

ALIMENT.

451

(*Ex debito naturali.*)

1688. February 17.

ELPHINSTON'S CHILDREN, *against* ELPHINSTON Laird of Airth, and his TUTOR.

AN eldest brother found liable *jure naturali*, to aliment his unprovided younger brothers and sisters, according to his ability.

Harcarse, (ALIMENT.) No 23. p. 6.

No 85.

* * * The following case, as reported by Fountainhall, is recorded also under the division of this Title relative to the Act 1491. No 12.

1705. July 25.

MR WILLIAM AYTON of that Ilk, Advocate, *against* Dame MARGARET COLVILL, his Step-mother.

MR WILLIAM AYTON of that Ilk, as heir to his father, having pursued Dame Margaret Colvill his step-mother for an aliment, in respect his father's estate was so overburdened with her liferent, the provision of her children, and extraneous debts, that there was not a competency left to sustain him, the heir :

Answered for the defender : Aliment can only be claimed by the pursuer, either by virtue of King James the Fifth's statute, ordaining superiors to aliment their ward vassals ; or *super jure nature* ; none of which holds here, the defender being a stranger to the pursuer, and not his own mother, and secured in a jointure by her contract of marriage, which cannot be diminished *contra fidem tabularum nuptialium*. 2do, Such aliments are only given to minors who are destitute of any other mean of subsistence, and not to those come to age who have a calling ; that idleness may not be encouraged ; 11th February 1636, Sibbald *contra* Wallace, No 9. *supra* ; 21st July 1636, L. Ramorny *contra* Law, No 10. *supra* ; now the pursuer is major, and an advocate. 3tio, The defender is burdened by her contract, with the aliment of her own children, till they be seven years old ; and therefore cannot be further burdened with the heir of the first marriage. 4to, The pursuer can have no benefit by this aliment ; for he being served heir *cum beneficio*, it must be added to the inventory, and accrete to his father's creditors. 5to, Personal debts exhausting an estate, were not thought sufficient to found an aliment ; 18th December 1667, Dobie *contra* Lady Stoniehill, No 15. *supra* ; and there is no real diligence by adjudication or infestment upon the estate of Ayton, to debar the heir from possessing.

Answered, imo, The alimentering of heirs is introduced by immemorial custom, that is much stronger than positive statute ; and it is always sustained against step-mothers having extravagant jointures. 2do, The name of an employment will not afford a man bread, and *officium nemini debet esse damnosum*. Neither is the

No 86.
A mother-in-law found liable to aliment her husband's son.

(Ex debito naturali.)

No 86. race always to the swift, nor the battle to the strong; for many advocates have risen to great eminency, who at the beginning have had little or no business. The cases cited do not meet; for in the first, *non constat*, but the heir was a placed minister, who had a sure fund to live on; and the mother had but an aliment herself, and it was thought hard to burden one aliment with another. As to the second decision, the father was then alive, who had a reserved liferent; and it was as reasonable he should bear the aliment, as the elder brother's relict. 3^{to}, The defender's children of the second marriage have *aliunde* an adventitious estate whereupon they may be maintained; and therefore cannot prejudice the heir's aliment. 4^{to}, Aliment not being arrestable or affectable, by creditors, is not to be added to the inventory; and the law doth not distinguish whether the heir be served or not. 5^{to}, *Esto* at the father's death the debts were merely personal; how soon are they made real by charging the pursuer to enter heir, and adjudging.

THE LORDS repelled all these defences in respect of the answers; and modified the fourth part of the lady's liferent for the pursuer's aliment; and decerned her to make payment to him accordingly, albeit he was quarrelling her liferent in a reduction; seeing if he prevailed therein, the aliment would cease.

Forbes, p. 35.

ALIMENT by PACTION.

1724. June 17.

MARY TURNBULL, and ELIZABETH AIKMAN her Mother and Tutrix, *against* JAMES TURNBULL of Currie.

No 87.

Aliment found not due, in virtue of a clause in a contract of marriage; but the claim *ex jure naturæ* reserved.

MARY TURNBULL insisted against her brother James for an aliment, as due to her in virtue of her father and mother's contract of marriage, whereby, "in regard the lands and barony of Loquhart were provided to the heirs male of that marriage; which failzieing, to George Turnbull (the father) his other heirs male of any subsequent marriage; which failzieing, to the heirs female without division: Therefore, and for a suitable provision to the daughters to be procreate of the said marriage, who should not happen to succeed to the estate, the said George Turnbull obliged himself to pay certain sums to the daughters at their respective marriages or ages of eighteen years, extending to 15,000 merks, if