

No 323.

Action for the price of goods consigned by one foreign merchant to another, is not cut off by the triennial prescription.

1795. *January 24.* JOHN HAMILTON and Company *against* JOHN MARTIN.

IN 1774, John Hamilton and Company, then merchants in Virginia, consigned to John Martin, then also merchant there, 700 bushels of pease, and 30 barrels of beef, to be sold by him in the West Indies.

Both parties having returned to this country, Hamilton and Company, in 1793, brought an action against Martin, for payment of these articles, who stated in defence, that he had reason to believe, that the debt had been long since settled; and, at any rate, that in consequence of the lapse of the triennial prescription, its subsistence could be only established by his own writ or oath. That the statute 1579, c. 83. extended to every species of open account; July 1731, Crawford against Simson, No 306. p. 11102.; 16th December 1675, Sommerville against the Executors of Muirhead, No 285. p. 11087.; 22d July 1755, Farquharson against King's Advocate, No 313. p. 11108.; and in particular, to cases similar to the present; 15th February 1630, Orr against Duffs, No 279. p. 11083.

The Lord Ordinary sustained the defence.

But on advising a reclaiming petition, and answers, the Court were of opinion, that the chief object of the act 1579, was to prevent the hardship which might arise from losing the old discharged accounts of shopkeepers and other retailers, and that it was not meant to cut off claims arising from considerable mercantile transactions, like the present, which, at the date of the act, were very rare in this country; and further, that it did not extend to actions arising upon the contract of mandate.

THE LORDS unanimously repelled the defence of the triennial prescription.

Lord Ordinary, *Stonefield.* Act. *Arch. Campbell.* Alt. *Geo. Fergusson.* Clerk, *Sinclair.*
R. D. *Fol. Dic. v. 4. p. 105.* *Fac. Col. No 150. p. 343.*

No 324.

A citation, where the witnesses subscribing the execution were not present, found insufficient to interrupt the triennial prescription, although it was admitted by the defender, that he received a copy of the summons from the messenger.

1799. *January 18.* COLIN and DUNCAN CAMPBELLS *against* JOHN MACNEIL.

ALEXANDER MACCORQUODALE had been much employed by John Macneil as a messenger, and his estate having been sequestrated, it appeared to Colin and Duncan Campbells, the trustees on it, that a balance of an account was due by Mr Macneil to the bankrupt.

The last article in the account was dated 30th October 1788. About the middle of October 1791, one of the Trustees wrote to Mr Macneil, that a summons for payment of the balance was to be immediately executed against him to interrupt the triennial prescription. This was accordingly done on the 19th of that month.

The action came before the Sheriff of Argyle, and the defender proponed improbation against the execution of the summons, in respect that the witness-

ses subscribing it were not present when the copy of the summons was delivered to him by the messenger. No 324.

The pursuers, while they admitted the fact stated by the defender, contended, that the citation was nevertheless sufficient to interrupt prescription. And the Sheriff, after a good deal of procedure, at last "appointed the defender to state his peremptory defences."

Mr Macneil complained of this interlocutor by advocacy; and

Pleaded; It is unnecessary to enter into the merits of the question, as the citation cannot bar the triennial prescription. Both the statute 1686, c. 4. and the act of sederunt, 28th June 1704, require, under the sanction of nullity, that citations shall be subscribed by 'the executor and witnesses.' But the persons called witnesses in the present execution have no title to that character. To sustain the citation, therefore, would not only be an infringement of the statute, but lead to a criminal laxity in judicial procedure. Nor does it make any difference, that the object of the citation was to interrupt prescription. It follows from 1686, c. 4. taken in conjunction with 1681, c. 5. that the legislature meant that executions of citations used for that purpose should, like every other, be subscribed by the witnesses. And although in a few cases such citations have been sustained, notwithstanding some trifling informalities, the present objection is not of that description; Pres. Falc. 1st February 1684, Anderson, No 83. p. 2857.; Reid against Ker, Div. 15. *h. t.*; 2d March 1790, Baillie against Doig, *IBIDEM.*

Answered; The sole object of citation is to notify the action to the defender, and accordingly the essential part of it is the delivery of a copy of the summons. That object was here fully attained, as the defender admits his having received not only the copy of the summons, but also a letter from one of the pursuers, notifying the step which was to be taken. The act 1686 does not apply; it merely requires the subscription of the witnesses, and *ex facie* the execution is unexceptionable. Supposing, however, that the statute were applicable, it is not more strongly expressed than the certification in a variety of enactments regulating the solemnities in the execution of deeds, yet in practice their omission is allowed in many cases to be supplied by the party's acknowledging his subscription.

At all events, although the citation could not oblige the defender to appear in Court, it is sufficient to bar him from pleading the triennial prescription; it being fully established, that where the essential parts of a citation have taken place, it is to be held a good interruption, although liable to objection in point of form; Stair b. 2. tit. 12. § 26.; Ersk. b. 3. tit. 7. § 40.; Div. 15. *h. t.*; 2d February 1705, Wilson against Innes, Div. 17. *h. t.*; 30th July 1761, Camerons against Macdonald, *IBIDEM.*

THE LORD ORDINARY "advocated the cause, and found that the pursuers must make a general reference to the defender's oath, as well as to the subsistence as the constitution of the debt."

No 324.

On advising a reclaiming petition for the pursuers with answers, and a minute for the defender, with answers for the pursuers, two of the Judges were for repelling the defender's preliminary defence, on the ground, that any citation is sufficient to interrupt prescription which affords notification of the action, and has the effect of bringing the party into Court. But the LORDS, by a great majority, "adhered."

Lord Ordinary, *Armadale*.
Alt. *Connel*.

Act. *Solicitor-General Blair, Fletcher*.
Clerk, *Sinclair*.

R. D.

Fac. Col. No 100. p. 235.

1799. *June 12.*MARGARET GALLOWAY *against* ROBERT GALLOWAY, and Others.

No 325.

In an action for accounting brought by the representative of a minor against his pro-tutors, a plea of compensation by one of the defenders, on account of his having alimented and educated the minor in his house, and made certain furnishings to him from his shop, found to be struck at by the triennial prescription.

By the marriage-contract of James Galloway, a farmer, it was provided, that if his wife should survive him, he should have the liferent of one half of the stock and conquest, and the interest of the other till the children of the marriage should attain 18 years of age, she maintaining and educating them till that period. The fee of the whole was vested in the children, and the father reserved a power of division. He died in 1773, leaving his widow, and four children by her, viz. a son named John, and three daughters, all of whom were minors. Their father neither exercised his power of distribution, nor named tutors or curators to them.

His family and funds were managed by his widow till 1777, when she having married again, Robert Galloway, a retail shopkeeper, who had married one of the daughters, and two other persons, took charge of the other children as pro-tutors.

The effects left by James Galloway were ascertained to amount to about L. 400. The interest of one half of this sum was allotted to the mother. The pro-tutors, and chiefly Robert Galloway, got the remaining funds into their hands.

John went to America, where he died about 1792, without having made a final settlement with his pro-tutors.

Margaret, one of his sisters, brought an action against the pro-tutors before the Commissary of Stirling, to account for her share of John's proportion of their father's effects.

In defence, Robert Galloway stated, that John, who was about 13 years of age in 1777, had lived in his house, and had been boarded and educated at his expense for three years and a half from that period, and that he went abroad about two years after. For this expense, charged at L. 30, and for an account of furnishings from his shop, amounting to L. 6 : 11 : 4, he pleaded compensation. These two articles, with others admitted by the pursuer, more than exhausted his intromissions.