

(Ex debito naturali.)

at that age, but sooner, if they be sooner married; which, though it uses sometimes to be so expressed, yet oft times it doth not bear sooner, but at such an age, or their marriage, but have always taken effect at the marriage, if before that age, but have never been so applied, so as if they never married, never to have right; which is yet more evident in this case, because there is neither aliment nor annualrent provided; so that they should have nothing if never married.—The defender *replied*, That whatever may be the construction, as to provisions of heirs-female excluded by an heir-male, which must presuppose the father's death, before their provisions can take effect; yet here, where the father himself in life is bound to pay, it cannot be thought that he did not leave himself that latitude, either to pay at their age of 15, or at their marriage. *2do*, There are not only here two terms, but the obligation is conditional, viz. They marrying with consent of their father, the defender, and others; and till that condition be purified, they cannot crave payment.—It was *duplicated*, That this condition of consent cannot be interpreted a suspensive condition, putting a necessity upon them to marry, or otherways to have neither stock nor annual; but a resolute clause, that if they did marry without consent, they should be obliged to restore, which could not hinder them from payment upon caution, in case they should transgress; and the freedom of marriage hath made such clauses only to import that they should demand consent; but if it were refused without reason, whereof the Lords are judges, yet if they married without just exception, their portions should be due.

THE LORDS found, That the clause, as it is here conceived, obliging the father himself in his own life, was suspensive as to the payment of the stock, till it appear how the children would marry; but that the brother was obliged to aliment them *medio tempore*, from their age of 15, for which the annualrent of their sums were modified; but it was not determined, whether, if they should never marry, their portion would not belong to their nearest of kin, but absolutely fall to the brother. See ALTERNATIVE.

Fol. Dic. v. 1. p. 33. Stair, v. 2. p. 676.

1678. July 23.

THOMSON against WILKIE.

UMQUHILE Walter Wilkie having several children, one called Thomas became furious before his father's death, and his father provided nothing to him, but made his relict his executrix and universal legatrix, who entertained the said Thomas during her life; and after her decease, William Thomson having married Lucas Wilkie his sister, he entertained him 14 years, and now pursues Agnes Wilkie, who succeeded to the whole means of both father and mother, for the aliment of the furious person, in respect that it was a duty by the law of nature, both upon his father, and in case he had no means, upon his mother, to

No 56.

No 57.

A sister succeeding to the means of her father and mother, found liable in expence of alimending her furious brother; but that only in so far as she

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No 57.
was *lucrata*,
by being
freed from
entertaining
him in her
own family.

constitute an aliment for him during his furosity, according to their means and estate, which therefore must affect all representing them.—The defender *answered*, That the law and custom of Scotland hath only extended aliment of children against fathers personally, and never against mothers, nor against any representing either. *2do*, This aliment being bestowed upon the furious person by his own sister, without any agreement, must be presumed to be of charity and natural affection, and introduces no obligation, especially having continued 14 years after the death of both parents; and if it had been otherways intended, the pursuer ought to have required the defender to have accepted of the furious person in her family, and could not crave a modification to entertain him elsewhere.—The pursuer *answered*, That the Lords had made this natural obligation effectual, not only against fathers, but against mothers, where the father left no means, as was found in the case of the Children of E. Buchan *contra* the Countess of Buchan, No 45.; and also against the heirs, as was found in the case of the Children of Otter, No 49. and Netherlie against the Heirs thereof, No 50. And albeit the Lords has found that the entertainment of persons who can contract, is presumed gratuitous, unless there be an agreement, yet it is neither extended to pupils nor furious persons, who can make no act nor agreement for themselves.

THE LORDS sustained the process, and ordained a modification according to the means of the father and mother, whereunto the defender succeeds, and only in so far as she is *lucrata*, by being freed of entertaining the furious person in her own family.

Fol. Dic. v. 1. p. 32. Stair, v. 2. p. 639.

* * * Fountainhall states the same case thus:

WILLIAM THOMSON pursues Agnes Wilkie for paying him the aliment of her brother, who was fatuous.—*Alleged*: As representing her father, she was not liable, because his obligation, *jure naturæ*, died with himself, nor as representing her mother, *non tenetur alere*; and, as sister, the pursuer was as much concerned, having married another sister; and it is presumed he did it *ex officio pietatis*; and, in law, a sister is not bound to entertain her brother.—THE LORDS found his father should have provided him, since he was not capable to serve or work; and, therefore, found the defender, as representing the father and mother, bound to aliment him, *secundum vires hereditatis*.

Fountainhall, MS.

1697. January 13.

DON of Attenburn against DON.

No 58.
Younger
children al-

THE younger children of Mr Patrick Don of Attenburn, pursue their elder brother for an aliment, on this ground, That their father had left them nothing