

(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.