

(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.

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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

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there were three of them; and, in the mean time, to educate, entertain, and bring up the said daughters in bed, board, and literature, according to their rank and quality."

The pursuer *subsumed*, That she was a daughter of the marriage who could not succeed, by reason of her brother's taking the estate; and therefore, as she was entitled to her portion, so she had a right to be alimented in the mean time, in virtue of the clause above recited.

It was *answered* for the defender, That since the clause of aliment was connected with that which provided the daughters to certain sums of money, the aliment could not be due, unless these provisions could likewise take place; but, it was obvious from the clause, however inaccurately worded, that no provisions were due to the daughters unless in the event that there was no heir-male: For these words, *who shall not happen to succeed*, could not regard the case in which an heir male of the marriage existed, because in such a case they could neither by law, nor by the scope of the contract, have any chance of succeeding; but as in certain events, the law, as well as the contract, gave these daughters a hope of succession, their provisions must be restrained to such cases.

It was further *pleaded*, That it could not be supposed the parties contracting would agree to lay so heavy a burden as 15,000 merks, in favours of daughters, upon an heir male of the marriage, possessed of an estate of only 2400 merks yearly, especially when no provisions were made for younger sons, however many of them might have existed.

Replied for the pursuer, That, by the express words of the contract, she was entitled both to her portion and aliment, which being clear from the words taken in their natural and obvious meaning, there was no place for conjectural arguments from what was ordinarily done in other contracts; for nothing could hinder a father to give provisions to his daughters, even when a son of the same marriage was to succeed: And though there should be inaccuracies and blunders in other clauses of the contract, yet that could not afford any reason for evacuating the force of a clear and express clause conceived in the pursuer's favours; and the father might have had many reasons for providing his daughters, which did not induce him to make provisions for the younger sons of that marriage.

THE LORDS found, That the clause in the contract of marriage, obliging the heir to aliment the daughters, did not take place in this case, since there did exist an heir male of that marriage: Without prejudice to the pursuer to insist for an aliment for her daughter *ex jure natura*.

A. C. Areskine & Arch. Murray.
Reporter, Lord Newhall.

Alt. Dun. Forbes & Jo. Fleming.
Clerk, Murray.

Fol. Dic. v. 3. p. 26. Edgar, p. 50.