

heir is primarily liable ; Douglas against Douglas, 8th February 1739, No. 63. No. 4.
p. 425.

The heir

Answered : There is no obscurity in the provisions of the settlement ; and accordingly, the pursuers rest upon a presumed omission ; but such an assumption can never be legally made. The pursuers must either abide by the provisions of the settlement as they stand, or they must reduce it altogether, and confine themselves to what the division of the law would assign to them. Either of these modes stops the present action. Most of the cases referred to were where the younger children were totally unprovided for, while the heir had succeeded to an ample fortune, and the others are where the provision was at least very slender, which is not the case here. Besides, the testator has expressly declared the sum of £3000 to each child, to be in full of all claim against the estate.

The Court, looking upon this as entirely an omission on the part of the father, and that the children who were to succeed to an ample provision afterward, were not, in the mean time, to be deprived of the means of maintenance and education, held, that the trustees were bound to advance, in the mean time, out of the funds, what was necessary for the aliment of the younger children ; but did not think it necessary *in hoc statu* to determine whether this was ultimately to come out of the fee of their own provisions, or out of the subject belonging to the heir.

Lord Cullen, Reporter.

For the Children, *A. Campbell.*

Agent, *R. Boyd, W. S.*

For the Heir, *M. Ross.*

Agent, *Cha. Stewart, W. S.*

F.

Fac. Coll. No. 35. p. 71.

1802. July 6. CHRYSTIE against MACMILLAN.

GRACE CHRYSTIE brought a declaratory action of marriage before the Commissaries of Edinburgh against Robert Macmillan younger of Barwhinnock, and obtained a decree (9th January 1801) in absence of the defender. Afterward, as Macmillan had left Scotland, she raised a process of aliment in her own name, and in that of her child, against James Macmillan, her husband's father ; and the Lords found her (6th July 1801) entitled to an aliment. In the mean time, however, Robert Macmillan returned to this country, and pursued a reduction of the Commissaries decree, which was conjoined with the process of aliment, on which a final judgment had not yet been awarded.

The whole cause was afterward stated to the Court in memorials ; upon advising which, the Lords (February 23d 1802) recalled their interlocutor in the process of aliment, so far as it related to the mother ; and superseded con-

No. 5.

A father is not bound to maintain his son's wife, while his son is alive, and able to maintain her.

No. 5. sideration of the aliment of the child until the question of marriage was determined ; and a condescence was ordered, on the part of Robert Macmillan, of the facts and circumstances in support of the reduction.

This condescence never was given in. Robert Macmillan again left Scotland, and the process of reduction was consequently abandoned. An additional petition was thereafter presented on the part of Chrystie, in the question of aliment, in which she

Pleaded : The process of reduction having been abandoned, the pursuer is to be held, by the decree of the Commissaries, as the daughter-in-law of the defender ; and her husband having left her in a destitute situation, she is entitled to an aliment as a daughter of the family. Such obligations are reciprocal on parents and children ; and as a father, in necessitous circumstances, might claim from his son an aliment out of the fortune brought by his wife, the son's wife may likewise claim a provision from the estate of the father. The defender, as a gentlemen of landed property, is bound either to give an aliment to his son, or to put him in a situation to gain a maintenance suitable to his rank and station ; and as his wife is entitled to a share of all the privileges competent to her husband, she has a right to a portion of that aliment ; Adam against Lauder, March 1st 1762, No. 26. p. 398.

Answered : The pursuer, if she has any claim for an aliment, can make it only as wife to Robert Macmillan ; her claim, therefore, cannot be better founded than that of her husband himself. The obligation of aliment on the part of a father ceases, when his son has been put into a situation to support himself ; Puffendorf, Lib. 4. C. 11. § 4. ; Blackstone, V. I. C. 16. p. 449. ; Erskine, B. I. Tit. 6. § 56. ; Stair, B. I. Tit. 5. § 12. Robert Macmillan is forisfamiliated, being established as a merchant in America, able to maintain himself, and all dependent on him. It is the duty of his wife, therefore, to follow his fortunes, and to live in his family. The law does not afford a married woman a temptation to neglect her duties, by allowing her to claim an aliment from the father of her husband, while she declines to accommodate to his situation. The case of Lauder probably was decided upon the act 1491, c. 25. respecting the maintenance of heirs ; and the Court appears to have sustained the claim of aliment, on the footing, that the husband was the heir of an entailed estate. But the defender holds his lands in fee-simple. That decision, therefore, is not to be held as a precedent in this case.

The Lords assoilzied Macmillan from the claim of aliment at the instance of Chrystie ; but sustained the claim for the aliment of the infant daughter to the period of her death, with the expense of her funeral. The Court, while it seemed in some degree to doubt the propriety of the decision in the case of Lauder altogether, thought it at any rate inapplicable to the present case.

Lord Ordinary, *Armadale.*

Act. *Turnbull, Murray.*

Agent, *J. Jeffrey.*

Alt. *Campbell, W. Erskine.*

Agent, *A. Young, W. S.*

Clerk, *Pringle.*