SECT. II.

Where there could be no opportunity of Paction, Donation is presumed or not according to circumstances.

1624. *February* 3. Lady Mongreenan *against* Ld Blair.

No 105.

A minor's mother pursued the tutor for several years aliment. Although the minor, during these years, had nothing of his own, because of a grandmother liferenter, then alive; yet, after her death, the minor having come to his own, action was sustained to the mother entertainer, for all the preceding years.

Fol. Dic. v. 2. *p.* 142. *Spottiswood.*

*** This case is No 23. p. 8918.

No 106.
Aliment to a a daughter found due to a mother by an extraneous heir. The *pietas materna* held to have no weight in such a case.

1663. Stirling *against* The Laird of Ottar.

By contract of marriage betwixt umquhile Archibald Campbell of Ottar and Anna Stirling, the lands are provided to the heirs-male of the marriage; and if there be but one daughter, she is provided to 6000 merks payable by Ottar's other heir-male when she should be fit for marriage, and an occasion should offer. There being but only one daughter of that marriage, whom the mother hath alimented since the husband's death *in anno* 1651; the mother pursues this Ottar, brother and heir-male to the said deceased Archibald, for the daughter's aliment since the said year, and the daughter pursues for payment of the said 6000 merks. Against the aliment it was *alleged*, There is none due *de pacto*, by the contract of marriage, nor by law, and the mother must be presumed to have alimented her daughter *ex affectu naturali*. It was *answered*, That there was upon the father, if he had been alive, a natural obligation to maintain his daughter; so his heir succeeding to his fortune is obliged naturally to that same duty; and the mother is not presumed *ex suo* to aliment her daughter where there is a natural obligation lying upon any other, who has whereupon to discharge that obligation abundantly; and though, according to the usual form, the writer has neglected in the contract a clause for alimenting the daughter; yet seeing nature obligeth to the thing, and there is an estate whereupon to do it, the judge ought to decern accordingly. To the other part of the libel it was *alleged*, That the term of payment of the tocher comes not till the occasion of a marriage offer, and the sum returns back failing of her by decease without heirs of her body. It was *answered*, That the daughter was now marriageable, and so long as the money were in the power of the uncle, it would be an impediment of matches to her; whereas, if the money were out of his hands, and

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