

No 101.

friend comes and stays some time for a visit ; yet here no such presumption can take place, where she staid three years ; and though there was no stipulation or express paction, yet that does not infer a donation ; where, *imo*, the giver of the aliment is but a poor person, and so not presumed to be gifted ; *2do*, If he be debtor, *non præsumitur donare* ; but Wilson owed Peter Archibald 300 merks by bond, which made Wilson advance the aliment the more frankly, that he knew he would have retention and compensation of his bond *pro tanto* ; as was decided 15th December 1668, Winrame *contra* Elies, No 108. p. 11433.—THE LORDS repelled the defences, and found an aliment due ; but modified it only to 100 merks yearly in full of all.

Fol. Dic. v. 2. p. 141. Fountainhall, v. 2. p. 109.

1703. January 15.

MR JAMES CHISHOLM, chirurgion in Linlithgow, *against* JAMES STEEDMAN, skipper in Grangepans.

No 102.

The Lords found nothing due for the aliment of a boy, in regard there was no paction thereanent, the entertainer being the boy's uncle.

This, according to Fountainhall. According to Forbes, aliment was found due.

JOHN BAIRDY, merchant in Linlithgow, being debtor to Mr Chisholm in a sum, he arrests in Steedman's hands the sum of 1400 merks, owing by him to Bairdy, on the account of aliment and board that Steedman owed for his son's entertainment in Bairdy's house at the schools in Linlithgow, for the space of six or seven years. *Alleged* for Steedman, That aliments are presumed gratuitous, unless there be an express paction and agreement to the contrary ; which rule has only this *fallentia* and exception—if the person alimented be a pupil, and so not capable to make a paction ; but even, in that case, if the pupil have either a father or have tutors, if no stipulation be made with them, law still presumes the aliment was given *animo donandi*, especially where the party is a near relation ; as here the boy alimented is his own nephew, and had his father in life, and yet living within a mile of Linlithgow, and many opportunities of meeting, and much business betwixt them during the space of seven years, and yet never a word of aliment, or any thing demanded *eo nomine*. *2do*, He charged sundry small disbursements about mending the boys clothes, and the like, and got payment thereof ; which is a demonstration he never designed to claim any aliment ; otherwise, he would have sought all together. *3tio*, By a letter produced, he craved the loan of some money ; which he would not have done had there been any thing due on the account of the aliment. *4to*, By a fitted account betwixt them, Bairdy is debtor to Steedman in a balance, and nothing of the aliment is there either stated or mentioned, though it was posterior to the whole years of the aliment. *Answered* to the first, *Nemo præsumitur suum jactare*, and donation is never presumed *ubi alia conjectura capi potest* ; and l. 82. *D. De reg. jur.* says, *donari videtur quod nullo jure cogente conceditur*. And the rule presuming aliment to be gratuitous, holds only *inter*

ascendentes et decedentes, but not among collateral relations; so that, if a mother aliment her son, law presumes it to be done *ex pietate materna*, and not *animo repetendi*; but in remoter relations, donation is not presumed; yea, some lawyers say, *stultitia et error potius præsumitur quam donatio*; and Colerus, *De alimentis*, lib. 3. cap. 5. num. 33. et 34. lays it down as a rule, That *unusquisque animo repetendi alimenta præbuisse præsumitur*, and gives decisions for it. See 2d of February 1672, Guthrie *contra* Mackerston, No 74. p. 10137.; 21st July 1665, Ludquharn *contra* Gight, No 97. p. 11425.; and 11th June 1680, Gordon *contra* Leslie, No 99. p. 11426.; and, in this case, a paction could not be so well made with Steedman, because, being a skipper, his employment made him be oft from home. To the *second*, it was *answered*, That we are more sensible of disbursed money than of what is wared on our house; and therefore he might take reimbursements of that, without any design of passing from his claim of aliment. To the *third*, designing some present supply, it had marred his design to have mentioned his being debtor in the aliment, for it was not yet liquidated; and so he had not *paratum executionem* thereon. To the *fourth*, The account relates only to their debit and credit in trade and commerce, but not as to extraneous and heterogeneous articles, such as this of aliment was. THE LORDS, on the head of the want of a paction, and the other grounds above represented, found no aliment due in this case; and therefore assolizied.

Fol. Dic. v. 2. p. 141. Fountainhall, v. 2. p. 174.

* * * Forbes reports this case:

JOHN BAIRDIE having taken home to his house his sister's son, when James Steedman the child's father was abroad on a voyage, and educated him at Linlithgow about seven years; he assigned his claim of aliment to Mr James Chisholm, who had married the cedent's other sister. Mr Chisholm pursued James Steedman for the seven years aliment of his son, upon the grounds following, *1mo*, Donation in this case cannot be presumed for want of a previous paction, because the pupil could not contract; and no paction could be made with the father, who was abroad when the child was brought to his uncle's house; so that this is the simple case of a pupil having means of his own, intertained by a person who was not obliged to do it; *2do*, Though it should be considered as the alimenting of one that is major without paction, the father being major; yet even in that view the defender must be liable in aliment for his son, *actione negotiorum gestorum*. And as when a man acts profitably for an absent tutor, he is presumed to do the business of the tutor, except in so far as the pupil's fortune is enriched thereby, L. 6. Pr.; L. 37. D. De Negot. Gest.; Voet in his Commentary upon the said Title, N. 10.; so this is a matter betwixt a man and his brother-in-law, whose *negotium* in his absence being *maxime utiliter gestum* by taking care of his son, he ought to pay for it; especially considering, that by the universal custom of Europe, *ne unus locupletetur cum*

No 102. *alterius damno*, repetition is allowed in cases where the civil law denies it; as when the person absent after his return prohibited his friend to prosecute *negotium inceptum*, which he did notwithstanding perfect to advantage, &c. Voet, *IBID.* N. 11. 12. 13.; 3^{tio}, The matter is put beyond controversy by decisions, January 1663, Stirling *contra* Laird of Ottar, No 106. p. 11432.; 7th July 1675, Wilkie *contra* Morison, No 125. p. 5923.; and 3d July 1701, Tait *contra* Trotter, (*See* APPENDIX;) 4^{to}, Suppose the father had been at home, and sent his son to Mr Bairdie to be schooled and educated, and he had complied with the father's mandate, aliment would have been due by the father, because the mandant is bound to make up what is expended in execution of his mandate, that *officium* be not *damnosum*. Again, *in dubio, animo repetendi aluisse quis præsumitur, Colerus de alimentis, Lib. 3. Cap. 5. N. 33. 34.*; and it is a common saying, That *error et stultitia potius præsumitur, quam donatio.*

Answered for Mr Steedman; Where a person capable by himself or another to bargain for his entertainment, is alimented by a near relation who invited him to his house, as in this case, the aliment is understood to be furnished *donandi animo*; and though the absent father could make no agreement for the child, the mother might have done it as *præposita* in her husband's absence to the *negotium* of alimenting the family; 2^{do}, It is not enough to say, That *negotium* was *utilitur gestum* for James Steedman; for the question is, Whether *gestum erat animo donandi*, or with a design of repetition. 3^{tio}, The cited decisions are not applicable to this case; for these of Stirling *contra* L. of Ottar, and Wilkie *contra* Morison, concern only mothers pursuing for aliment given to their children more out of necessity than *animo donandi*, against their father's representatives; whereas here no necessity gave rise to the aliment, but the alimenter's free desire to have his nephew in his own family. The practick betwixt Tait and Trotter, where Trotter being sent in his infancy by his father to be kept and nursed in Tait's house at Howdoun, and continued there a matter of 13 years without any paction, aliment was found due for all that time, though Tait's wife was a near relation, vastly differs from the case in hand; for Tait's relation to Trotter was but very remote, and Trotter set his child out of Edinburgh to Tait's house for his health and the country air; whereas Bairdie was the child's uncle, and the child came from his mother's house, where he breathed as fresh air as at Linlithgow; 4^{to}, Nothing in this affair looks like a mandate, though Mr Steedman when present allowed his son to continue in his uncle's family, which was only an acquiescing to Mr Bairdie's desire of keeping his nephew; and *mandatum* is a contract whereby *negotium suscipienti gratis gerendum committitur*. Besides, the alimenting of Mr Steedman's son, with a view of repetition and heaping a considerable debt upon his head, when the charge of entertaining the child in his own family would have been inconsiderable and insensible, was no favour to Mr Steedman, but a great loss. 5^{to}, Mr Bairdie, a considerable time after the child was returned home, finding himself in great straits, wrote earnestly to Mr Steedman for the loan of £. 100 Scots.

without mentioning any claim of debt he had against him; and thereafter Bairdie granted a ticket to Steedman, bearing, That he was resting to him, after counts cleared in his books, L. 36 Scots, which he obliged him to pay to him upon demand; whence it follows, That Mr Bairdie never reckoned Mr Steedman's son's aliment a debt upon him. No 102.

Replied for Chisholm, 1^{mo}, The mother, as being *vestita viro*, could not oblige herself for her son's aliment; and it cannot be pretended that she was *præposita huic particulari negotio*; 2^{do}, The defender mistakes in point of law, when he argues that aliment cannot be sought *actione mandati*, because a mandate is a gratuitous office; for it is only gratuitous as to the mandatar's personal service, and not as to expenses laid out by him in executing the mandate; 3^{tio}, As there is no place for a presumption of donation from the want of paction; so there is as little from the relation of the parties, which is but collateral; 4^{to}, As to the ground of presumption from Bairdie's letter and ticket, the question is, If aliment was originally due, and not if *ex post facto*, it was discharged or accounted for; nor is Bairdie's long forbearing to seek payment of the aliment of any import, the delay of a debt being no discharge.

THE LORDS found James Steedman liable in an aliment for his son to John Bairdie, and remitted to the Lord Ordinary to modify the same.

Fol. Dic. v. 2. p. 140. Forbes, p. 195.

1715. June 23. FORRET *against* REPRESENTATIVES OF CARSTAIRS.

No 103.

A PERSON, who had arrived at the years of majority, was found liable, even without paction, for his aliment to a person who usually alimented for money.

Fol. Dic. v. 2. p. 141. Dalrymple. Bruce.

* * * This case is No 302. p. 11098.

1734. July 30. COUNTESS OF WEMYSS *against* Her CHILDREN.

No 104.

CHILDREN who had ample alimentary provisions settled upon them by their grandfather upon the mother's side, were occasionally with him at the time of his death, and continued in family with their grandmother, his relict, for about a year thereafter, when they returned home to their father. The grandmother's executor craving this year's entertainment out of the children's funds; the presumption was founded upon by the children, That their grandmother, being in opulent circumstances, furnished the aliment out of affection, not interest.—THE LORDS found no aliment due.—See APPENDIX.

Fol. Dic. v. 2. p. 141.