

(DUE by *lucrati*.)

1714. December 8.

WILLIAM LESLY, Merchant in Aberdeen, *against* DAVID ROBERTSON, younger of Gladney.

No 88.

A purchaser of falt accepted a bill for the price. The feller was *in mora*. The acceptor was obliged to pay to an indorsee. Found entitled to interest of the money so advanced, until delivery of the falt.

IN *anno* 1709, Gladney, younger, accepts a bill for 450 bolls of falt, to one Alexander Gordon, which he indorfed to William Gordon, and he again to James Steuart, merchant in Edinburgh. Steuart charges, and a suspension is presented by Gladney, wherein he *alleges* circumvention by Alexander Gordon, and that he should have got meal from him by way of barter for the falt; and offered to prove the same by Steuart's oath. But he deponing *negative*, the suspension was refused; whereupon Gladney transacted the matter, got up the bill, and gave Steuart a new one for 460 bolls of falt. This new falt bill is thereafter indorfed to William Lesly, for the value whereof he accepts a bill for L. 736 Scots, payable to Steuart, and indorfed by him to John Parkhill, who having charged Lesly thereon, he paid the same; whereupon Lesly charges Gladney for the falt bill, and he suspends, fill insifting upon Alexander Gordon's fraud upon the first bill.

After five year's litigious debate, Gladney at length consents that decret might pass against him for the L. 736 Scots, as the price of the falt, at L. 1 : 12s. per boll; and now the expences of plea being the only point in controversy, Lesly the charger insifts that Gladney may be decerned, *imo*, For a considerable sum necessarily debursed in discussing the suspension, and that upon the act 1681, anent the privileges of foreign bills, which is extended to inland bills by the act 36th Parl. 1696; as also insifts upon the act 22d of the said Parliament, anent expences in suspensions, in case the suspender be caluminous. *2do*, He insifts for damages for not delivery of the falt in the terms of his bill; at least craves the annualrent of the L. 736, *nomine damni*, from the day it should have been delivered; and this upon the foresaid acts of Parliament, and because the charger, when he acquired right to the falt bill, granted a bill for the value, which he was compelled to pay. *3tio*, He claims the expences to be debursed in extracting the decret, or that Gladney may satisfy the clerks.

Answered for Gladney: That the original fraud of the Gordons being manifest by the contract of barter, and the meal bill extant in process, and by the Gordons going off, when they had got free of the falt bill to Steuart, Gladney could be no caluminous suspender, since now he was obliged to deliver the 460 bolls of falt by the Ordinary's interlocutor, for which he had nothing. Nay, *2do*, Lesly having precipitantly paid Parkhill, though there was reduction raised at the suspender's charges, both against him and Steuart; wherein the Lords had allowed Lesly the benefit of Steuart's oath, for proving the fraud, it would seem that Lesly ought rather to be liable in expences.

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THE LORDS founds, That Gladney the suspender was liable for the annualrent of the sums contained in the money bill, accepted by the charger, from the time he paid the same; and that in lieu both of damages and expences.

No 88.

For Robertson, *Graham*.Att. *Leith*.Clerk, *Robertson*.*Fol. Dic. v. I. p. 43. Bruce, No 15. p. 20.*

1736. June 29. PATRICK VANSE against JOHN VANSE.

THE deceased Colonel Vanse having settled his estate upon his issue of a second marriage, the said Patrick Vanse, his eldest son and heir, brought an action against them as heirs of provision; one of the articles of which, was a claim he had against his father for intromitting with some pay due to him while an infant, as an ensign in a regiment, to which the colonel was paymaster.

The *defence* proponed against this demand, was: That his father had alimanted him in his family, which behoved to compensate the pay. — But the LORDS found the aliment presumed to have been furnished *ex pietate*; and therefore could not compensate or extinguish the claim. — After obtaining this judgment, he *insisted*, in the next place, That the Colonel having received that money as tutor and administrator in law to him, behoved likewise to be accountable for the annualrents thereof from a year after the several dates of his intromissions.

Answered for the defender: That there was a great difference betwixt a father, who acts as administrator in law, and other tutors; seeing he is not liable for omissions, whereas they are: And that such is the case, is a necessary consequence of the act 1696; for, as he has thereby a power to name tutors and curators with that quality, he must be supposed to act under the same character himself.

2do, Et separatim, though it has been found, That the aliment furnished by the father to the son does not extinguish his claim to the pay; yet it does not follow, that the aliment furnished by the father does not exhaust the claim for interest; for, if the father shall be supposed subject to annualrents, it is impossible to imagine that he designed to aliment his son *gratis*. Nor will the law impute the aliment to the *pietas paterna*, if the son had a fund bearing interest: And, although it might have had some influence in determining the first point, That the aliment given to an infant bore no proportion to the pay; yet that circumstance is of no weight in this question, since it must far exceed the interest claimed: Nay, a tutor, in the common case, is only liable to lay out his pupil's rents at interest, in so far as they exceed the expences of his aliment. And it has been found, That a father is not obliged to pay the annualrent of a legacy belonging to his son which was uplifted by him, seeing he alimanted him, 15th December 1668, *Windram*, (*Stair*, v. I. p. 570. *voce* PRESUMPTION, *donatio namque præsumentur*.)

No 89.

Aliment furnished by a father to an infant, does not compensate his intromission with the Son's Money. Such intromission as administrator in law, found not to subject him to annualrent.