

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.

The Commissary allowed Robert Galloway " to prove, *prout de jure*, that he kept and maintained John Galloway at bed and board for the period claimed, and made the furnishings to him charged in the account in process."

In an advocacy, the pursuer, *inter alia*, contended that the defence was cut off by the triennial prescription, 1579, c. 83. The defender

Answered; Although the right of action for the articles claimed might be prescribed *quoad modum probandi*, the plea of compensation is not affected, according to the maxim, *Temporalia ad agendum, perpetua ad excipiendum*. When a debtor makes furnishings to his creditor, he has no occasion to bring an action for payment, as the mutual claims extinguish each other. This is particularly reasonable in the present case, where the counter-claims were vested in the acting curator, who had the whole funds of the minor in his hands; and yet, *ante redditas rationes*, could make no claims against him, so that compensation at settling accounts was the only mode in which they could be made effectual.

Replied; The maxim alluded to by the defender, does not affect the present case, where the prescription applies only to the exclusion of parole proof, and the defender has himself to blame for not taking a voucher from his debtor. It is a settled point, that compensation does not operate *ipso jure*, and that the *concursum debiti et crediti* does not prevent the currency of prescription against a ground of debt *quoad modum probandi*; Bank. b. 1. t. 24. § 24.; Ersk. b. 3. t. 4. § 12.; 5th July 1681, Dickson against Macaulay, No 288. p. 11090.; 17th June 1665, Murray, Div. 13, *h. t.*; 23d January 1712, Herries against Maxwell, *IBIDEM*; and so far from there being any exception in the present case, it would be a bad precedent to allow the defender, at such a distance of time, to rear up, by parole evidence, a claim for board, afforded in his own house, or furnishings from his own shop, no voucher having been taken at the time, either from the minor, or other tutors, or evidence of agreement to pay now produced.

The Lord Ordinary repelled the defence.

On advising a petition, with answers, one Judge thought the Commissary's judgment well founded, as the defender was to be considered as a *negotiorum gestor*, against whom the triennial prescription does not apply. But the rest were of an opposite opinion, partly on the specialties of the case, but chiefly on the general grounds urged for the pursuer.

THE LORDS adhered.

Lord Ordinary, *Cullen*.
Clerk, *Home*.

For Margaret Galloway, *Cranstoun*. Alt. *Wemyss*.

D. D.

Fac. Col. No 128. p. 294.

See APPENDIX.