

## S E C T. III.

## Aliment.—Schoolmaster's Salary.

1739. November 16.

PATRICK DAVIDSON *against* ALEXANDER WATSON of Glentarky.

ALEXANDER WATSON of Glentarky having an only daughter Margaret, Watson settled his estate of Glentarky upon her, and failing her, to Alexander Watson, second son to Watson of Aitherny. In this deed, he named Aitherny tutor and curator to his daughter. After Glentarky's death, his widow married Provost Davidson, who took home his step-daughter, Margaret Watson, to his house, and alimeted her for the space of nine years. Upon her death, while yet a minor, Aitherny, as administrator-in-law to his second son Alexander, who succeeded to the estate, granted a bond to Provost Davidson for 4000 merks, in consideration of the aliment due to him for Margaret Watson; but, when Alexander came to be of age, he reduced both the bond granted by his father, and likewise a bond of corroboration thereof, which he had granted on the head of minority and lesion. After this, Patrick Davidson, (the Provost's son) to whom these bonds had been assigned, brought an action against the said Alexander Watson (Margaret's heir) for payment of the foresaid aliment. The defence was the prescription introduced by the 83d act, 6th Parl. James VI. which enacts, 'That all actions of debt for housemails, men's ordinary, servants fees, merchants accounts, and other like debts that are not founded on written obligations, be pursued within three years, otherwise the creditors shall have nae action, except he eather preive be writ, or be aith of his party.'

To support this defence, it was *observed*, That if aliments of this kind, which chiefly consist in a maintenance in meat and drink from day to day, are not comprehended under the words of the statute, 'men's ordinary's,' it is believed they are very near a-kin to it, and so fall under the general words, 'other the like debts.'

*Answered*, Provost Davidson kept no ordinary; he did not furnish victuals, neither by retail, nor by quarters, nor half years; and therefore he does not fall under any expression in the statute. Nor does his claim fall under the indefinite clause of *other* like debts; the only debts mentioned in the statute are debts in use to be paid with ready money, and without taking discharges in writing: Of this sort are all the particulars mentioned; and it is upon this account that the presumption of payment within the three years, the prescription of this statute, is introduced. Such is the case of house-mails, tavern-bills, board payable to those that keep boarding-houses, &c.; but aliment and education furnished to minors, as they are due without paction, so they are not li-

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Found, that the aliment of a minor fell under the triennial prescription; and that a bond by the curator, granted after the curatory, did not prove that the aliment was resting; but reversed on appeal.

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quid, and need to be modified by the minor after majority, or by a judge; so they are not in use to be paid by the tutors and curators without a written document; and therefore they do not fall under the reason of the statute. The minor has no fund out of which he can make payment; his effects are in the hands of tutors and curators, and they are accountable for the same; so that if they pay without a written document, they lose their money: And therefore the debt cannot be paid without writ; consequently, if there is no written document of the payment, the presumption is, that the debt is outstanding; which holds in the strongest manner in the present case, where not only there is no document granted to the tutor of payment, but the tutor grants an express declaration that no payment was made, but that the aliments were resting owing. And in order further to explain the import of this statute, it will be considered, that the same is not a peculiarity in the law of Scotland; the like statute was made by the Emperor Charles V. in the 1549, as also in Friesland in the 1511; and it is observable, that, neither in our statute, nor in that of Friesland, is any debt mentioned, but what is founded either upon a sale, or a *locatio conductio*. Now, as aliment and education, furnished to a minor without paction, is not a contract of that sort, but a *negotium gestum*, it would be extending the statute to cases no ways similar, but unlike to those expressed, should the present action fall under the same; since it has always been held, that such furnishing to minors of aliment and education were liable to no sort of prescription but that of 40 years.

*Replied*, The pursuer's reasoning tends to restrain the act simply to the particulars therein mentioned, and to throw out the general words, contrary to the genius of our law: Thus, although merchants accounts are only mentioned in the act, the Lords have often found it reaches to accounts of brewers, bakers, &c. yea, even to the accounts of writers, and it must be obvious, there is, at least, as close a connection betwixt mens' ordinary, and aliment or entertainment, commenced with or without paction; for where an obligation in writing does not appear, the design and intent of the statute was, that, after three years, all such enquiries should be superseded in consequence of any proof by witnesses; because that, whether there be paction or no paction, it is natural to presume, that necessary aliment will be yearly paid by persons, especially as in this case, who have sufficiency of effects. And that which might amount to no more than a *præsumptio hominis*, within the three years, is after that time, by a statute, a *præsumptio juris et de jure*; neither can it be argued, that a party where there is no paction, should be in a better case than where a direct paction is proved. And this will serve as an answer to the argument, that the alimentering of a person under age, having tutors and curators, affords the *actio negotiorum gestorum* competent to such only as manage the affairs of others who are absent; for a tutor *sistat personam pupilli*, and is appointed for this very thing, to manage the pupil's affairs, and to answer such demands as can be directed against the pupil; so that a merchant, furnisher of clothes to one under age, without any

previous mandate or paction with the tutor, at a remote distance, may, with more reason, pretend to be a *negotiorum gestor*, and consequently be entitled to a perpetual action, than the pursuer's cedent. And it is of no avail to say, that the statute comprehends only such debts as are usually paid without any discharges; for what is more ordinary than take discharges of house-mails and of merchants accounts? But if these are not pursued till after three years, can it be argued that they do not prescribe *quoad modum probandi*, because the party was in use to take discharges, but that no discharge appears thereof? And if the case were supposed, that a minor had possessed a house, or had got furnishings out of a merchant's shop, can it be argued, that these are not comprehended under the act, because the tutor can produce no discharges? This, to be sure, will never conclude; for although this may be one reason for enacting the law, that such debts are usually paid in a short time, yet it is not the only one on which the statute is founded: It presumed likewise, that the goods were never furnished, or the house possessed; and therefore the law denies a proof by witnesses of the possession or furnishing. And these presumptions are strongly fortified in the present case, since, for the course of nine years that the infant lived, and for more than three years thereafter, there was never any demand whatsoever on account of the aliment.

*Duplied* for the pursuer, If the statute were to extend to all debts contracted without writing, it would make a very extensive prescription. Rents of land would fall under it; though it is certain that, till the statute 1669, they fell only under the long prescription, though, by the defender's argument, they have a resemblance to house-mails. But they are not comprehended under the statute, because they are not so regularly paid; they are not always paid in money and receipts, and discharges use to be taken upon payment. And upon the same principles it is, that though goods sold by retail, that enter into a merchant's account, do fall under this prescription; yet a bargain for merchandise of any sort sold by wholesale, does not: Or suppose a gentleman's farms to be sold without any written obligation, such bargains are not accounts, and will not fall under this prescription; so that the defender argues unjustly, when he pleads, that all actions, not founded on writ, fall under the statute. And as to the suggestion, that a merchant, furnishings clothes and other necessaries to a minor, would be subject to the triennial prescription, it was *answered*, That if such furnishing were made on account of the minor's parent, or any other liable to aliment him, no doubt the furnishings would be considered as made to the parent, to a major, and would be governed by the ordinary rules. But if these were made upon the minor's own credit, who had tutors and curators, it is doubted if such would fall under the prescription. *2dly*, The instance is no ways similar to this case; it might be comprehended under the words of the act, 'merchants accounts;' but the present aliment was not furnished by a merchant, nor by a retail, but was *unum negotium*, the education of the infant. And as to the suggestion, that the act was founded on other presumptions than that of payment, it was observed, that payment is presumed after three years,

No 273. and therefore no action is competent, unless the presumption is redargued by a proof of resting owing, which being brought, there is no pleading this prescription, but a proof of the furnishings, or of the possession : Or suppose they are admitted, and suppose further it be admitted, that no donation was intended, yet this will not avail after three years.

The quotations for the pursuer were, 16th Feb. 1681, Spence, *voce* PRESUMPTION; Sande Decis. Fries. lib. 5. tit. 6. defin. 1.; 23d July 1678, Thomson, No 57. p. 419. And for the defender, 23d June 1715, Forrest, No 302. p. 11098.

THE LORDS found, That the aliment of the minor fell under the triennial prescription; and that the bond by the curator being granted after the curatory expired, does not prove that the aliment was resting.

*Fol. Dic.. v. 4. p. 105. C. Home, No 135. p. 230.*

\*.\* Kilkerran reports this case :

IN a process against the heir of a minor for her aliment, an Ordinary having repelled the defence upon the triennial prescription, upon this ground, That all the particulars mentioned in the statute fell under sale or location, whereas aliment furnished to minors without paction, falls under neither, but is a *negotium gestum*; that further, all the cases mentioned in the statute are of debts that are in use to be recently paid, and without taking discharges in writing, which could not be said of aliments furnished to minors, which are not in use to be paid by curators during minority, without a written document; upon a reclaiming petition, the LORDS found, ' That the aliment of the minor fell under the triennial prescription.'

They thought it unreasonable that the privilege given to a major should not be competent to a minor, of pleading this prescription, and that contrary to the genius of the law a minor should be less privileged than a major.

N. B. Upon an appeal this judgment was reversed.

*Kilkerran, (PRESCRIPTION.) No 3. p. 415.*

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1747. January 20. NICOLSON *against* MONRO.

SCHOOLMASTER's salary found not to fall under the triennial prescription.

*Kilkerran, (PRESCRIPTION) No 13. p. 421.*

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Aliment of a bastard child found not to fall under the triennial prescription of the act 1379.

1758. February 14.. MARION PATERSON *against* JAMES COCHRAN of Kirkwood.

MARION PATERSON, in 1755, brought an action against Mr Cochran, for aliment of a bastard child which she had brought forth to him in the year 1730.

The defender acknowledged his guilt with the pursuer, and that about twenty years ago he made several payments, amounting to about L. 100 Scots, to her