

(Ex debito naturali.)

1739. February 8.

HELEN, ARCHIBALD, &c. DOUGLASSES, against Sir JOHN DOUGLASS of Killhead.

SIR WILLIAM DOUGLASS having died without making any provision in favours of his younger children, they intented an action against Sir John, their elder brother, for aliment, upon this ground, That he possessed an opulent fortune, (about 500l. a-year,) descended to him from their common father. In support of this, it was *observed* for the pursuers, That the defender, as heir to his father in such an estate, is obliged to aliment them, in like manner as the father was, conform to 24th of January 1663, Netherlie, No 50. *supra*—8th of January 1663, Lady Otter, No 49. *supra*, which proceeded on this principle, That the obligation to aliment, which lay on the defunct, does descend against his heirs, and is competent to majors as well as minors, as the Court always found; particularly, 25th July 1705, Aiton, No 12.; when it appeared such were not in a condition to aliment themselves, which is the case of all the pursuers in this process; and therefore action ought to be sustained for aliment bygone, since the father's decease, and in time-coming, until they should be able to provide for themselves. Neither can it afford any objection, that the pursuers have been maintained part of the time since their father's decease by their friends, as the favour was not intended to be done to the defender; consequently the benefit thereof ought not to accrefce to him.

Pleaded for the defender: He did not controvert, but brothers, succeeding to the estate of a common father, are by law bound to aliment their younger brothers and sisters; but then that obligation lasts only till majority. A father is bound not only to aliment his children, but to educate them to some calling, in order to put them in the way of maintaining themselves: If he does not do this, he will be bound for aliment, even after majority, because of his neglect; but a brother is under no such obligation; he is not bound to put his brothers and sisters to apprenticeships, or to give portions to his sisters; and therefore, if, after majority, they are not infirm, their elder brother may be called cruel, if he leaves them to starve, but there is no law to compel him to aliment them further. *2do*, Admitting he is liable for the pursuers aliment till majority, unless he has no other defence, he further says, That persons liable in aliments, are to be taken in a certain order; first, the father, *super jure natura*; and, if he is indigent, the mother is bound to maintain the children, if she be in a condition; which arises likewise from the law of nature; and, by the civil law, grandfathers and grandmothers; beyond this, aliments are not due *super jure natura*: A brother is bound in conscience to maintain his brothers; to which duty the law has added a positive command; but the obligation does not arise from the same source, because a brother has no hand in bringing his brother into the world; it arises singly from filial duty, by which a son, in reverence to his parents, ought not to suffer their children to starve; a brother then being pursued in a process like this, has a

No 63.

The brother, in a question with his mother, found primarily liable for the aliment of the younger children; the males till majority, the females till marriage.

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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.