

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.

No 185.

goods, upon which William craved compensation against John's annual legacy ; therefore, they sustained John's oath, and the quality adjected thereto, viz. That the said goods sent to him by his brother Robert were gifted to him ; and rejected the compensation craved upon the furnishing of these goods." This is against the brocard *nemo donare præsumitur quamdiu debet*. But all these circumstances foresaid accumulated induced the Lords.

*Fountainball, v. I. p. 63.*

1682. *March, November, December.*

GRANT & GILCHRIST against PRINGLE.

No 186.

THE affording horses and carts to carry away household furniture from one person to another, found not to infer that it was gifted by the one to the other.

\* \* \* This case is No 242. p. 6032. *voce* HUSBAND AND WIFE.

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S E C T. XI.

Money given upon Receipt.

1703. *January 7.* GEORGE OGILVIE against ALEXANDER ABERCROMBIE.

No 187.

Receipt granted for money, in general implies an obligation to re-pay.

GEORGE OGILVIE of Newrain, as executor confirmed to George Abercrombie of Tillybody, pursues Alexander Abercrombie of Skeith for 300 merks contained in his ticket, bearing, he had received that sum from the said George Ogilvie in name of Abercrombie of Tillybody. *Alleged, 1mo*, The ticket was null, wanting writer's name and witnesses. *Answered*, Offered to prove by his oath the subscription was his, and he had not repaid the money nor counted for it. THE LORDS repelled the defence, in respect of the answer. *Alleged, 2do*, The ticket was not binding, containing no obligation to repay, but only the naked receipt of the money, and so was a pure gratuity and donation ; for Tillybody being his near cousin, and unmarried, he was in use to give his near relations some small acknowledgments ; and Mr Ogilvie, now pursuer, being his factor and trustee, he took a receipt for instructing to Tillybody, that, according to his order, he had given the money ; and if there had been the least design of ex-