

1745. February 21. BONTEIN against BONTEIN.

No 3.

A FATHER bound himself to pay his son L. 20 *per annum*. He became unable. The defence of *beneficium competentia* was sustained; although the son was thereby reduced to indigence.

\* \* This case is mentioned in the case which immediately follows.

1749. November 30.

HOGG of Cammo against JULIA, &c. HOGGS, his Grandchildren.

No 4.

A person, to bring about an advantageous marriage of his son, gave a false state of his affairs. He conveyed his estate in his son's contract of marriage, referring a liferent. The deficiency appeared at his son's death; and the father was not permitted to plead *beneficium competentia*, so as to retain his liferent.

THE case between John Hogg and Julia, &c. Hoggs, his grand-daughters, by his eldest son, deceased, *vide* stated 21st July 1749, *voce* FRAUD; where the said grand-daughters were found preferable for the provisions made for them in their father and mother's contract of marriage, to the liferent therein reserved to their grandfather; *but reserving* to him to be heard, How far he is entitled to the *beneficium competentia*? And the debate upon that point being now reported by the Ordinary—THE LORDS: 'found him entitled, upon the *beneficium competentia*, to L. 30 Sterling yearly, and that over and above L. 100 Scots, which, in his son's contract of marriage, was provided as an yearly aliment to an infirm daughter.'

As no doubt was made by the Lords, but that the *beneficium competentia* obtained with us, notwithstanding of two decisions, one observed by Gosford in the 1669, (*supra*); and another by Harcarfe in the 1687, (*supra*); as our later practice had, from example of the civil law, sustained it; so, in the reasoning among the Lords, the nature of it was opened and explained in a more distinct manner than is to be met with in any of the writers upon our law.

It was observed, that although it may have taken its rise from the obligation upon children to maintain their parents, it was nevertheless of a very different nature from the action to aliment, in so much, that it is competent, even where the action to aliment does not lie. The action to aliment only lies, where the child has to spare, over what is necessary to aliment himself; as in no case can one be obliged to aliment another, who is no more than able to aliment himself. But the *beneficium competentia* is a right, which lies to the parent against his children, who happen to be his creditors, of retaining *ne eget*, even though the effect thereof should be to expose the child to poverty.

An instance of this occurred in the year 1745, between Bontein of Mildovan and his son. The case was, Mildovan had bound himself to pay to his son L. 20 Sterling yearly for his aliment, which was but a moderate subsistence; but it happened that the father's circumstances fell so low, that he was unable to pay it, and the Lords sustained his defence against payment upon the *beneficium competentia*, although the son was thereby reduced to want. In like manner, an ac-

tion to aliment does not lie against grandchildren, while there are children able to aliment their father, and who are *primo loco* liable; but the *beneficium competentie* being a right in the parent of retention *ne egeat*, obtains, notwithstanding there be other children able to aliment, and who, in an action for aliment, would be *primo loco* liable.

And accordingly, the Lords repelled the two defences pleaded in this case for the said Julia, &c. Hoggs, That the whole remaining fund of the father's effects was no more than sufficient for a moderate subsistence to themselves; and that John Hogg, their grandfather, had two sons in opulent circumstances, able to aliment him; and found him entitled, on the *beneficium competentie*, to L. 30 Sterling yearly, and that over and above L. 100 Scots yearly, for the aliment of his infirm daughter.

But, after pronouncing this interlocutor, a difficulty occurred in the execution.

John Hogg was debtor to his grandchildren in nothing; nor was there any real estate on which he had security, other than the houses in Edinburgh, on which the widow's liferent, which exhausted them, was preferable; and, as she was to him a stranger, and an onerous creditor, the *beneficium competentie* did not lie against her; and THE LORDS, without determining any thing, 'Remitted to the Ordinary to hear parties on the method of execution;' but gave this hint, that as the widow had a personal obligation for her liferent, she might, upon her barring John Hogg from the houses upon her preferable right, be obliged to assign to him the personal obligation, whereupon he might adjudge the L. 1000 bond, which was resting of the price of Sauchton, and was heritable as excluding executors; and, when the grandchildren came to attack that subject, he would exclude them to the extent of his *beneficium competentie*: And, accordingly, upon the Ordinary's report, this method of execution appeared to be competent.

This judgment was, upon an appeal, reversed.

*Fol. Dic. v. 3. p. 73. Kilkerran, No 1. p. 67.*

\* \* \* The same case is reported by D. Falconer:

JOHN HOGG insisted, that the *beneficium competentie*, on which it was reserved to him to be heard, 21st July 1749, (*voce FRAUD*), was due to him as a parent, and craved to be allowed the same; in consideration that his grandchildren, by the law of nature, were bound to aliment him; and that, in the modification, consideration ought to be had of the aliment he was obliged to afford to his daughter Margaret, whose circumstances of health made it necessary.

*Answered*: The Lady is a stranger to Mr Hogg, so no *beneficium competentie* can be pleaded against her: And, with regard to the children, they contend, that the *beneficium competentie* does not obtain in the law of Scotland: Besides, they are not asking any thing from their grandfather, which is the case in which

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it is allowed by the civil law ; but have been competing with him on their several interests in a subject, and have been found preferable ; and for the same reasons are preferable to Margaret. And, with regard to his claim of aliment, there remains only free to them 1000l. Sterling, in lieu of the provisions contracted ; which is a small enough aliment for four young Ladies.

*Replied* : This benefit was allowed to a father, 21st February 1745, Bontein against Bontein, (*supra*).

*Observed*, That the *beneficium competentie* was more extensive than a claim of aliment ; for, in an action of aliment, it was considered what the defender could spare : But, upon the exception of competency, the consideration was what the defender, in that case, could pay, reserving a competency. And here Mr Hogg's grandchildren were demanding from him, as their claim was a reduction of his reserved liferent : That with regard to Margaret's interest, the reduction was upon Fraud ; and it would have been equally fraudulent in him not to have reserved power to grant her an aliment.

THE LORDS, 25th July, ' found the defender entitled in this case to the *beneficium competentie*, to the extent of a necessary aliment, which they modified to the sum of 30l. Sterling for himself, and during his life ; and 100l. Scots money for his daughter Margaret, payable to the defender during her and his joint lives ; and to herself after his decease, during her life.' And this day, on bill and answers, adhered.

This was reversed on an appeal ; but without prejudice of any remedy that might be competent to Margaret for her annuity on the death of her father, which was reserved.

1750. July 13.

It being reserved to Margaret Hog, by the decision of the House of Peers, reversing that mentioned 30th November 1749, to insist on any right she had to the annuity of L. 100 a-year, granted her by her father, in virtue of the reserved powers in his son's contract of marriage, payable after his death, and she insisting therefor,

THE LORDS found she was not intitled thereto in competition with the pursuers.

*D. Falconer, v. 2. p. 118. 173.*

1778. July 11. PATRICK REID against MATHEW DONALDSON.

No 5.  
A person  
who had ob-  
tained a  
*Cessio*, was  
sued by a creditor

PATRICK REID obtained decret of *cessio bonorum* against his creditors. Afterwards, Donaldson, one of the creditors called in the *cessio*, pursued Reid for payment of his debt, obtained decret in absence, and was proceeding to do diligence against his effects.—In a suspension,