

No. 7. Answered: An alimentary provision must be regulated by the situation of the party for whom it is provided. To ascertain its amount in the present case, no better rule can be obtained, than referring by the sum which had been agreed on between the parties in their contract of separation as an adequate provision. The pursuer had obtained a half-yearly payment upon this account at the term of Martinmas preceding her husband's death, and had granted a discharge until the following term, which showed that these half-yearly payments were made at the beginning of each term. She did not live in the family of her husband, and had no occasion to keep up his establishment, so that there does not appear to be any foundation for an additional claim against his executors. So far as the cases quoted by the pursuer authorise in general a widow's claim of aliment, they are not disputed; for in this case that claim has been already discharged: And with respect to the case, Countess Dowager of Caithness against Countess and Earl of Fife, February 3, 1767, No. 69. p. 431. the aliment was not paid by advance, but after the lapse of each term, and it endured "during their living separate by mutual consent;" while in this case the pursuer's aliment is expressly declared to continue "until the conventional annuity provided to her by her marriage-contract shall open and fall due," which shows that the separate aliment was to be the amount of her provision until the first term of the payment of her jointure.

The Court sustained the defences; and it seemed to be the general opinion, that the special provisions of this deed of separation precluded the operation of the general rules of law with respect to the aliment of a widow.

Lord Ordinary, *Hermand.*
Alt. *Scott.*

Act. *Monypenny*
Agent, *W. Riddell, W. S.*

Agent. *J. Campbell, Atus, W. S.*
Clerk, *Menzies.*

J.

Fac. Coll. No. 103. p. 229.

1806. July 3.

DE COURCY against AGNEW.

No. 8.

The proprietor of an entailed estate is bound to maintain the widow of his son, who is the mother of his heir.

The only son of Sir Stair Agnew of Lochnaw, Baronet, was married, in 1792, to the Honourable Martha De Courcy, daughter of Lord Kinsale. At this time he was a Lieutenant in the army. He died a few months after his marriage, and his wife was delivered of a posthumous son. Upon this occasion, Sir Stair offered to maintain his grandson, provided he resided in Scotland; but this offer was declined, and Mrs. Agnew and her child continued to live with Lord Kinsale in Ireland for twelve years.

In 1805, an action was raised at the instance of Mrs. Agnew and her son, against her father-in-law for an aliment. The Lords (8th June 1805) found the defender liable in a suitable aliment to his grandson for bygone years, and

in time coming ; but, with regard to the claim at the instance of Mrs. Agnew, No. 8. appointed the case to be stated in memorials. The pursuer

Pleaded : The obligation of a father to maintain his children, is one of those natural obligations which are enforced by courts of law ; Stair, B. I. Tit. 5. § 1. Ersk. B. I. Tit. 6. § 56. This obligation must subsist as long as the father is able to maintain them, and the children unable to maintain themselves. By marriage with his eldest son, the pursuer became, to all intents and purposes, a member of the defender's family, and consequently entitled, as well as his own daughters, to an aliment from his estate. Had her husband been alive, and unable to maintain her, the defender might have been compelled to aliment the pursuer, either directly or indirectly, by furnishing a greater aliment to his son, on account of his having a wife ; Adam against Lauder, 1st March 1762, No. 26. p. 398. And it would be strange, if the death of her husband, which renders her still more destitute, were to put an end to her claim for aliment. The ultimate decision of the case of Lauder is opposed by the following authorities, and differs from this case materially, in as much as there was no issue of the marriage ; Couper against Laird of Tofts, February 1, 1662, No. 117. p. 5908. ; Countess-Dowager of Caithness against Earl of Fife, February 3, 1767, No. 69. p. 431. Thomson against Macculloch, March 6, 1778, No. 70. p. 434. Lowther against Maclean of Lochbuy, 15th December 1786, No. 71. p. 435. Young against Campbell, January 27, 1790, No. 29. p. 400.

Answered : The obligation of a father to maintain his son ceases when the son is forisfamiliarized, and exercises a profession by means of which he may support himself ; L. 5. § 7. *D. De agn. et al. liberis* ; Puffendorf, B. IV. C. 11. § 4. Blackstone, V. I. C. 16. ; Stair, B. I. T. 5. § 12. Ersk. B. I. T. 6. § 56. The son of Sir Stair Agnew, therefore, if he had been alive, had no right to insist against his father for an aliment. But, if this right did not exist in the son, far less can it exist in the pursuer, whose connection with the defender, is only through her husband, and who can never, in any view, have a better right to an aliment. Accordingly, similar claims have been repelled ; Adam against Lauder, 11th July 1764, No. 30. p. 400 ; Belch, December 1798, (not reported), Christie against Macmillan, July 6th 1802, APPENDIX, PART I. No. 5. p. 7. *h. t.* These cases afford precedents directly in point ; and there is no authority in support of the pursuer's right to an aliment, except the first decision of the case of Lauder, which has been virtually set aside by subsequent judgments. The cases quoted for the pursuer where aliment was found due, occurred only where the defender was *lucratus* by the succession of the deceased.

The case was reported by Lord Probationer Robertson, (13th November 1805), and the Lords found the defender liable in aliment to the pursuer. They afterwards adhered to their interlocutor, upon advising a reclaiming petition for Sir Stair Agnew, with answers.

No. 8. There were five Judges against the interlocutor, who held, that it was dangerous for the law to extend its interference, in enforcing obligations due *ex pietate* ; that though the circumstances of this case were strong, it might, if held as a precedent, lead to dangerous consequences ; that it had always been understood, that obligations of aliment were reciprocal, and that the same principle which authorised the decision of this case, would have entitled the widow of Sir Stair Agnew, if in needy circumstances, to have claimed an aliment from the pursuer, which was carrying the principle of this obligation farther than it had hitherto been carried. On the other hand, it was thought by those who supported the interlocutor, that the son's widow had an equitable claim to some maintenance directly or indirectly, as the mother of the heir, and making part of his family ; and that as there existed a child of the marriage, the connection was not altogether dissolved by the death of the husband.

Act. *Campbell, Monypenny.*

Agent, *Ja. Home, W. S.*

Alt. *Hamilton.*

Agent, *Ja. Smith, jun. W. S.*

Clerk, *Home.*

J.

Fac. Coll. No. 256. p. 575.