

number of years therein stipulated; and likewise seemed convinced, by the proof, that the foundation of the bridge was originally faulty.

No 83.

THE LORDS repelled the reasons of suspension.

Reporter, *Auchinleck*

Act. Geo. Clerk.

Alt. *Crosbie*.Clerk, *Tait*.

*Fol. Dic. v. 4. p. 61. Fac. Col. No 191. p. 121.*

1794. November 29.

DAVID WHITE against DAVID BAILLIE.

DAVID BAILLIE, a farmer in the county of Forfar, having hired David White, as his servant, for a year, the latter, after entering into his service, was seized with an illness, which prevented him from working during 11 weeks. No other servant, however, was hired to do his work during his absence.

White having afterwards brought an action against Baillie, for payment of his wages, the defender claimed a deduction, in proportion to the period of the pursuer's absence.

The Sheriff gave judgment in favour of the pursuer.

A bill of suspension having been passed, the suspender offered to prove, that it was the practice of the county where he lived, to make such deduction; and farther

*Pleaded,* As in the contract of location, the premium paid by the *conductor* is meant to be proportioned to the benefit received by him, it is reasonable, that when any unforeseen accident deprives him of the expected advantage, he should be allowed an equivalent abatement. This principle is recognised where the subject of the contract is a farm or a house; (*vide supra, b. t.*) and it should hold more particularly in the contract between master and servant, as there the amount of the deduction can be more easily ascertained; and although, from motives of humanity to the latter, every short period of absence would not be taken into account, yet where the inability to work has been so long continued as in the present case, the defence ought to be sustained. Accordingly, at an appeal heard at the Perth circuit, within these few years, it was found, that a master was entitled to make a deduction where the servant had been absent on account of sickness a quarter of an year.

*Answered,* Wherever a person pays a determinate premium for the use of a subject, he takes on himself the risk of the quantity of benefit to be received from it. Upon this principle, in the case of a farm, although the tenant is not obliged to pay any rent, where, from circumstances not imputable to him, no crop at all is produced, he has no claim for abatement, merely because the farm has been less productive than usual. The same should hold still more in questions between master and servant, as the duty of the latter consists not so much in performing any specific quantity of work, as in a general respect and

No 84.

A farmer found not entitled to deduct any part of the wages of a servant hired for a year, on account of his having been disabled by sickness from working during eleven weeks of that period.

No 84. submission to the former, and attention to his interest; which lay him under a corresponding obligation to take care of his servant, when in bad health; Stair, b. 1. tit. 15. § 1. 2.; Bankton, b. 1. tit. 20. § 19.; Erskine, b. 3. tit. 3. § 16.; see also, *l.* 38. *D. Loc. Cond.*

THE LORD ORDINARY found the letters orderly proceeded.

Upon advising a reclaiming petition, with answers, one Judge doubted the propriety of the interlocutor, and others wished to have the practice and understanding of farmers ascertained; but it was the prevailing opinion of the Court, that, without laying down any general rule on the subject, the circumstances of the case sufficiently warranted the interlocutor which had been pronounced. In England, (it was believed,) no abatement would be allowed in a case like the present; and it was thought a strong circumstance, that the suspender did not find it necessary to hire another servant in the charger's place, during his illness.

THE LORDS "adhered."

Lord Ordinary, *Dreghorn.*

Alt. *Robertson Scott.*

For the Suspenders, *Jo. Millar, jun. Monypenny.*

Clerk, *Home.*

*D. D.*

*Fol. Dic. v. 4. p. 58. Fac. Col. No 135. p. 300.*

*Periculum* in Contract of Insurance;—see INSURANCE.

See *Nautæ, Caupones, Stabularii.*

See APPENDIX.