

## S O L D I E R.

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1710. *November 4.* MR. ALEXANDER BROWN *against* GORDON.

MR. ALEXANDER BROWN of Thornydikes, gave in a petition, bearing, he had enlisted himself a soldier in my Lord Carmichael's, now Hyndford's, regiment, in July last, and yet one Gordon, a messenger, had apprehended him on a caption, and put him in prison, though he had intimated to him his privilege and exemption by the British act of Parliament; and therefore craved liberation, and the messenger to be punished. Answered: He was not in the regiment's livery, nor wore any badge of it; and it was a sham trick to defraud his creditors; neither got he any pay, nor mustered with them; *2do*, He was past the age of 60, after which one can do little service in the army. Replied: He opposed the testificates of his on-taking, and his furlough. The Lords ordained him to be set at liberty, and the messenger to answer before the Ordinary on the Bills for his contempt. What inclined the Lords to this was, that he was going to Dunse to vote as a freeholder in the election of a member for Berwickshire, and was picked up by this caption, and stopped; which stratagem the Lords thought was not to be encouraged; and therefore ordained trial to be taken at the messenger who was his employer?

No. 1.

*Fountainhall, v. 2. p. 595.*

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1778. *July 30.* WILLIAM LOW *against* CAPTAIN LEWIS DRUMMOND.

ON the 26th January, 1778, Macgregor, recruiting serjeant for Captain Drummond, enlisted Low and two others, by giving them some shillings in the King's name. On the 28th, Macgregor went with a party to bring them to attest, but desisted, on a suspicion that they would be rescued; and, on the 29th, he applied to the Justices of Peace, by petition, praying for warrant to bring them to be examined. Answers to this petition were given in, upon the 30th, for Low and

No. 2.  
Import of  
§ 73. of the  
mutiny-act.

No. 2. the other two, in which they declared their refusal to attest, and consigned £.3 as smart-money. They likewise alleged, that they had been unfairly enlisted, upon which a proof was allowed, and taken. The Justices, upon advising the whole, found it proved, "That the respondents were legally enlisted as soldiers, and that they cannot get off now, upon payment of the smart-money." This judgment was brought under review of the Court by suspension, at the instance of the respondents.

The merits of the question betwixt the parties turned upon the interpretation of the 73d sect. of the mutiny-act, by which it is enacted, "That when, and so often as any person or persons shall be enlisted as a soldier, or soldiers, in his Majesty's land-service, he and they shall, within four days, but not sooner than 24 hours, after such enlisting, respectively, be carried before the next Justice of the Peace of any county, &c. and before such Justice, or chief Magistrate, he or they shall be at liberty to declare his or their dissent to such enlisting; and, upon such declaration, and returning the enlisting money, and also, each person so dissenting paying 20 shillings for the charges expended, or laid out upon him, such person or persons, so enlisted, shall be forthwith discharged and set at liberty, in presence of such Justice or chief Magistrate: But if such person or persons shall refuse or neglect, within the space of 24 hours, to return and pay such money, as aforesaid, he or they shall be deemed, and taken to be enlisted, as if he or they had given his or their assent thereto, before the said Justice or chief Magistrate."

Under this clause of the act, the suspenders insisted that they were free; having entered their dissent, and consigned their smart-money, within the time required by the statute.

Pleaded for the charger: *1mo*, The statute indulges the enlisted person with 24 hours from his enlistment, to deliberate whether he chooses to resile or not, but with no longer time. He does not get free by consigning the smart-money, and returning the enlisting-money, unless these requisites are performed within that time; for both the periods of 24 hours, mentioned in this clause, must be understood as commencing from the act of enlistment. This is specially provided as to the first; and, though it is not again repeated in the part of the clause relative to the other, within which the consigning, &c. must be performed, yet no other period of commencement being mentioned, that in the beginning of the clause must be understood as applying to it, as well as the former. The consignment, therefore, made by the suspenders, came too late.

*2do*, Supposing the consignment had been made in proper time, the suspenders did not return the enlisting-money, as this clause requires; and, therefore, they could not resile.

Answered for the suspenders: Though the act does not expressly say from what time the last mentioned 24 hours commences, the form of the sentence points it out. This period of 24 hours must be understood as relative to what was men-

tioned in the immediately preceding part of the sentence, and computed from the time of appearance before a Magistrate, to give an assent, or dissent, to the enlisting. The returning the gratuity, and consigning the smart-money, are evidently the consequences of dissenting.

A contrary interpretation would involve the act in a contradiction. In every case where the enlisted person is brought before a Magistrate, he is, by the statute, entitled to his option, either of assenting to the enlistment, or resiling from it. But he cannot be carried before a Magistrate until the lapse of 24 hours from the enlistment; consequently, the 24 hours allowed for returning the enlisting-money, and consigning the smart-money, cannot be understood to run from the act of enlistment; for that would annihilate the option which the statute expressly gives the enlisted person to dissent, when brought before the Magistrate.

*3tio*, The act was sufficiently complied with, by consigning the smart-money, there being no enlisting-money. The shilling given to each, in the King's name, is merely a symbol of the enlistment, not the gratuity for enlisting. The returning of the latter was the object of the act. This symbol is like the earnest given in hiring a servant, or making a bargain, which is never considered as part of the price or wages, and is called "dead earnest;" Ersk. B. 3. T. 3. § 5.

The suspenders likewise insisted on two separate grounds of suspension: *1mo*, That, from the proof, it appeared, that they had not originally given any consent to be enlisted; *2do*, That there had been no proper requisition on them to attend the Magistrates to attest; as the petition to the Justices only requires their attendance to be examined.

The judgment of the Court was, "Find it proved, that the three suspenders were enlisted by M'Gregor, to serve in the charger's company of the Athol regiment, upon the night of the 26th of January last, by the symbol of a shilling given them in the King's name; but that no enlisting-money, or bounty, was paid, or agreed to be paid, to them: Find, that the only attempt to bring them before a Magistrate, in order to be attested, was by a petition presented to the Justices of the Peace, upon the 29th day of January, praying warrant for bringing them before the Justices for examination; which was served upon them that evening: And find it proved, that, upon the day following, and within less than twenty-four hours after such service, they appeared, and judicially declared their dissent to the enlisting, and consigned, each of them, in the hands of the clerk, twenty shillings for the charges laid out upon them; and find that, upon such declaration and consignment, they were entitled to be discharged, under the statute: Find, that the shilling given by the serjeant as the symbol of enlisting, was properly part of the charges laid out upon them; and therefore find, that they were not obliged to consign such shilling over and above the twenty shillings; and therefore sustain the reasons of suspension, and suspend."

*Fel. Dic. v. 4. p. 294. Fac. Coll. No. 39. p. 67.*