

(Ex debito naturali.)

No 63. fort of *beneficium ordinis*, if not *diffuffionis*, that, if he can point out one liable in aliment by the law of nature, and able, he can only be liable *in fuo ordine*: Now, Lady Douglafs, their mother, is able, fhe having 2000 merks *per annum* of jointure off the defender, and L. 150 yearly more in property.

THE LORDS found the defender, Sir John Douglafs, having fucceeded to his father in a confiderable eftate, is primarily liable to aliment his younger brothers and fifters unprovided; and found the males have no claim to be alimented by their brother after majority; but that the females are entitled to be alimented till marriage; and found, That, in fo far as they have been alimented by their friends, they have no claim againft their brother.

Fol. Dic. v. 3. p. 23. C. Home, No 114. p. 183.

* * The fame cafe is thus reported by Lord Kilkerran :

It was found, that the eldeft fon, fucceeding to his father in a land-efate, was, in a queftion with the mother, primarily liable to aliment his younger brothers and fifters unprovided; the brothers till their majority, and the fifters till their marriage; unanimofofly as to the endurance of the aliment of the brothers; but by a fmall majority as to the endurance of the aliment of the fifters.

N. B. The obligation upon the eldeft fon fucceeding to his father in an eftate fufficient to afford aliment to the younger children, is a legal obligation, which, therefore, muft take place before that which arifes only *ex jure naturæ* upon the mother; and therefore he was found primarily liable in a queftion with the mother. But had not the eftate of the eldeft fon been fufficient to afford a fuitable aliment, the mother would have been found liable *ex jure naturæ*.

Kilkerran, (ALIMENT.) p. 21.

1749. June 14. MACNEIL *againft* MACNEIL of Taynifh, his elder Brother.

No 64.
Import of an obligation to aliment and educate, till the child's portion bears annualrent. — Can the claim exceed the annualrent?

The deceased Macneil of Taynifh, a man of a confiderable fortune, having fettled moderate portions on his children, payable at a certain age, bound himfelf and his heirs, in the mean time, to aliment and educate them according to their rank.

In the action, at the inftance of Archibald the fecond fon, yet under age, againft his elder brother, for a certain fum to be paid towards his aliment and education, over and above the annualrent of his portion, it was, for the defender *pleaded*, That fuch obligations to aliment and educate till the age at which annualrent on the portion becomes due, are defigned for the eafe of the heir; but are never underftood as intended to go beyond the annualrent which had been regularly paid to the purfuer's mother, towards his aliment and education, and whereof the defender was willing to continue the payment.

(Ex debito naturali.)

The pursuer *answered*, That the annualrent of the portion is by no means the measure of the obligation. On the contrary, the obligation to aliment and educate, is put in place of the annualrent, as what is understood to require more than the annualrent can afford. And certain circumstances were condescended on to show such to have been the intention of it, in this case, with respect to the pursuer; particularly that his deceased father had, some months before his death, sent him to Dublin for his education, at the University, with a governor attending him; an education which could not be defrayed by the double of the annualrent of his portion, which was no more than his share of the sum of L. 800, as one of four children.

Upon this debate, it appeared to be the opinion of the Court, that the obligation to aliment and educate would receive a different construction, according to the circumstances of the estate left to the heir, and extent of the portion; so that in some cases, the claim for education might exceed the annualrent of the portion; and in others not even extend to so much: And, in this case, the Lords would, in respect of the above circumstance, have given a further sum, but for a new fact advanced by the defender at advising, and which the doers for the pursuer could not refuse, That the pursuer had a separate estate of his own, left him by a friend; which the LORDS 'found to be a good defence, and absolved the defender.'

Fol. Dic. v. 3. p. 24. Kilkerran, (ALIMENT.) p. 23.

1754. January 25.

MARGARET ANDERSON and RACHEL GIBSON, *against* JAMES GIBSON and his Curators.

JAMES GIBSON having succeeded as heir to his grand-uncle John Jack, James Gibson's mother, Margaret Anderson, and his sister Rachel Gibson, brought a process against him and his curators for an aliment.

The defender admitted, that an aliment was due to his mother; but contended, That his sister, who was past 21 years of age, had no legal claim against him for an aliment.

Pleaded for Rachel Gibson: That by the civil law, persons who are able, are bound to aliment their brothers and sisters who are in want; l. 1. § 2: *ff. De tutel. et ration. distr. l. 13. § ult. ff. De admin. tut.* and *Voet, ab tit. De agn. et alend. liberis*: And as this obligation is founded on the law of nature, and proceeds *ex æquitate et charitate sanguinis* betwixt brothers and sisters, it ought to take place with us; and so it has frequently been decided, particularly 10th November 1671, *Hasty contra Hasty*, No 53.; and 23d July 1715, *Children of Knapperny* against their elder Brother, No. 62.

No 64.

No 65.

A person succeeded to the estate of a distant relation. His mother and sister being poor, claim aliment. He admits the mother's claim. The sister, who was past 21, found not entitled.