

(Ex debito naturali)

No 59.

children, partly taken off before the burial, and partly within a day or two after, while the money could not possibly be misapplied.

Replied: The allegiance, that the minor, by his aspect, looked to be major, deserves no answer. Nor was it ever sustained that a minor was *in dolo* for concealing his age, and not telling that he was minor; the legal exception being *si majorem se dixerit*, and not *si minorem non dixerit*. And it cannot be termed dolo in a minor, not to tell that he was under age, when such a question was never put to him. *2do*, It is contended, that one who deals with a minor, and furnishes him goods, is in law obliged to know for what and for whose use they are, otherwise he trusts upon his peril.

THE LORDS repelled the reason of advocacy, in respect of the answers; and found the minor liable, though the furnishing was not made to himself, but to his brothers and sisters; and therefore remitted the cause. (See MINOR.)

Fol. Dic. v. 1. p. 32. Forbes, p. 26.

1711. February 2.

SOMERVELLS against L. DRUM.

No 60.

The Lords allowed younger children unprovided, an aliment from the heir; and they having no tutors, their relations, among whom they were distributed, were found adequate to receive the money and discharge the heir.

THE deceased James Somervell of Drum, having left five children, besides the heir, and none of them provided, in respect of his sudden death; and being all young, they pursue their elder brother, who succeeded to the estate, not indeed for portions, (for that our law has not yet allowed) but for an aliment till their majority; for, where an heir succeeds to a plentiful estate, the Lords have burdened him with alimentering his brethren and sisters *ex obligatione juris naturalis*, 24th January 1663, Edgars against their eldest Brother, No 54.; and 10th November 1671, Hasty No 53.; which continues till they be bred up in an employment; or, if mean people, to go to service; but cannot exceed the expiring of their minority.

THE LORDS having taken a summary cognition of the value of the estate, and burdens affecting it, they found it betwixt 4 and 5000 merks by year, with some debt; and therefore modified only 1500 merks of aliment yearly for all the five; but did not allow every one of them equally, but according to their ages, less till they came to ten or twelve years old, and then more; as they did in Jacobina Inglis's aliment against Sir John Inglis of Cramond, her brother.* But the difficulty arose who should uplift it, and give the heir a valid discharge. They represented, that for them to take out a gift of tutory from the Exchequer, would exhaust a great part of their aliment; neither would any be tutors, having nothing to manage but this small modification. Therefore, an expedient was offered, that the friends of the father's and mother's side had concerted amongst them, to divide the children, and each of them to take one into their family; and they were willing to discharge the heir on his paying their several proportions; and to give bond to apply it to their aliment and education, and to hold count for the same at their respective majorities; their design being to spare as much of their

* General List of Names.

(Ex debito naturali.)

aliment yearly, as, in process of time, may make up a little stock to them at their majority; which the Lords condescended to, upon their giving bond in manner foresaid, that their discharge should be a sufficient exoneration to the heir and his tutors. (See TUTOR and PUPIL.)

I remember, in the Parliament, held in 1672, an overture was brought in, that, for providing younger children, it should be lawful for parents to burden the heir, even on death-bed, with a sum not exceeding three years free rent of the heritage; but, by a vote, it was rejected and cast out.

Fol. Dic. v. 1. p. 33. Fount. v. 2. p. 633.

1711. February 23.

MAXWELL against MAXWELL.

THE deceased Sir William Maxwell of Monreith, by his testament, nominates Sir Alexander his son, to be his only executor and universal legatar, with the burden of 5000 merks to his daughter Elisabeth, and some other small legacies. But Sir Alexander finding his father's moveable debts exceed the inventory of the testament, he pursues an exoneration before the Commissaries to prove exhausted. In which process, the said Elisabeth, and Andrew Heron, younger of Bargally, her husband, compear, and repeat a reduction they have raised of that testament, as being elicited *in extremis*, when infensible, *et contra officium pietatis*, he having succeeded to an opulent land-estate, and ought not *viis et modis*, to intercept their natural legitim. But, during this dependence, being unable to subsist, the said Elisabeth, and her husband, and Agnes, another sister, raise a process of aliment against their elder brother, as a *debitum naturale*, seeing *frater dives fratres vel sorores inopes alere tenetur*. Yea some lawyers go farther, that if she be *dote destituta tunc eam dotare tenetur*.—*Alleged*, imo, Against Elisabeth, that being married, she must be alimented by her own husband, especially considering that she went away without her father's consent; and though her husband has little during his father's lifetime, yet law has prescribed an order of discussing, that his father should be, *primo loco*, conveyed *super jure naturæ*, to aliment him and his wife; and no law obliges a brother to aliment a sister, except so long as she remains a part of the family; but when she is emancipated, or passed into another family, his obligation ceases.—*Answered*, Not only the common law, but our municipal customs, have laid this burden on brothers, without respect to marriage or not, but merely if necessitous and poor; as was found 8th January 1663, Lady Otter, No 49. *supra*—29th June 1676, Rowe, Stair, v. 2. p. 434: (See PRESUMPTION.)—5th July 1676, Chiefly, No 54. *supra*—and 5th July 1677, the Children of Straiton of Lawriston, No 55. *supra*. And this case is more deplorable, that she has fundry young children; and her father had so far connived at her escape, that he left her 5000 merks. But Sir Alexander, her brother, offered to secure that to her children; debarring the father.—THE LORDS found the mar-

No 60.

No 61.

During the dependence of a reduction of a father's testament, betwixt a sister pursuer, and a brother defender, she, being married, found entitled to no interim aliment.