(*Ex debito naturali.*)

1764. *February* 11.

Younger CHILDREN of Seaton of Carriston, *against* the HEIR.

No 68.
The next heir found obliged to aliment the widow and children of the former heir, who had died in apparancy, after possessing the estate two years.

GEORGE SEATON of Carriston, possessing an estate as heir apparent to his father, very little above 1400 merks yearly of free rent, burdened his eldest son and heir with an annuity of 600 merks yearly to his wife, and a provision of L. 100 to each of his six other children; but having died in apparency, after possessing the estate but two years, these provisions became ineffectual.

This produced a process of aliment against the heir, who was but eleven years of age, at the instance of the widow, and her six other children. It was admitted by the tutor for the heir, That he was bound *ex jure naturæ*, to aliment his mother, and the quantum was submitted. But they *contended*, That the natural obligation to aliment relations is not extended beyond one's own children; that therefore he was not bound, *qua* brother, to aliment the pursuers, nor as representing his grand-father; because there is no natural obligation upon a man to aliment his grand-children; and that he does not represent his father, who was only bound to aliment the pursuers, his children. The Judges considered, that children arrived to the age of fourteen, may make a shift for bread to themselves; but that children under that age are helpless, and that it would be a defect in law if there should exist an infant, having near relations in easy circumstances, and yet no person bound to provide for him.

In this view, they modified 600 merks yearly to the mother, and an aliment of 100 merks yearly to each of the three younger children, until they should arrive at the age of fourteen.

Fol. Dic. v. 3. *p.* 23. *Select Dec. No* 214. *p.* 279.

1767. *February* 3.

COUNTESS DOWAGER of CAITHNESS *against* The COUNTESS and EARL FIFE, and Sir JOHN SINCLAIR of Stevenson.

No 69.
Whether aliment of a widow, until the first term after her husband's death, the expence of her mourning, and the rent of a jointure-house, fall to be paid by the heir or executor?

ALEXANDER, late Earl of Caithness, by contract of marriage with Lady Margaret Primrose, became bound to infeft her in an annuity of 4000 merks out of his lands, payable at Martinmas and Whitsunday equally, the first term's payment to commence at either of the terms that should first happen after his decease; and he further obliged himself, his heirs and successors, to provide her in a convenient jointure-house.

Some time after the marriage, a voluntary separation took place between them, and thereupon the Earl became bound to pay to the Countess L. 1000 Scots yearly; which, upon the Earl's succeeding to his brother, in the estate of Murkle, was, upon a process brought by the Countess, increased to L. 200 Sterling yearly.

(*Ex debito naturali.*)

No 69.

Alexander, Earl of Caithnefs, died on the 9th December 1765. His real eftate, which was very confiderable, he fettled on Sir John Sinclair of Stevenfon; and he was fucceeded in his perfonal eftate, (which was alfo confiderable) by his only child Dorothea, Countefs of Fife.

The Countefs Dowager of Caithnefs brought an action both againft her hufband's heir and executor; concluding, that either conjunctly and feverally, or one or other of them, fhould be decerned, *1mo*, To pay to her L. 300 in name of aliment, from the day of her hufband's death to Whitfunday 1766, the firft term at which her liferent annuity fell due. *2do*, In payment of L. 600 in name of mournings. And, *3tio*, To provide her a convenient jointure-houfe, or otherwife to pay her L. 100 yearly in place thereof.

It was not much difputed that the Countefs had a right to make thefe claims; but the extravagancy of them was objected to. It was alfo *pleaded* againft her claim for aliment, That it could not be fuftained, in refpect that the Countefs was living in a ftate of feparation from the Earl at the time of his death, and that the laft half year's payment of the feparate aliment was made to her at Martinmas 1765, which was for the half year immediately fubfequent; and therefore, that allowing her a further aliment for the half year in which the Earl died, would be allowing her a double aliment. And *2do*, It was faid that the claim for L. 100 yearly, in place of a jointure-houfe, would not be fuftained, in refpect there was a jointure-houfe in the eftate of Caithnefs, of which fhe was entitled to take immediate poffeffion, and which Sir John Sinclair was willing to give her. But the chief point pleaded was, Whether the heir, or the executor, fell to be made primarly liable in what fhould be found due to the Countefs, of the articles acclaimed by her?

It was *pleaded* by the heir, againft payment of the aliment, That as it was a perfonal claim, it fell naturally to be a burden upon the executor; and fo it was found in the cafe, Lady Turfappie *contra* Laird Turfappie, 20th December 1662, Stair, v. 1. p. 150.*; and it was faid, that to find otherways might infer, in certain cafes, manifold abfurdities. For inftance, fuppofe that the widow had a right to the liferent of the whole of her hufband's real eftate, the rents becoming due at the next term would belong to the liferenter, in virtue of her liferent; fo that her aliment, for the time before her jointure came to take place, would be naturally a burden upon the executry; and in the cafe fuppofed, the heir would have nothing wherewithall to fatisfy the claim.

2do, It was faid, that the claim for mournings being perfonal, it undoubtedly fell to be paid by the executors. And

3tio, It was *contended*, That the obligation to provide a jointure-houfe ought likewife to be a burden upon the perfonal eftate, providing it was found that the Countefs was not obliged to accept of the houfe offered her, but was entitled to infift for a fum of money in place thereof; for though an obligation to purchafe

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* *See* Heir and Executor.

a real right is heritable *quoad creditorem*, yet it is moveable *quoad debitorem* ; and ſeveral inſtances from the Fol. Dic. of Deciſions, vol. 1. p. 369. were appealed to, to ſhow that it has been often found by the Court, that where a huſband has become bound, by his marriage contract, to employ a ſum of money on land or annualrent, to himſelf and his wife, and the children to be procreate betwixt them, that ſuch obligation was moveable *quoad debitorem*, and performable out of the defunct's moveable eſtate, which was ſaid to be ſimilar to the preſent caſe ; becauſe, if an obligation to ſecure a wife in a liferent annuity out of lands, is a perſonal obligation affecting the moveable eſtate of the debtor, no reaſon could be given why an obligation to provide a wife in the liferent of a houſe, ought not likewiſe to be a burden upon the perſonal eſtate of him who is debtor in the obligation.

It was not diſputed by the executor, that the ſum which was to be allowed by the Court for mournings to the Counteſs Dowager, was primarily a burden upon the executry ; but it was *pleaded*, That the aliment fell to be a burden upon the heir, as having a *tractum futuri temporis*, commencing from the death of the huſband, and conſequently of the nature of a jointure, which indiſputably affected the heir ; and to ſhow that it was a debt of that nature, it was ſaid, That if the Counteſs Dowager had only lived a month after her huſband, the aliment would have been only due in proportion to that time, and not the whole ſum. And,

With regard to the jointure-houſe it was ſaid, That upon the ſame principles it could not be doubted that the obligation as to it, or an annual allowance in lieu of it, was preſtable by the heir. If a particular houſe upon the eſtate had been ſpecially allotted to the Counteſs, it muſt undoubtedly have affected the heir ; and, in the ſame manner, an obligation to furniſh or provide a houſe muſt be incumbent on him, as it is a permanent obligation, having clearly a *tractum futuri temporis*, and which muſt be performed during all the years yet to run of the Counteſs's life.

'THE LORDS found the Counteſs of Caithneſs entitled to an allowance for mournings and for aliment, not to be influenced by the quantum of her jointure or former aliment ; and that the executor of the Earl was liable in payment of theſe : They alſo found, That ſhe was entitled to a ſum in place of a jointure-houſe, and that the heir was liable in payment thereof; and remitted to the Ordinary to modify the quantum.' *See* HERITABLE and MOVEABLE.

For the Counteſs, *Alexr. Murray*. Alt. *Rae et alii*.

Fol. Dic. v. 3. *p.* 24. *Fac. Col. No* 59. *p.* 101.

J. Swinton, tertius.