

1745. February 21. BONTEIN against BONTEIN.

No 3.

A FATHER bound himself to pay his son L. 20 *per annum*. He became unable. The defence of *beneficium competentia* was sustained; although the son was thereby reduced to indigence.

* * This case is mentioned in the case which immediately follows.

1749. November 30.

HOGG of Cammo against JULIA, &c. HOGGS, his Grandchildren.

No 4.

A person, to bring about an advantageous marriage of his son, gave a false state of his affairs. He conveyed his estate in his son's contract of marriage, referring a liferent. The deficiency appeared at his son's death; and the father was not permitted to plead *beneficium competentia*, so as to retain his liferent.

THE case between John Hogg and Julia, &c. Hoggs, his grand-daughters, by his eldest son, deceased, *vide* stated 21st July 1749, *voce* FRAUD; where the said grand-daughters were found preferable for the provisions made for them in their father and mother's contract of marriage, to the liferent therein reserved to their grandfather; *but reserving* to him to be heard, How far he is entitled to the *beneficium competentia*? And the debate upon that point being now reported by the Ordinary—THE LORDS: 'found him entitled, upon the *beneficium competentia*, to L. 30 Sterling yearly, and that over and above L. 100 Scots, which, in his son's contract of marriage, was provided as an yearly aliment to an infirm daughter.'

As no doubt was made by the Lords, but that the *beneficium competentia* obtained with us, notwithstanding of two decisions, one observed by Gosford in the 1669, (*supra*); and another by Harcarfe in the 1687, (*supra*); as our later practice had, from example of the civil law, sustained it; so, in the reasoning among the Lords, the nature of it was opened and explained in a more distinct manner than is to be met with in any of the writers upon our law.

It was observed, that although it may have taken its rise from the obligation upon children to maintain their parents, it was nevertheless of a very different nature from the action to aliment, in so much, that it is competent, even where the action to aliment does not lie. The action to aliment only lies, where the child has to spare, over what is necessary to aliment himself; as in no case can one be obliged to aliment another, who is no more than able to aliment himself. But the *beneficium competentia* is a right, which lies to the parent against his children, who happen to be his creditors, of retaining *ne eget*, even though the effect thereof should be to expose the child to poverty.

An instance of this occurred in the year 1745, between Bontein of Mildovan and his son. The case was, Mildovan had bound himself to pay to his son L. 20 Sterling yearly for his aliment, which was but a moderate subsistence; but it happened that the father's circumstances fell so low, that he was unable to pay it, and the Lords sustained his defence against payment upon the *beneficium competentia*, although the son was thereby reduced to want. In like manner, an ac-