No 301.

Replied for the pursuers; That the point came very well here to be decided; for if these two years be due, and are preserved from the prescription, then there is place for an action for them. The speciality in the case of Sir David Nairn and the Duchess of Buccleuch consisted in this, that prescription could not be objected against Sir David, in regard he had been an intromitter, and was bound to charge and discharge himself, and so could not separate the salaries from the account, which in effect is an interruption of the prescription. Indeed, the pursuers could not hinder the Earl to answer *intus habetis*, and therefore they were ready to subject themselves instantly to account for these two years; but if the Earl will not answer, as he may, and admit the count and reckoning, there is no reason, why this article of salaries may not now be claimed by way of action.

The Lords found, Prescription can take no place in any action of count and reckoning for the said two years intromissions, but that the same may be allowed as articles in the discharge; but their Lordships, upon hearing parties next day, restricted the L. 100 Sterling libelled, of yearly salary for the two years not accounted for, to 800 merks yearly.

Act. *Falconer*. Alt. *Horn*. Clerk, *Gibson*.

Bruce, v. 1. *No* 14. *p.* 19. *&* *No* 29. *p.* 38.

1715. *June* 23.

James Forrest *against* The Relict and Children of James Carstairs.

No 302.

A person having been alimented in a boarding-house; in a process against his representatives for the same, the Lords restricted the libel to three years preceding the citation, upon the presumption, that the pursuer would not lie longer out of his money, and that former scores were cleared.

James Forrest pursues the Relict and Children of James Carstairs, as representing him, who represented Julian Finlay his mother; which Julian did represent Mr Thomas Finlay, late schoolmaster in Drumeldrie, libelling, that the said Mr Thomas was several years boarded and entertained in the pursuer's house, where he died; and concluding for payment of 200 merks yearly, during his abode there.

The defenders, denying the passive titles, *alleged*; That the defunct being major, and no paction libelled, there was nothing due.

It was *answered*; That the presumption of alimenting *gratis* can take no place in this case; because the pursuer did keep a public-house near the school, where several of the scholars were boarded, and the defunct, the schoolmaster, had his entertainment there also, being a convenient place both for him and his scholars, that they should be near the school and boarded together. And this is my Lord Stair's opinion, that the presumption of entertaining *gratis* ceases, where those who entertain are in use to furnish provisions for money.

"Which the Lords sustained."

No 302.

It was further *alleged*; That prescription would take place for any entertainment above three years preceding the citation, conform to the 83d act, Parl. 6th, James VI. providing that men's ordinaries not founded on a written obligation be pursued within three years.

It was *answered*; That act of Parliament takes no place in aliments, which are often resting for many years; but the act concerns only eating-houses, or such public-houses where persons are in use to pay daily, or where they have not constant residence.

It was *replied*; That regularly such as are entertained in families for a constant course of years, being majors, are presumed to be gratuitously entertained, unless there be a paction. But the LORDS, in this case, having found the presumption more strong for the pursuer that he kept a public-house, and was in use to entertain boarders for money; and the same presumption will bring this case under the said act of Parliament; for it cannot be presumed, that the pursuer, who keeps a public-house, would lie out of his payment without a written security, or a pursuit, for more than three years;

"Which the LORDS also sustained."

The pursuer further *alleged*; That he ought not to be obliged to prove the passive titles, seeing the defender has proponed a peremptory defence of prescription.

It was *answered*; The defenders did, and might allege prescription, denying the passive titles; because their allegeance of prescription was instantly verified, requiring no probation. And it would not tend to shorten, but to lengthen processes, if they were not allowed to allege upon any exception requiring no probation before litiscontestation; because an allegeance of prescription, requiring no probation, would be competent even after probation, at the conclusion of the cause; and if the pursuer should in that case reply upon interruption, there would be a necessity for a new probation; whereas, if the pursuer should now reply upon interruption, one act and probation would serve for all.

It was *replied*; if the defender do not represent, the pursuer ought not to be put to any further trouble of a process or probation; nor is the defender concerned to object prescription, or any other defence or objection; and the LORDS, both of old and late, have been in use to find so; and especially 15th December 1671, Hamilton of Kinkell against Aiton of Kinaldie, *voce* PROCESS; and 11th February 1713, Margaret Lundie and her Husband *contra* the Lord Sinclair, IBIDEM.

"THE LORDS found the defenders could not be allowed to propone prescription denying the passive titles. But, in this case, it was not pleaded for the defenders, that the process being against them, as representing their father, who represented his mother, and she again the schoolmaster, that some of these intermediate predecessors were libelled to be executors; and that it might be competent to the defenders to allege the testament was exhausted; and in that case it might be more doubtful, whether prescription might not be also alleged,

No 302. seeing the representation of the intermediate predecessors was not libelled to be universal, but only *secundum vires inventarii*.

Fol. Dic. v. 2. *p.* 121. *Dalrymple, No* 147. *p.* 202.

*** Bruce's report of this case is No 62. p. 9713, *voce* Passive Title.

1716. *July* 25.

Hamilton of Bangour *against* My Lady Ormiston and her Children.

No 303.
Aliments prescribe, *quoad modum probationis*, in 3 years.

In a process betwixt these parties, among several other points this came to be discussed, viz. What is the term of prescription of bygone aliment? And it was *contended* for the defenders, That all aliments prescribe, *quoad modum probationis*, in three years, conform to the act James VI. Parl. 6th, cap. 83d, by which it is statuted, That all actions of debt, for house-mails, men's ordinaries, servants' fees, merchants' accounts, and other the like debts, that are not founded upon written obligations, be pursued within three years, otherways the creditor shall have no action, except he either prove by writ, or by oath of his party.

Answered for the pursuer; That there is not one word in the act of Parliament that with any propriety of speech can be extended to signify aliments; and that "men's ordinaries" which is the only word that can with any colour be so stretched, by the common and known acceptation of the word, signifies no more but men's entertainment and mails in a public-house, and that the words, "all others of the like nature," are certainly restrictive, and do exclude aliments, as being of a very different nature from any that are there enumerated.

Replied for the defender; That aliments fall very properly under the act, it being designed to cut off many debates for debts that had *tractum*, which consisted of furnishing from time to time, and were not usually constituted by writ, and where the presumption lay that they would not lie over unpaid, and frequently not being constituted by writ, receipts and discharges were often omitted; and therefore, 1*mo*, "Men's ordinaries" may very well include aliment, which is a daily provision; and though the true import of the word is not at this day so well understood, yet in the general notion of it, it seems to comprehend all maintenance furnished from time to time; 2*do*, Though the word had a restricted signification, yet the other clause in the act "and other the like debts," does certainly comprehend the subject in question, the act being plainly designed to take in all those current accounts of furnishing, providing, &c. and there can be no difference assigned betwixt the merchant's and the entertainer's account; nay, the reason of the law militates much more in this than the other, the advance for aliment being more necessary, and not so usually lying over as that of merchant-accounts; 3*tio*, Our practice favours it, for so it was almost *in terminis* decided in February 1714, Lady Carnfield against the