

No 183.

strator. *Answered* to the *second*, Suppose it had been made a real burden, that does not take it out of the father's power to discharge his son of the provision, more than if he had retained a faculty to burden, which he might have exercised, or not.

" THE LORDS found, That Sir Donald Bain having given the bond libelled upon to his son Kenneth, and the father having called for the said bond, upon his getting up thereof from his son, did warrantably cancel the same.

Act. *Dun. Forbes.*Alt. *Sir Wal. Pringle.**Fol. Dic. v. 2. p. 149. Rem. Dec. v. 1. No 6. p. 10.*

S E C T. X.

Delivery of Goods, what Cause presumed.

1677. *June 13.*HUME *against* JAMIESON.

No 184.

Delivery of victual, by an ordinary buyer and seller thereof, found to infer the ordinary price, unless the defender would instruct an other cause of delivery than a sale or definite price.

DAVID HUME having obtained decret before the Bailies of Kelso for certain victual sold and delivered by him to Jamieson, he suspends, on this reason, That the decret is null for want of probation, there being nothing proved but the delivery of the victual, and nothing of bargain or price, though it was so expressly libelled; and delivery alone would not be relevant, for delivery might have been as a donation, or for payment and satisfaction of debts, and upon many other accounts. It was *answered*, That delivery of a considerable quantity of victual presumeth that it is in the ordinary way by sale, unless the receiver prove another cause; for merchants are never put to prove more but the taking off and delivery of ware, for which their apprentices are admitted, and which will burden the receiver to prove payment, though oftimes it be made at the delivery of the ware; and where the special price cannot be proved, it is presumed to be the ordinary price, and so is modified by the Judge. It was *replied*, That the probation in merchant ware is not sufficient by witnesses proving the delivery, without the concurrence of a merchant count book, wherein all parties may have inspection, and see that the ware be marked for present payment, or if to a day, it be delete when paid; but in bargains of victual, there are no such adminicles.

THE LORDS found, That if the defender was an ordinary buyer of victual, the delivery was sufficient to infer the ordinary price, unless the receiver should instruct another cause; which they admitted him to prove, in corroboration of the decret.

No 184.

Fol. Dic. v. 2. p. 149. Stair, v. 2. p. 523.

1679. November 13. ANDERSON against ANDERSON.

ROBERT ANDERSON, factor in Camphire, having no children, did nominate William Anderson, his brother, his executor and universal legatar; and left an annual legacy of 400 merks to John Anderson, a baxter, his brother, yearly during his life; who thereupon pursues William Anderson, the executor, for payment; who *alleged*, Absolvitor for a part thereof, because the legatar was debtor to the defunct for ware sent to him from his brother out of Holland, and for ten dollars he had lent him. Both being referred to his oath, he deponed, That his brother had sent him some particular goods, without any mention of a price, or demanding any thing for them, and he gave him nine dollars, without the expression of lending or giving; which oath being advised by the LORDS, they found, That these particulars could not infer a debt to compensate the annual legacy; but were presumed to be gifted, or past from, being delivered by a rich brother to a brother who was no merchant or factor, and the particulars for the baxter's use, and not of any great value; and though donation is not presumed, yet, from these circumstances, that the deliverer was rich, and had no children, and the particulars of no great import, and that the same brother left an annual legacy, which is alimentary to that brother,

They found these were past from, and could be no ground of compensation against the legacy pursued for.

Fol. Dic. v. 2. p. 149. Stair, v. 2. p. 705.

* * * Fountainhall reports this case:

1679. November 12.—IN the case John Anderson against William Anderson, his brother, the LORDS having advised John's oath, they " found, That since John was not Robert Anderson's correspondent, nor a trading merchant; and that John was poor, and Robert was in use to send him gifts; and that an *annuum legatum* is alimentary, and favourable in law; and that John's oath doth not mention that he sent for these goods, but affirms he thinks that they were gifted him; neither doth it appear that there was any treaty, bargain, or price made for these goods; and the letters produced by William to fortify the presumption of law *quod debitor non præsumitur donare*, (in which letters Robert ~~im~~powered his brother William to crave payment, or at least to take bond from John for what he was owing him), were in date prior to the sending of these

No 185.

Delivery of some ware and money, by a rich man to his brother, who was no merchant or factor, the particulars being useful to the receiver, and of no great value, was presumed to be a donation.