474. The expense and trouble arising under the present conditions, and necessarily entailed in a trial by jury, rendered this case unsuitable for that form of process.

Argued for the pursuer—The case was suitable for jury trial. A proof had been allowed, and the averments as to injuries—particularly the averments as to permanency of the injury and the length of time the pursuer had been incapacitated—were such that, if proved, would reasonably lead to an award of damages exceeding £50. "Suitable for jury trial" referred to the nature of the case and not to a state of affairs wholly external to the case.

At advising—

LORD PRESIDENT—If I were to apply the familiar criterion to this case, I cannot say that I should pronounce it to be a case unsuitable for jury trial within the meaning of the 30th section of the Sheriff Courts Act of 1907. But under present circumstances, and having regard to the conditions, industrial and commercial, prevailing in the country at the present time, I have no difficulty in dealing with the question. It appears to me that at a crisis like the present it would be altogether wrong to bring here a number of business men to try a case which, to say the least of it, can be equally well investigated in the sheriff court.

Accordingly I propose to your Lordships that we should remit this case for proof to the court in which it originated.

I need scarcely add that in the present circumstances, and in similar cases, the same