

## WINTER SESSION 1676.

1676. November 8. KINNEAR contra ———

ONE having sent his son to London, he finds trust and credit from a merchant-factor there; the father not knowing thereof, writes a letter of advice to that same factor, desiring him, upon his score, (this is what the law calls *pecunia constituta*, and which *Paul* offers to *Philemon* in behalf of *Onesimus*) to advance (furnish) what his son should call for, and he should pay it. Upon this letter the father being pursued to pay the money he had given his son before that letter came to his hands; the DEFENCE was, he could not be liable for that which was not given *illius intuitu vel contemplatione*, and wherein he had only followed the son's own faith, and the recommendatory letter only warranted posterior givings. Whereunto it was ANSWERED, That even the first lending was *intuitu* of the father, and from respect to him, for which he ought not to suffer; that the letter was of the nature of a rati habitation, *quæ comparatur mandato*; that it did not restrict to subsequent givings, but was indefinite, *quæ universali æquipollet*. They were to have the Lords' answer on it.

I think, in equity, the father should be liable; especially if the sum advanced was moderate, or anywise *in rem vel patris vel filii-familias versum*: and the factor seemed to be founded *in utili actione*, *Quod jussu*, though not *in directa*, since the supervenient letter may be esteemed an interpretative homologation of what should be advanced to his son; and in material justice, *nihil patri deerat*, he had no prejudice, for if that money had been paid in to his son, after the receipt of his letter, he could have made no cavilation whereupon to have shunned the payment of it: *et non refert*, that it was paid him before the order; which must be retroracted, else the merchant's civility should be dommeagable to him, and *pater dolose lucraretur cum ejus detrimento*.

In the Roman law, the father was liable for his son *in familia tam noxaliter*, in case of a *delictum*, or *quasi quam civiliter* for his engagements, *quatenus erat in peculio filii cujus peculii pater erat dominus et administrator*; except only in the case of *mutuum filio-familias datum*, against which the father was secured *per senatus consultum Macedonianum*. But if the father employed the son as excercitor or institor, then who contracted with the son had those actions, or rather proper qualities and adjections to actions competent against the father constituent, viz. *exercitoriam, institoriam, tributoriam*: if it was *in rem versum*, then they had the action *de in rem verso*; if there was a mandate intervening, then *quod jussu* took place; see those titles *in Pandectis*. With us, things furnished to a son *in familia tacite*, oblige the father, if they were profitable and useful, as aliment or abulyiement, and no other allowance given by the father *eo nomine* for them, and were conform to his quality. *Vide supra*, a like case, November 1671, Christopher Le Noir, Frenchman, *contra* Jo. Brown, No. 245.

*Advocates' MS. No. 502, folio 263.*