

(DUE *ex pacto.*)

§ 2. *Instit. de verbor. obligat.* 4th December 1629, Oliphant *contra* Peibles, (Durie, p. 472. See PRESUMPTION.)—On the other hand, it was *alleged*, That annualrent was provided in children's bonds of provision instead of aliment; so, where they are alimented, they ought to have no annualrent, it being unreasonable to give them both; and, *ita est*, the father and mother alimented the younger children during their lifetime; and the term not being fixed, neither in the contract nor bond of provision, but left as the father should afterwards determine, which he never did, the Lords, *tanquam boni viri*, came in his place to supply it.—And having balanced all the presumptions on both sides, they found no annualrent due for their portions till after both the father and mother's death. That it did not commence during the father's life, the LORDS were unanimous: But not in the second; for some were of opinion, that his death was the true term of payment, after which annualrent became due; but it was decided *ut supra*.

Fol. Dic. v. 1. p. 37. Fountainhall, v. 1. p. 729.

1702. February 27. SIR JOHN HOUSTON *against* SIR JOHN SCHAW.

SIR JOHN HOUSTON pursues Sir John Schaw of Greenock, for payment of L. 2500 Scots, contained in his ticket.—*Alleged*, *imo*, Absolvitor from annualrents, because the ticket bears none.—*Answered*, It ought to be repelled, because it is made payable at a precise day; and if not then, Greenock is obliged to grant bond for it bearing annualrent.—*Replied*, You should have required me to grant that bond after elapsing of the day.—*Duplied*, In all these obligations *dies interpellat pro homine*, and it was your part to have offered it.—THE LORDS found annualrent due.—*2do*, Greenock craved compensation, because you became cautioner for my Lord Blantyre, in a suspension of a greater sum he owed me, and I have discussed the suspension, and obtained a decret against Blantyre, which he produced extracted.—*Answered*, No liquid compensation, because the principal is not yet discussed, and I condescended on an estate both heritable and moveable, belonging to him, to be subject of discussion.—*Replied*, By your bond of caution you became obliged to pay the sum, how soon the principal suspender shall be found debtor therein, and so no need of discussion.—*Duplied*, Wherever cautioners are not bound conjunctly and severally, they are only *subsidiarie* liable, and has been always so found by a constant tract of decisions; and though the last case, 16th December 1698, Sir John Dempster against Bayne of Tulloch, (Fount. v. 2. p. 26. See CAUTIONER.) be adduced as contrary, yet it had no contingency with this, for it was against the attester of a cautioner in a bond of presentation.—THE LORDS found Houston only *subsidiarie* liable. Some started, what was meant by discussing the principal suspender before access to

No 17.
the father;
he having
died without
fixing it, it
was found
that the chil-
dren being al-
imented dur-
ing the lives
of their fa-
ther and mo-
ther, annual-
rent could not
begin till af-
ter the death
of both.

No 18.
A party hav-
ing given
ticket for a
sum, payable
at a precise
day, and if
not then paid,
obliging him-
self to grant
bond for it
bearing annu-
alrent; al-
though the
creditor, after
the day elap-
sed, did not
require the
bond, yet an-
nualrent was
found due.

(DUE *ex pacto.*)

No 18.

the cautioner, and it was said, denunciation was sufficient ; but others thought, if he had a land estate, adjudication behoved likewise to be used. (See CAUTIONER.)

Fol. Dic. v. 1. p. 37. Fountainball, v. 2. p. 153.

1711. July 12.

JANET and MARY NIELSONS, Children to Umquhile Robert Nielson in Bourhouse,
against JANET CULTER, and MR RICHARD WILSON, her Husband.

No 19.

A legacy was payable to one, in case he should demand it within seven years after the testator's death; if not, payable to another. It having accrued to the substitute, through the institute's neglect to call for it, the substitute found to have right to the annualrent from the testator's death.

JAMES NIELSON, merchant in Rowen, having, 10th May 1701, disposed his estate to Janet Culter, his wife, with the burden of a legacy of L. 40 Sterling, to be paid to James Nielson his nephew, in case, upon information, he should demand the same personally within seven years after the testator's death ; and failing thereof, to fall and accrue to Robert Neilson his brother, with annualrent thereof during the not payment: Janet and Mary Nielsons, as having right to the said legacy, by assignation from Robert Neilson their father, through James Nielson's failing to demand it within the time limited, pursued Janet Culter, and her present husband for his interest, to pay the L. 40, with annualrent thereof since the testator's decease.

Alleged for the defenders: The clause of annualrent being subjoined only to the substitution, no annualrent was due within the seven years. Nor could it be claimed till they were *in mora* to make payment after the legacy fell due: And it cannot be pretended that they were *in mora* for not paying to James the first institute, he not having compeared to require payment in the terms of the destination; or for not paying to the pursuer, who had not *jus exigendi*, till after elapsing of the *septennium*. So a bond payable at a certain term with annualrent during the not payment, infers annualrent only from the term of payment.

Replied for the pursuers: James Nielson the institute, might have compeared and required payment of the L. 40 immediately after the testator's death, or any time within the seven years, with annualrent from his death; seeing it cannot be imagined, that the testator would have burdened his relict with annualrent in favours of the substitute, and not of the institute, *persona prædilecta*. And the pursuers have all the right that James had, now that the condition of the substitution is purified, which must be drawn back to the testator's death. Where a bond is payable at a term, with annualrent during the not payment, though the money could not be demanded before the term, annualrent would be due from the date.

THE LORDS found annualrent due from the testator's death.

Fol. Dic. v. 1. p. 37. Forbes, p. 522.