

1740.

LORD
ARBBUTHNOT
v.
SPOTTISWOOD.

“versed; and it is further ordered, that the said
“Lords of Session are to proceed to determine
“touching the validity of the marginal note on
“the said back-bond, and the merits of this cause,
“in such a manner as shall be just.”

For the Appellants, *Wm. Hamilton, Alexander
Lockhart.*

For the Respondent, *Charles Areskine, W.
Murray.*

When the case was afterwards brought before the Court of Ses-
sion in consequence of the above judgment, their Lordships found,
“that the marginal note was good against the user.” (Kilk. p. 606,
Brown’s Supp. V. p. 709.)

PATRICK DAVIDSON of Woodmiln, *Appellant* ;
ALEXANDER WATSON of Glentarkie, *Respondent.*

4th December, 1740.

PRESCRIPTION.—ACT 1579, c. 83.—Found that the act does
not apply to actions for the aliment of minors.

[Clerk Home, No. 135; Kilkerran, p. 415; Mor. Dict. p.
11077; Brown’s Supp. V. p. 200.]

No. 57.

ALEXANDER WATSON of Glentarkie had issue by
Jean, his wife, one daughter, Margaret. Failing
her and the heirs of her body, he settled his estate
upon Alexander Watson the respondent (second
son of Watson of Aithernie,) and he appointed
Aithernie tutor to his daughter.

Upon the death of Glentarkie, his widow inter-married with Patrick Davidson, and Margaret the infant lived in their family, and was alimènted by them till her death. She died in minority.

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The succession to the landed estate then opened to the respondent; and Athernie, as his tutor in law, granted a bond in favour of Patrick Davidson for 4000 merks as the alimènt due for Margaret Watson at Whitsunday 1724.

In 1730, Davidson assigned this bond to his son (the appellant,) and a bond of corroboration was granted in his favour by Athernie and the respondent, then a minor.

In 1735, the respondent being then of age, an action was raised against him for payment of these bonds, and he, on the other hand, instituted an action of reduction of them on the head of minority and lesion.

The Lord Ordinary (10th February 1737,) “re-
“pelled the reasons of reduction; the bond in-
“ferring no lesion, in respect it was granted for
“alimènt of Margaret Watson whom the respond-
“ent represented.”

But the Court, upon advising a petition and answers, (6th December 1738,) altered this interlocutor, and ‘sustained the reasons of reduction, ‘and reduced the said bond, and bond of corroboration, and decerned, reserving to the appellant ‘to insist against the heir or executor of the minor ‘(Margaret Watson) for alimènt and education as ‘accords.’

An action was then instituted against the respondent for alimènt from 1715 to Whitsunday 1724. The defence was, that the debt being for

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aliment, was prescribed by the 6th of James VI. establishing the triennial prescription.

The appellant answered, that the debt did not fall under the particulars specified in the act of Parliament; the cases provided for being those of debts that are in use to be paid in ready money, which cannot be said of the aliment of minors.

The Lord Ordinary ‘ found (4th January 1739) ‘ the bond bearing to be granted on account of the ‘ cedents having alimented, and otherwise disburs- ‘ ed upon the education of the deceased Margaret ‘ Watson from Whitsunday 1715 to Whitsunday ‘ 1724; the assignation to the bond implies an assign- ‘ nation to all the claims competent to the cedent ‘ against the granter of the bond for the said aliment ‘ to the extent of the sum in the bond; and there- ‘ fore, notwithstanding the bond is reduced by the ‘ respondent on the head of minority and lesion, ‘ sustained the pursuer’s title, and repelled the ‘ defence of the triennial prescription, in respect ‘ of the reply, and found the defender liable, re- ‘ serving to him to be heard on the modification ‘ of the sum due.’ But the Court, upon advising a petition and answers, found (16th November 1739,) ‘ that the aliment of the minor did fall un- ‘ der the triennial prescription.’*

Entered
Dec. 7, 1739.

The appeal was brought from the interlocutors of the 6th December 1738, and 16th November 1739.

Pleaded for the Appellant:—The aliment being admitted, Margaret Watson was debtor for the

* “ It being thought unreasonable and contrary to the genius of “ the law that a minor should be less privileged than a major.”
Kilk. p. 415.

amount, and upon her death, both her heir and executor were liable, and the creditor might make his demand against either.

The respondent, the heir, might have been compelled to pay; and therefore it was of advantage to him that the bond was granted, and he cannot now challenge it on the head of lesion.

The case does not fall under the triennial prescription. That is founded, in the cases specified, on the presumption of payment in ready money and without receipt, whereas the presumption is, that minors have no money to pay, and their tutors and curators never do pay without taking a receipt to serve as a voucher in settling their accounts with their ward.

Pleaded for the Respondent:—The respondent was lesed by the bond in question, because it debarred him from challenging Jean Watson's intrusions with the estate, which were more than sufficient to pay the aliment of Margaret, and because it cut off his right of relief against the executor, the proper heir in the debt.

The plea of prescription is supported by the words of the act, which apply to all aliments, without distinction, between the case of minors and that of majors; and indeed in matters of prescription, the former is more favoured than the latter.

After hearing counsel, “ it is ordered and adjudged, that in the said interlocutor of the 6th December 1738, after the words, (‘ said bond of corroboration,’) these words be inserted (‘ (so far as the same do establish a certain liquidated debt of four thousand merks with interest against the respondents;’) “ and that at the end of the said interlocutor, these

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“ words be added, (‘ and that the said bond, and
 “ ‘ bond of corroboration do stand as securities in
 “ ‘ what shall be found justly due for such aliment
 “ ‘ and education ;’) and that the said interlocutor,
 “ with these additions be, and the same is hereby
 “ affirmed ; and it is farther ordered and adjudged,
 “ that in the interlocutor of the Lord Ordinary, of
 “ the 4th January 1739 after the words (‘ on the
 “ ‘ head of minority and lesion,’) these words be
 “ inserted, (‘ so far as the same establishes a cer-
 “ ‘ tain liquidated debt of four thousand merks,
 “ ‘ with interest against the respondent,’) and that
 “ in the same interlocutor, instead of these words,
 (“ ‘ reserving to him to be heard,’) these words be
 “ inserted, (‘ reserving to both parties to be heard ;’)
 “ and at the end of the said interlocutor these
 “ words be added, (‘ and reserving to the respond-
 “ ‘ ent the benefit of any compensation or dis-
 “ ‘ charge arising from any intromissions by Patrick
 “ ‘ Davidson, the appellant’s father, or Jean Wat-
 “ ‘ son his wife, with Margaret Watson the minor’s
 “ ‘ effects,’) and that with this variation and these
 “ additions, the said interlocutor be, and the same
 “ is hereby affirmed. And it is further likewise
 “ ordered and adjudged, that the said interlocutor
 “ of the Lords of Session of the 16th November
 “ 1739, in the said appeal complained of be, and
 “ the same is hereby reversed.”

For Appellant, *W. Hamilton, W. Murray.*

For Respondent, *W. Noel, A. H. Campbell.*