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cut, and by interdict was prevented from being sold until the arrangement of the bond of caution.

Respondents.—1. There was no judicial reference, nor acquiescence in the Sheriff's judgment, but merely an obligation to pay what should be finally awarded, and no final adjustment has followed. Besides, the Sheriff's interlocutor has been reduced and set aside.

2. The appellant's claim is not privileged; nor has every tradesman of necessity a lien or security over the subject of his operations for the expense of these operations. To constitute a lien there must be actual possession. Callum had not that possession. He was merely the contractor for cutting, &c.; but the Company's overseer was on the spot to superintend and pay wages. At any rate the appellant gave possession up, and abandoned the work. In these circumstances, it is in vain to assert a right of retention to the prejudice of the Company's creditors.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

Appellant's Authorities.—1. Bell's Com. p. 177. 5th edit.; Stat. 54. Geo. III. c. 137. § 38.

Respondent's Authorities.—2. Bell's Com. p. 158–91–95. 5th edit.

SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 41.

THOMAS, Earl of STRATHMORE, Appellant.

Sir JOHN DEAN PAUL, and Others, Trustees of JOHN late Earl of STRATHMORE, Respondents.

June 17. 1825.

1ST DIVISION.

Aliment—Expenses.—Held, (affirming the judgment of the Court of Session, with costs), 1. That the younger brother of an Earl, who had attained majority,—had received a provision from his father of L. 12,500,—and who had succeeded to the titles, but was excluded from the estates by a trust-deed executed by his brother in favour of trustees,—had no claim of aliment against these trustees, although he was destitute, and the estates had originally belonged to his father. 2. That he was not entitled to payment of the expenses of process out of the trust-estates.

FROM an early period the estates of the family of Strathmore had descended through a regular series of heirs, till they became vested in John 9th Earl of Strathmore, the father of John 10th

Earl, (the constituent of the respondents), and of the appellant. Their father died in 1776, and under his marriage-contract the appellant (who was a younger son, and then a minor) was entitled to a provision of L. 12,500. He was maintained and educated out of this provision; and, after attaining majority, he granted a discharge to his brother for the sums advanced him, and the residue of his provision, by which he exonered 'the said 'John, now Earl of Strathmore, and his heirs, executors, suc- 'cessors, and representatives, and all others the heirs and repre- 'sentatives of the said John Earl of Strathmore, my father, of 'all claim and demand competent to me against them,' in relation to his provision. By the death of an immediate elder brother, the appellant succeeded to an estate in England worth L. 3000 per annum, and by his marriage acquired a sum of money; but it was alleged, and not disputed, that he was now reduced to a state of destitution. His brother, Earl John, executed a deed of entail and nomination of heirs, and a trust-disposition; by which he vested his whole estates in the respondents, as trustees, for thirty years; and thereafter, during the survivance of the appellant, and of John and Charles Lyon, the two next heirs entitled to succeed after the appellant's son Lord Glammis; and appointed the trustees to vest the rents in the purchase of lands in Scotland, to be taillied under the same conditions, and to the entire exclusion of the appellant. June 17. 1825.

Lord Strathmore died on the 3d July 1820 without lawful issue, and was succeeded in his titles by the appellant. He then brought an action of aliment before the Court of Session against the trustees, in which, after setting forth the antiquity and dignity of the family, the deeds executed by his brother, and stating that the annual income of the whole estates exceeded L. 12,000; that the deeds were contra bonos mores, and ultra vires, and that he had brought a reduction of them; he subsumed, 'seeing that, by the law of nature, as well as by the laws and 'practice of Scotland, the said Thomas Bowes, Earl of Strath- 'more and Kinghorn, pursuer, as representing the said noble 'family, and inheriting the titles, honours, and dignities descend- 'ing along with the said estates through a long line of ancestors, 'and for the suitable support whereof the same were originally 'granted, is entitled, in the mean time, to be alimented out of the 'proceeds and profits of the said estates vested in trust as afore- 'said, in a manner suitable to his rank and station;'—he then concluded, that 'therefore it ought and should be found and de- 'clared, by decreet of our said Lords of Council and Session,

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'that the said Thomas Bowes, Earl of Strathmore and Kinghorn, 'pursuer, is in the mean time entitled to a maintenance for him- 'self and his family, and to an aliment suitable to their elevated 'rank and station, out of the rents, produce, and profits of the 'foresaid estates vested in trust as aforesaid, and whereunto he 'was entitled upon the demise of the said John Bowes, Earl of 'Strathmore, his brother, along with the said titles and dignities, 'in terms of the former rights and investitures of the same: and 'it being so found and declared, the said James Farrer, James 'Farrer Steadman, James Dundas, and Sir John Dean Paul, 'Bart. as trustees and executors aforesaid, ought and should be 'decerned and ordained, by decreet of our said Lords of Coun- 'cil and Session, to make payment to the said Thomas Bowes, 'Earl of Strathmore, pursuer, of the sum of L.4000 sterling 'yearly, as a reasonable and suitable allowance, according to his 'rank and station, for the support of the dignity of the said an- 'cient and noble family to which he has succeeded, and for the 'maintenance, education, and support of himself and his family, 'or such other sum, less or more, as our said Lords may think fit 'and reasonable in the circumstances of the case, and that at four 'terms in the year, Candlemas, Whitsunday, Lammas, and Mar- 'tinmas, by equal portions, beginning the first term's payment 'thereof at the term of Lammas 1820, being the first term after 'the decease of the said John Bowes, Earl of Strathmore, and 'quarterly thereafter during all the years and days of the lifetime 'of the said pursuer, or during the subsistence of the said trusts, 'with a fifth part more of penalty for each term's failure in pay- 'ment of the said aliment, and annualrent thereof from and after 'the said respective terms of payment, during the not-payment 'of the same.'

Against this action the following defences were returned: 'The 'defenders have no personal interest in opposing the pursuer's 'claim, but they are bound to defend the funds committed to 'their charge; and they are advised, that the pursuer has no claim 'for an aliment, either "by the law of nature," or "by the laws 'and practice of Scotland."'

On advising memorials, and a hearing in presence,—

Lord Hermand observed,—This case must be decided, not on supposed grounds of equity, but upon legal principles. In cases of aliment, the legal principles upon which a claim can be made are just three: 1st, The jus naturæ; 2d, The jus representationis; and, 3d, The obligation of the liferenter to aliment the fiar, taken in connexion with the statute 1491. The claim here is founded

on the two first of these grounds. But the pursuer obtained a provision from his father of L. 12,500, whereby the obligation on the father was discharged,—a defence which could have been pleaded by the father himself. But, at all events, he is dead, and it is clear that the obligation being discharged, and there being no claim against the late Earl, except on the supposition of that obligation still subsisting, there is no ground for the plea of representation. Although, therefore, I have a great aversion to the settlement made by the late Earl, yet I am afraid there are no legal principles on which we can award aliment.

Lord Succoth.—I am entirely of the same opinion. The pleas of hardship, exalted station, and so forth, can furnish to us no legal principles on which to give aliment. There are just three grounds, as has been stated by Lord Hermand, on which aliment can be awarded. In this case the jus naturæ cannot apply, because the claim is made against the trustees of a brother, a collateral relation: neither has it any foundation on the statute 1491, because the pursuer is not, and never can be fiar of the estates: neither is there any claim jure representationis, which does not constitute a universal liability, but is of a limited nature. There can be no claim against a brother, unless, 1st, The claimant is totally destitute; and, 2d, Unless he is in minority. But here the pursuer is above majority; and he received a provision from his father, for which he granted a discharge. The circumstance of his having spent his provision, cannot revive his claim for it, or entitle him to come against his brother's trustees. It is true, that the claim on the jus naturæ is not so easily extinguished as that founded upon the jus representationis; but there is no room for it here. The decision in Loch's case was founded on his right as fiar, and not on the jus naturæ.

Lord Balgray.—This claim, as has been already stated, is founded on the jus naturæ and jus representationis. The pursuer's father made a provision for him, and the obligation was fulfilled. Nevertheless, however, if the father had been alive, and the child reduced to a state of destitution, I hold it to be undoubted law, that the father would have been bound to receive him into his house, or maintain him. But this is an obligation personal to the father, and is not transmissible against his heir.

Lord Gillies.—I certainly dislike these settlements, but I am sorry that I must agree in the opinions which have been delivered. I concur in what has been stated by Lord Balgray as to the obligation on the parent and child. It is perpetual and

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reciprocal. But when once fulfilled by a provision being made for the child, it does not transmit against representatives. This is clearly and accurately laid down in Erskine. The father and child can never extinguish the obligation to aliment each other when reduced to indigence. Even although a provision has been made, yet, if the parent or child fall into a state of destitution, the obligation to aliment revives. The case, however, is quite different in regard to a representative. If the father has implemented his obligation by supporting his child during his life, it ceases by his death, and cannot descend against his representatives.

Lord President.—As far as we can see, the late Earl was the fee-simple proprietor of his estates, from which he has excluded the pursuer. The ground on which the present claim is mainly rested is the jus representationis. It is said, that the father was bound to aliment the pursuer jure naturæ, and that this obligation transmitted against the late Earl, jure representationis. It is not necessary to inquire, whether, if the father had been alive, he would still have been liable to aliment the pursuer, notwithstanding the payment of the provision, because the obligation on his son, the late Earl, was not co-extensive. But the father, during his life, did aliment the pursuer, and amply provided for him; and on this point Erskine is clear and explicit, that no liability can attach to the representative. Besides, there are various limitations to such a claim. In a question with the representative, it is limited to a person in minority, whereas the pursuer is long past majority. I have also considerable doubts as to the plea maintained by the pursuer, that we cannot take his former extravagance into account. I should like to know how many provisions he can claim, or how many demands for aliment he may make. Suppose we were to award him an aliment, and he were to sell it the next day, spend the price, and then come to us for another aliment, telling us he was destitute, could we not take his conduct into consideration in judging of his right to such plea? I apprehend that we could. Now, here he got an adequate provision for his support; he has spent it; and now he says we must allot to him another provision. Such a claim appears to me quite inadmissible.

The Court accordingly, on the 29th May 1822, sustained the defences, assoilzied the defenders from the whole conclusions of the libel, and decerned. And to this judgment they adhered on the 13th December thereafter, and refused a petition, praying that a sum should be allowed him out of the trust-funds for defraying

the expenses of the litigation; their Lordships holding that, by the nature of the deeds, he could have no claim whatever.* June 17. 1825.

The pursuer appealed.

Appellant.—This is an action for aliment, arising out of the present destitute condition of the appellant—not an action having any reference whatever to the provision secured to him by his father's marriage-contract. In judging of this case, therefore, regard must be had alone to the law of aliment. Now that law rests upon the broad principles of natural justice, expediency, and necessity; and although, no doubt, certain rules have been laid down as to the application of these principles, still regard must be had to the peculiar circumstances of each case. The appellant was the heir-at-law of his brother—the estates had been allowed to descend through numerous generations without an entail, and he was entitled to entertain the reasonable expectation that he would succeed to them. His brother, however, for reasons of a most unjustifiable nature, has excluded him from his succession to these paternal estates. Besides, the appellant is a Peer of the realm, and cannot, consistently with constitutional rules and established custom, support himself by the labour of his hands. It is clear, therefore, that the appellant is placed in a situation of great hardship, and is entitled to relief out of the funds in the hands of the respondents, if a shadow of liability attach to them. Now it is admitted, that the appellant's father was under an obligation to aliment him, and that if he did not do so, this obligation was transmitted against the late Earl. But it is said, that this was discharged by the payment of the provision, and that the obligation is not transmissible. The obligation of the parent, however, is perpetual, and consequently attaches to his property, even although he may at one time have made a provision which has proved insufficient. Attaching therefore as it did to his property, it followed that property when it came into the hands of his representative; and as it is now confessedly in the possession of the respondents, they are bound to make that provision out of it for the appellant, which his father would have been obliged to do. Besides, the payment of the provision was not made in implement of the obligation of aliment, but of the marriage-contract.

In regard to the expenses of the process, the Court ought, con-

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* See 2. Shaw and Dunlop, No. 80.

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sistently with numerous decisions, to have awarded them to him out of the funds.

Respondents.—In order to support his claim, it is indispensable for the appellant to bring his case within the operation of some of those recognized rules of law, by which claims of aliment are allowed. He cannot be permitted to refer to general considerations of equity, expediency, and hardship. The principles of equity and natural justice may be, and certainly ought to be, at the bottom of the law of aliment, as well as of every other department of law; but still the undoubted fact is, that here, as well as in every other department, the extent of the operation of those abstract principles has been, in the course of practice, defined by limits which the Court hold no discretionary power to transgress. But the appellant has found it impossible to bring the present demand within any of those classes of cases, in which there is, according to the law or practice of Scotland, ground for such a claim. Such claims are now referable exclusively to three sources: first, The jus naturæ, as in the cases of husband and wife, and parent and child, in which the natural obligation, coeval with the existence of society, has been adopted, as founding a legal claim; secondly, Representation, according to which, the obligation arising jure naturæ is held, in certain cases, and to a certain limited extent, to be transmitted against the representatives of the party who is subject to the natural obligation; and, thirdly, Positive statute, the Act 1491, cap. 25. as explained by practice, according to which the liferenter is bound to give a reasonable support to the fiar of the lands liferented. The first and last of these grounds for demanding aliment cannot be founded on by the appellant. He holds no claim, either jure naturæ, or as fiar of the lands vested in the respondents; and it will be found, that his claim derives just as little support from the principle of representation, being the only one to which he can refer in support of it. It may be true, that, by the law of Scotland, the obligation lying on the father, jure naturæ, to aliment a child, is not capable of extinction or discharge. It is an obligation inherent in the relation between the parties, which the municipal law of this country has adopted to its full extent. But it follows, from the very nature and source of that obligation, that it is not properly a debt, which necessarily implies the capacity of being extinguished by payment or voluntary discharge, but is truly a parental duty. Accordingly, it does not, by the law of Scotland, lead to any pecuniary claim at all on the part of the

child. It merely imposes on the parent the necessity of receiving the child into his family, and allowing him to share the father's means of support as a member of the family. It follows, therefore, that such an obligation terminates by the death of the parent. The claim, however, against the representative is one in its nature essentially distinct. It is not a parental duty, and does not rest upon the law of nature, but is the creature of the law of Scotland, being properly a pecuniary claim or debt. But as it rests entirely upon the law of Scotland, the extent of it must be governed by that law. Now, where a parent makes a provision for one of his children out of his funds, and the residue goes to his heirs, it is clear that if a claim were competent against the heir, he would be made to pay twice over in discharge of the same obligation; and therefore it is settled, that where such a provision has been given, no pecuniary claim can be made against the heir. Besides, the obligation in the case of brothers is limited to their minority, whereas the appellant is far beyond majority.

As to the expenses, the appellant has no more right to claim them out of the trust-funds than out of the property of any third party, and the cases to which he has referred related to competitions on a common fund.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of affirmed, 'with L.150 costs.'

Appellant's Authorities.—2. Ersk. 9. 62.; Craig, 355.; 1. Stair, 5. 7. 12.; 1. Ersk. 6. 56. 58.; M'Culloch, Nov. 28. 1752, (Elchies, No. 48. Taillie).—*(Expenses).* Hardman, Jan. 25. 1822; Moffat, Dec. 8. 1813; Earl of Wemyss, Nov. 23. 1810.

Respondents' Authorities.—Forbes, 332.; Buchan, Feb. 23. 1666, (411.); Hastie, Nov. 10. 1671, (416.); Sommerville, Feb. 2. 1711, (422.); Douglas, Feb. 8. 1739, (425.); Campbell, Dec. 18. 1758, (428.); 1. Ersk. 458.; 1. Stair, 5. 10.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.