

(Ex debito naturali.)

1666. February 23.

CHILDREN of the Earl of BUCHAN, against Lady BUCHAN.

THE six children of the Earl of Buchan pursue their mother for aliment. It was *alleged* absolutor, Because their was neither law, statute; nor custom of this kingdom, obliging a mother to aliment her children. *2do*, Albeit there were, she offers her to admit them in her family, and to entertain them according to her means; but can never be obliged to pay a modification, in money, out of the family; for, in all cases of aliment of wives, or children against parents, the offer to accept, and aliment them in the family, according to the parents means, doth always exclude modification; as was lately found in the case of Sir Andrew Dick and his Son.—It was *answered*, That the law of nature is a part of the law of this, and all other civil kingdoms; and, according thereto, the Lords do always decide, in cases now occurring, where there was neither statute nor custom, and if aliment be due, the manner and measure is *in arbitrio judicis*, who may justly ordain their children to be bred from their mothers, seeing she hath miscarried, and married a deposed minister.—It was *answered*, That the law of nature, without our custom, is no sufficient law to us, and does not induce *obligationem civilem*, but only *pietatem et affectum*: Upon which ground it is, that there was necessity of this statute, to appoint an aliment for heirs against the wardatars and liferenters; which insinuates that there was no such law before; and, if the law of nature be the adequate rule, we are obliged to entertain the poor, and all in distress; and therefore they might pursue us thereupon. *2do*, There is no reason to put it *in arbitrio judicis*, whether a child should be educated with the parent, who must aliment him, even upon pretence of the parents miscarriage; for that being the indispensable right of parents to educate their children, as they see cause, especially who demand aliment of them; it ought not to be in the arbitrament of any judge, unless it were a Parliament; and this arbitrament would lay the foundations to encourage children to desert their parents, and to claim aliment out of their family, and to pretend the parents miscarriages, as unfit persons to be bred with, and not breeding them in a fit way; which accusations were prohibited by the civil law, and never admitted by our custom; for albeit the Lords may appoint the way of education of pupils, their parents being dead; yet tutors have no such interest as parents.

THE LORDS found the mother obliged to aliment the children *jure naturæ*; which was sufficient to infer this civil obligation and action; but found, that the offer of alimenting them in her family, was sufficient according to her means; and they could demand no aliment, nor modification, *extra familiam*: For they found, that the Lords had thus sustained aliment to children against their fathers, not upon the act of Parliament, which is competent against all liferenters and dona-

No 45.

A mother is obliged to aliment her children *jure naturæ*; but it is sufficient that the aliment them in her family.

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- No 45. tars, without consideration of their being parents, but *super jure naturæ*, which they found would not extend to the obligation of charity, and which had no definite rule, but at the discretion of the giver, and was not allowed as a civil obligation by any nation.

Fol. Dic. v. 1. p. 32. Stair, v. 2. p. 365.

1756. March 2. CATHARINE DRUMMOND against ROBERT STEWART.

No 46.
A mother, who alimanted an idiot son while he had no fortune, found to have no claim for repayment when he succeeded to an estate.

CATHARINE DRUMMOND, mother to Robert Stewart an idiot, alimanted him from the year 1721 till the year 1751. He had no fortune whatever. In that year he succeeded to the estate of Ardvorlick, of L. 840 Scots yearly rent. In the year 1756, Catharine Drummond brought a process of aliment against her son, concluding for aliment from the 1721 till the 1751, as well as after this last period.

'THE LORDS found no aliment due till 1751; and, after that period, modified L. 40 to the pursuer.'

Act. ———.

Alt. And. Pringle.

Fol. Dic. v. 3. p. 22. Fac. Col. No 195. p. 289.

Sir J. Dalrymple.

1757. July 12. JEAN HOME against ASSIGNEE of Lady Wedderburn.

No 47.
Prior aliment by a mother deemed to be *ex pietate*, notwithstanding a child's supervenient fortune.

JEAN HOME, with her sister Isabel, had a bond of provision from their brother for 5000 merks; but it contained a clause, 'That the money should be divided betwixt them by Ninian Home, by such proportions as he should think fit to appoint, by any writ under his hand, *etiam in articulo mortis*.'

This power of division was never exercised by Ninian Home. At his death, one half of the 5000 merks fell to Jean, by the legal construction of the bond.

From the date of the bond till the death of Ninian Home, which was twenty years, Jean Home, who had no fortune except the prospect of this bond, had lived in family with her mother Lady Wedderburn.

After the death of Ninian, Lady Wedderburn claimed aliment as due by her daughter Jean, for this intermediate space, in respect of her supervenient fortune.

In an action betwixt Lady Wedderburn's assignee and Jean Home, concerning this claim of aliment,

'THE LORDS found, That Lady Wedderburn had no claim of aliment.'

For Assignee, Patrick Home.

For Jean Home, J. Dalrymple.

Fol. Dic. v. 2. p. 22. Fac. Col. No 43. p. 70.

Sir J. Dalrymple.