secured to be furthcoming, occasions would offer; wherein the defender has no prejudice, since the law will oblige him either to pay annualrent for the tocher, or to grant an aliment equivalent; and the pursuer is content to find caution to make the money furthcoming to such as it shall be found to belong to, failing the pursuer's daughter. No 106.

THE LORDS found the aliment due to the mother, and decerned the defender to pay the principal sum upon caution *ut supra*.

Fol. Dic. v. 2. p. 142. Gilmour, No 75. p. 56.

*** In the case Wilkie against Morison, 7th July 1675, No 125. p. 5923. *voce* HUSBAND and WIFE, a mother having alimented her son, an infant, until his death, she was found to have action against extraneous heirs, though she liferented his whole effects.

1664. *June* 25. GEORGE MELVILL *against* MR THOMAS FERGUSSON.

No 107.
A mother having alimented her son, was not entitled to payment therefor; but she having married, the stepfather was found entitled to payment for alimenting her son after her decease.

GEORGE MELVILL pursues Mr Thomas Fergusson's step-son for the value of his aliment, after the mother's decease. The defender *alleged* absolvitor, because the defunct was his own mother, and he had no means of his own; and it must be presumed that she entertained him free, out of her maternal affection, and that his step-father did the same, after he had married his mother.

THE LORDS sustained the first part of the defence, but not the second anent the step-father after the mother's decease.

Fol. Dic. v. 2. p. 141. Stair, v. 1. p. 206.

*** A similar decision was pronounced, 2d February 1672, Guthrie against Ld. of Mackerston, No 74. p. 10137. *voce* PERICULUM.

1668. *December* 15. MARY WINRAHAME *against* MR JAMES ELEIS.

No 108.
A father becoming debtor to his minor children, by uplifting a bond due to them; his heir being sued for payment, was assoilzied from the annualrents of those years during which the children continuedin their

JAMES MURRAY of Deuchar having married his daughter to James Eleis of Stenopmiln, leaves to the seven sons of the marriage beside the heir, 7000 merks, and the portion of the deceasing to accresce to the surviving; which sum was uplifted by James Eleis, who in his testament nominates his eldest son and heir his executor and universal legatar, and ordains him to pay all his debts out of the first end of his moveables, and then leaves 9000 merks to Patrick his second son, in satisfaction of all that he might succeed to by the decease of the testator his father. Margaret Winrahame, relict and executrix-creditrix to her husband, obtained a decreet before the Commissaries against Mr James Eleis, who suspends on this reason, That Patrick's legacy of 9000 merks, being in full satisfaction of all he could demand by his father's death, must be understood in

No 108. father's family; it being presumed that the annualrent of their own stock was applied, *pro tanto*, towards their aliment, *quia debitor non præsumitur donare.*

satisfaction of the said legacy, left by James Murray; which being lifted by James Eleis the testator, and so becoming his debt, *debitor non præsumitur donare*; 2*dly*, The Commissaries' decreet is most unjust, in decerning annualrent where there was none due by paction, the sum being but a legacy which never bears annualrent. The charger *answered* to the *first*, That the brocard *debitor non præsumitur donare*, holds not in many cases, especially in provisions of children by their fathers, who are obliged *jure naturæ et ex pietate paterna*, to provide them; and in this testament, the executor is appointed to pay all the debts without any exception of this or any other, and the testator had a plentiful estate. It can no ways be thought that both the legacy and this sum in question were too great a portion to his second son; as for the annualrent, the father being tutor, and lawful administrator to his son, ought to have employed it profitably, and no doubt did, being a most provident man. It was *answered*, That the son never having insisted for this sum, nor having ever demanded annualrent during his father's life; it is an evidence he acquiesced to his father's provision, and cannot seek annualrent against his father's executors, his father having alimented him, neither is he liable for that rigour that other tutors are.

The Lords repelled the reasons as to the principal sum, and found that the father's legacy was not in satisfaction of the grandfather's legacy; but found no annualrent due, but suspended the letters *simpliciter* as to annualrent.

Fol. Dic. v. 2. *p.* 143. *Stair, v.* 1. *p.* 571.

*** Gosford reports this case:

Margaret Winrahame as executrix creditrix to her husband, Patrick Elies, did pursue Mr James Elies her husband's brother, as heir and executor to his father, for payment of a legacy of 1000 merks, left to the said Patrick by James Murray their grandfather, and intromitted with by James Elies their father. It was *alleged* for the defender, That the pursuer having right as said is, could not crave the sum, because their father having intromitted with the said legacy, he had provided the said Patrick his son to the sum of 9000 merks, and that in satisfaction of all that could fall to him through his decease, which provision must be thought to be in satisfaction of the said legacy, in which he was debtor to his son by his intromission therewith, *quia debitor non præsumitur donare.* This allegeance was repelled, for the Lords found, that the provision of the son not being in satisfaction of the foresaid legacy, or in general of all that the said Patrick could ask or crave, and that a father by the law of nature is bound to provide his children, it did not fall within that general maxim of law, that *debitor non præsumitur donare.* In this same cause, annualrent of the legacy being craved, upon that ground that the father was administrator to the son, who was a minor, *et nummi pupillares non debent esse otiosi*, the Lords refused to grant annualrent, because the father having educated his son, and been at the charges of his breeding, they thought, that he

should not be liable to pay annualrent for a legacy intromitted with by him belonging to his son. No 108.

Gosford, MS. No 61. p. 22.

1669. *July* 13. EDWARD MAXWELL of Hills *against* BROWN of Inglistoun.

No 109.
Found in conformity to Winrahame against Elies, No 108. p. 11433.

MAXWELL of Kirkhouse having left a legacy of about 40,000 merks, to five daughters of Crichtoun of Crawfordstoun's, who uplifted the same; one of the daughter's being married to Alexander Trane, who did assign her part of the legacy to the said Maxwell of Hills, who did pursue Brown of Inglistoun as one of the heirs-portioners of Crawfordstoun, for payment of the principal sum, and annualrents since Crawfordstoun's intromission, as being administrator of law to his daughter; it was *alleged*, That Crawfordstoun the father had alimented his daughter, and expended great sums of money upon his daughter's marriage, and her cloaths and necessaries in order thereto, and that the legacies by the law bear no annualrent, and so ought to have compensation for the principal sum; to which it being *replied* that the father did bestow aliment *ex pietate paterna*, and was obliged to provide his daughter on marriage with all necessaries, and that as administrator he was liable in annualrent for the legacy uplifted by him, which was left by a stranger, the LORDS did sustain the defence to assoilzie from the annualrents, but decerned for the principal sum, as they had done before, in the case betwixt the second son of James Elies, and his Relict and Children against the Heir, No 108. p. 11433.; where they found, that parents alimenting and providing their children out of their own means, they nor their heirs were not liable for annualrents for legacies uplifted by them left to their children by strangers, they being in a different case from tutors and curators.

Fol. Dic. v. 2. p. 143. Gosford, MS. No 168. p. 66.

1672. *June* 13. LADY LUGTON *against* HEPBURNE and CRICHTON.

No 110.
In a process at the instance of a grandmother for aliment of her grandchild for 13 years; found that if a doubtful succession should be obtained, the grandmother should be reimbursed, if not, she should

A DECREET being recovered before the Commissaries of Edinburgh, at the instance of the Lady Lugton, against her grandchild Hepburne, daughter to the deceast Laird of Aderstoun, modifying 400 merks yearly, for aliment of the said Hepburne, by the space of 13 years since her birth; the LORDS in a reduction and suspension of the said decreet, modified the sum therein contained, being 3500 merks, to the tenth part of the sum of 30,000 merks, which was mentioned in the said decreet, and considered by the commissaries as the estate belonging to the said Hepburne, so that in respect and upon supposition of the same they modified the said aliment; and by reason the said estate was intricate and litigious, and possibly could not be