

not come in place of the first, nor absorb it, this being *quæstio conjectura voluntatis defuncti*.

No 120.

Fol. Dic. v. 2. p. 143. Fountainball, v. 2. p. 231.

1725. June 24.

MARGARET and HELEN IRVINES *against* ALEXANDER IRVINE of Drum,
their Brother.

No 121:

IRVINE of Drum, father to these parties, granted bonds of provision of 8000 merks to each of his two daughters, payable at their respective ages of 16 years, with annualrent after the term of payment; but in case he should die before they attained that age, the bonds were to bear annualrent from his death.

The father survived, the term for many years, the daughters continuing in family with him; and after his death, they insisted against their brother for the annualrents of their bonds, from the terms of payment above mentioned.

Compensation was pleaded for the defender as to any annualrent till their father's death, because they were alimeted and educated in his family; and as he was debtor for their annualrents, so he was creditor for their education and aliment, *et debitor non præsumitur donare*.

Answered; That there could be no compensation pleaded in this case, because there was no constitution of aliment; neither could there have been any by the father, who was bound to aliment his children *jure naturæ*; that there was a clear constitution of annualrent, and a precise term from which it was to fall due; and that when it is intended that no annualrent should be due upon such bonds, during the children's stay in the family with their parents, the term of payment is always made alternative, either from the time of their marriage, or the next term after their father's decease.

It was *replied*; That though by the law of nature parents were obliged to aliment their children, yet they were not bound both to aliment them and pay interest upon their bonds of provision; and therefore the one must compensate the other; And, *2do*, Besides the rule in law, that *debitor non præsumitur donare*, the father's *animus* in this case appeared plainly to have been, that the pursuers should only have their annualrents for the alimeting themselves before they attained the age of 16 in the event of his predecease, but not that so long as he lived, and they in family with him, they should have both aliment and the interest of their bonds, agreeable to a decision January 16th 1706, Aitkine against Goodlet, No 16. p. 5262.

THE LORDS sustained the defence, and found, that the heir had right to retain the annualrents in satisfaction of their aliments, during the time they were alimeted by the father.

Reporter, Lord Cowper. Act. Ja. Graham sen. Alt. Alex. Garden. Clerk, Justice.

Fol. Dic. v. 4. p. 121. Edgar, p. 183.

A father granted bonds of provision to his daughters, payable when they should arrive at a certain age, with annualrents thereafter. Found, that their aliment in their father's house compensated their claims for interest on the bonds.