

1704. June 20.

Mr WALTER STIRLING *against* ALEXANDER DEANS and ROBERT WATSON  
of Muirhouse, his tutor.

## No 120.

A testator legated a sum to his sister, with which he burdened his executors. Two years after he gave her assignation to a sum precisely the same. The last having no relation to the first, they were found both to be due.

THOMAS DEANS, by his testament in 1669, legated to Anna Deans his sister 6000 merks, and burdened his heir and executor with it. In 1701, he likewise assigns her to 6000 merks, to be paid by Patrick Steill out of what he owed him (as mentioned, 3d Feb. 1704, *voce* WARRANDICE). Anna disposes these two sums to Mr Walter Stirling, her husband; and having first pursued Patrick Steill, and meeting with difficulties there, because of his breaking, now pursues Alexander Deans, as executor to Thomas the granter, for payment of the first 6000 merks contained in the testament. *Alleged* for him, That, by the posterior assignation to the same individual sum of 6000 merks, the former is satisfied, extinct, and revoked; and both being gratuitous donations, law and reason presume the last is given in satisfaction of the first; and he being debtor in the warrandice of the first, non præsumitur donare; and it is a certain rule in law, that duæ causæ lucrativæ non possunt concurrere in eandem rem et personam. *Answered*, Though both the rights be for love and favour, and for the like sum, and betwixt the same persons, yet they must be reputed two distinct liberalities, seeing they are left by different writs, at sundry times, the one by testament, and the other by assignation; and the last is so far from bearing to be in satisfaction and lieu of the first, that it has no manner of relation to it at all, which certainly he would have done if he had designed the revocation of the former; and being his sister, both must subsist, especially he having given 12,000 merks to Mr Walter Pringle's relict, his other sister: And the special legacy of the 6000 merks left out of Patrick Steill's effects is like to fall exceedingly short. And as to the rule of two lucrative causes, it has many exceptions: For, *imo*, It holds only in speciebus et corporibus legatis, but not in summis et quantitativibus. If a horse be twice legated, it is but once due; but if certa quantitas vel summa be bis legata, non potest dici eandem rem legari, as Vinnius and other commentators observed, § 6. Institut. De legat.; *2do*, The rule holds not where the same is left in different writs, as is clear from L. 2. D. De probat. where Celsus the lawyer determines excellently, if 500 merks be left in testament, and 500 merks to the same person by a posterior codicil, both are due, nisi heres gravatus probaverit posteriorem scripturam inanem esse; Neither, *3tio*, Does it hold, si testator variaverit modum legandi, vel in quantitate vel qualitate, conditione, tempore, vel loco; in all which cases it is reputed a double additional legacy, especially if to be paid out of quite different funds, as here; and the one bears not to be in lieu of the other: Yea, L. Cod. De legat. goes a greater length, that a *legatum rei alienæ* is effectual, whether the defunct knew it to be *res aliena* or not, if so be it be legated to a near blood-relation. THE LORDS found, though it was the same testator, the same legatar, and the same sum, yet the last having no relation to the first, they were both due, and the last did

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 alimnet, *et debitor non præsumitur donare*.

*Answered*; That there could be no compensation pleaded in this case, because there was no constitution of alimnet; neither could there have been any by the father, who was bound to alimnet 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 alimnet their children, yet they were not bound both to alimnet 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 alimneting 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 alimnet 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 alimnets, during the time they were alimneted 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 alimnet in their father's house compensated their claims for interest on the bonds.