(*Ex debito naturali.*)

1786. *December* 15. Mrs BARBARA LOWTHER *against* MURDOCH M'LAINE.

No 71.
Aliment found due by the husband's heir to a wife, who was not entitled to legal or conventional provisions.

MR M'LAINE of Lochbuy died within a year after his marriage to Miss Lowther, there being no issue of the marriage. He had not received any portion with the lady; nor was any marriage-contract executed. Without claiming the *terce*, or the *jus relictæ*, she instituted an action of aliment against the heir of her husband, a distant collateral relation, to whom, by a family-settlement, he had devised his estate; though, being the daughter of a gentleman of some fortune, she could not be said to be in a state of indigence. The pursuer

Pleaded: Claims for aliment arise from the ties of nature; among which, as the relation of husband and wife is the earliest, so it is the strongest. If parents, *jure naturæ*, are bound to aliment their children, the obligation on husbands to aliment their wives is even superior. Other debts, and particularly alimentary obligations, are continued against heirs. This, then, the most just of all, ought not to cease; and no heir surely can be supposed more liable to the debt of an ancestor than the defender, so remote a relation, to whom an opulent estate has devolved; 10th November 1671, Hastie *contra* Hastie, *No* 53. *supra*; Kilker. *voc.* Aliment;—8th February 1739, Douglases *contra* Lady Douglas, *No* 63. *supra*;—13th December 1748, Bisset *contra* Bisset, Select Decis. *No* 48. *supra*;—11th February 1764, Seatons *contra* Seaton, Select Decis. *No* 68. *supra*;—8th March 1759, Scott *contra* Sharp, *No* 73. *supra*;—Balfour's Practics, p. 95. *; Fount. v. 2. p. 662. 19th July 1711, Lady Kinfawns *contra* Husband. *See* HUSBAND and WIFE.

By the Scottish practice, it is true, in cases like the present, no *terce* or *jus relictæ* is due. The pursuer, who claims neither, demands only a reasonable sum for her subsistence out of the estate of her husband, in consideration that those legal provisions have failed. If this is to be denied to her, it must be because the usage now mentioned ought to be extended, by analogy, to matters of a different kind from those to which it relates. But it is clear, that this consuetudinary rule ought not to be extended: for, in the first place, it is irrational and unjust; and secondly, it was improperly introduced into the Scots law, in consequence of a misapprehension of that of the Romans.

Marriage being as complete the moment it is instituted as at any subsequent period, or after the birth of children, it is plainly absurd to conceive any reason for legal provisions to exist afterwards which had no place before. The idea is peculiar to Scotland; and even here there is no distinction rested on that foundation, except what respects the *terce* and *jus relictæ*. All the other legal rights belonging to a wife arise on the instant of marriage.

The error, however, was not original in the Scottish jurisprudence. In *Regiam*

* *See* the cases here alluded to from Balfour, under HUSBAND and WIFE.

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No 71. *Majeſtatem*, *lib.* 2. *cap.* 16. 17. where the doctrine of Terce is fully treated, there is not the leaſt intimation of ſuch a rule. Nor are any traces of it to be diſcovered in the ſtatutes of Alexander II. or of Robert III. reſpecting the ſame ſubject. The earlieſt appearance of the rule is towards the beginning of the ſixteenth century, in the caſes of Windezettis *contra* Logan, and Gyle *contra* Cant; the firſt relating to the return of the tocher, and the ſecond to the wife's right in the moveables; Balfour's Practics, p. 95 *. As to the terce, the queſtion was not determined till *anno* 1600, in the caſe of Lord Gairlies *contra* Lady Maxwell, Haddington †. Craig, lib. 2. dieg. 22. § 23. But, as on the diſſolution of marriage, the *dos* and *donationes propter nuptias*, were, by the Roman law, mutually reſtored; the ſame rule has been admitted into the Scottiſh cuſtoms, in regard to ſuch marriages as diſſolve within the firſt year, and without any child; Craig, lib. 2. dieg. 22. § 23. Among the Romans, however, there was no right of primogeniture, nor preference of males in ſucceſſion; in conſequence of which circumſtances, the *dos* formed a juſt proportion of inheritance, and equal to that of any male. When reſtored, it was a fund for ſubſiſtence, and no aliment was wanting. The reverſe is the ſituation of daughters under the Feudal inſtitutions; their dowry is a trifle, inſufficient for their ſupport. Beſides, the *dos*, or *donationes propter nuptias*, were to be reſtored equally after any period; and, it is obvious, that the Scottiſh diſtinction is inconſiſtent with the end or nature of the Roman reſtitution.

As a rule, originating in injuſtice and error, ought not to be extended to new caſes, ſo this proper limitation has been conſtant in the practice of the Court. Thus, the rule was not applied to the caſe of a marriage diſſolving within the year, a child having been born, though it likewiſe died during the ſame period; 20th July 1632, Irvine *contra* Robertſon, Fol. Dict. of Deciſ. vol. 1. p. 415. (*See* HUSBAND and WIFE.) Nor to that of a father ſettling on his ſon, in contemplation of marriage, a ſum which by the ſon was aſſigned to his wife, ſeeing the marriage did not ſubſiſt a year; Kilkerran, 7th November 1740, Hood *contra* Jack, (*See* HUSBAND and WIFE.) Nor to the interim aliment claimed by a widow for herſelf and her family, between the huſband's death and the payment of her proviſion, the marriage having diſſolved within the year, and the proviſion being ſecured by a ſpecial paction, which did not include any interim aliment; Clerk Home, p. 377. 19th February 1743, Stewart *contra* Garden, See CLAUSE.

Nay, the rule has been found not to extend to the ſpecial caſe in queſtion. Thus, at a period when the law gave that liberty, a father having put his ſon in the fee of his eſtate, without reſerving his wife's terce, and by the death of both father and ſon, the lands having fallen to the ſuperior by ward and non-entry,

* *See* HUSBAND and WIFE. † *See* TERCE.

firſt the ſuperior, and afterwards the heir ſucceeding, became bound to allow the widow a reaſonable aliment; Balfour, p. 95. 21ſt July 1534, Logan *contra* Campbell and Wallace, (*See* HUSBAND and WIFE.) Again, in the caſe of Thomſon *contra* Macculloch, Fac. Col. 6th March 1778, *No* 70. *ſupra* the legal proviſions of terce and *jus relictæ* not being adequate, the Court found an additional aliment due to a widow; and it would be abſurd to ſuppoſe, that if thoſe proviſions had been more inadequate, or had not exiſted at all, the claim of aliment could have been juſtly denied. No 71.

Neither is it incongruous, when circumſtances do not admit ſpecific legal proviſions, that the law ſhould afford, in another ſhape, that aliment for which they were calculated. The legitim of children is a ſpecific legal proviſion for their aliment; but, if it is precluded by the father's effects being converted into heritage, the heir is bound to furniſh a competent maintenance to them.

Anſwered: Apart from the proviſions contingent on the ſubſiſtence of marriage for year and day, or until the birth of a child, the law of Scotland recogniſes no claim for aliment at the ſuit of a wife, againſt the heirs, as ſuch, of her huſband. Nor is this inconſiſtent with the analogy of our law. However ſtrong-founded the obligation is on parents to aliment their own children, an heir-male ſucceeding, in prejudice of the daughters of the anceſtor, will not be liable to the claim for aliment which lay againſt their father: A brother ſucceeding indeed might; but the diſtinction evidently ariſes from his fraternal relation. Were not ſuch limitation admitted, inextricable confuſion and embarraſſment would naturally attend every quick ſucceſſion of heirs; the obligations to aliment incumbent on one deſcending to another, and accumulated with his devolving on the next, without any ſtandard for ſettling the proportion of theſe multifarious claims. Beſides, there is this peculiar to the relation of marriage, that the marriage being diſſolved, the law deems the connection thence proceeding to be at an end. Thus, though a father was held to be liable for the aliment of his ſon's wife, during the lifetime of the ſon; yet, after his death, the claim was found not to lie; Fol. Dict. of Deciſ. vol. 3. *voc.* Aliment; 14th June 1765, Adam *contra* Sir Andrew Lawder. *See* TAILZIE.

To the argument founded on the caſe of Stewart *contra* Garden, the anſwer is, That the interim aliment was granted, not to the wife, but to the huſband's family. As to that of Logan *contra* Campbell, the marriage had ſubſiſted for the requiſite time, and the legal proviſions thence ariſing had been diſappointed by fraud. At preſent they would be wholly reſtored; at that early period they were reſtored to a certain extent. The caſe of Thomſon *contra* Macculloch was an amicable ſuit; and moreover, the aliment was claimed by a mother from her own ſon.

That, beſides the above mentioned ſpecific proviſions, the law admits no claim for aliment at the inſtance of wives againſt their huſband's heirs, is evident from the explicit opinion of all the writers on our law. Thus Lord Stair, b. 1. tit. 4.

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No 71. § 19.; Bankton, b. 1. tit. 5. § 5. para. 117.; and Erſkine, b. 1. tit. 6. § 38. concur in declaring, that a marriage diſſolving within the year, and without a living child, "all things return to the condition in which they were before;" by "all things" being evidently meant, all claim or intereſt in the reſpective eſtates of the married pair; as to the *dos* on the one hand, and on the other the *donationes propter nuptias*, the legal or conventional proviſions by the huſband to the wife. To ſuppoſe that a claim for aliment ſhould ſtill continue, is to figure a contradiction in the law; in rejecting, and at the ſame time allowing, a demand, the ſame in effect, and only differing in the ſhape in which it is preferred. Had ſuch a right remained, it could not have failed to be recogniſed by the authors quoted above; nor to appear in thoſe deciſions which have proceeded on the principle upon which the legal proviſions are withheld. In the above caſe of Stewart *contra* Garden, for example, why was not a permanent right of aliment inſiſted on by the widow? In that of Somerville *contra* Bell, 22d February 1751, Rem. Dec. v. 2. p. 257. (*See* HUSBAND and WIFE;) where a ſettlement on a wife was annulled on the ſame ground, would not a claim for a competent aliment have been made, and reſerved by the Court, if ſuch an one had been known in law? Or in the ſimilar caſe of Cuming *contra* Garden, 7th February 1781, Fac. Coll. No 28. p. 50. (*See* HUSBAND and WIFE.)

It has been ſaid, That the rule in queſtion is in itſelf unjuſt, and that it was by miſtake introduced into our law at a late period. But Craig aſſures us, that the return of the tocher "*omnium ſeculorum uſu comprobatum*," lib. 2. dieg. 22. § 23. There ſeems nothing irrational in having admitted this return from the Roman law, under our limitation; and, being once admitted, that right which was the counter part of the tocher, the *quid pro quo*, came to be withheld of courſe. The caſe of Gairlies, it is to be remarked, related to a conventional proviſion, ſo is not to be regarded as the earlieſt reſpecting the legal terce. Nor is the diſtinction of *year and day* ſo ſingular as has been ſuppoſed. It is exemplied in the uſages of ſeveral provinces, counties, or bailiages of France, as Anjou, Brittany, Maine, Touraine; Nouveau Coutumier General, p. 584. And were its foundation in juſtice ever ſo queſtionable, the province of a judge is to determine according to its foundation in law, and *ita lex ſcripta*.

The cauſe was heard in preſence, and afterwards memorials were appointed.

A majority of the Court conſidered the claim of an indigent widow for aliment from the heir of her opulent huſband as deeply founded in nature; and that the withholding of the legal proviſions, by the operation of the rule of year and day, made the exerciſe of that natural right neceſſary; while others of the Judges argued, That this was granting in effect the very thing which the law had denied.

"THE LORDS repelled the defences, and found the purſuer intitled to a claim for aliment out of the eſtate of her deceaſed huſband; and remitted to the Lord

Ordinary on the bills, to hear parties procurators upon the quantum of the ſaid aliment." No 71.

To this judgment, on adviſing a reclaiming petition, with anſwers, the Court adhered.

Act. *Dean of Faculty et Cullen.* Clerk, *Colquhoun.* Alt. *Lord Advocate, M'Cleod Bannatyne, et W. Campbell.*

Stewart. *Fol. Dic. v.* 3. *p.* 24. *Fac. Col. No* 297. *p.* 456.

1756. *January* 16.

MICHAEL, JOHN, HERRIES, MARGARET, ANNE, and ISOBEL MALCOLMS, Children of the deceaſed Michael Malcolm of Balbedie, by Anne Blackwood, his ſecond Wife, and the ſaid ANNE BLACKWOOD, as Protutor for them, *againſt* JAMES MALCOLM of Balbedie, only Son of the ſaid Michael Malcolm, by his firſt Wife.

No 72.
A ſon ſucceeding to his father, as heir of an entailed eſtate, found not obliged to aliment his brothers and ſiſters of a ſecond marriage.

THE defender ſucceeded to his father, as heir of entail to the eſtate of Balbedie; the purſuers brought an action againſt him for aliment.

Pleaded for the defender: That he ſucceeded to the eſtate of Balbedie as heir of entail, and did not repreſent his father; and therefore was not bound to aliment his father's children.

Anſwered for the purſuers: That the law of nature dictated, that children, whoſe tender age rendered them incapable of alimenting themſelves, ſhould be alimented by others; by their father, in the firſt place, if he be alive, and in a condition to do it; by the public, if they have no relations able to aliment them: but where they have one ſo near as a brother, it is a duty incumbent on him to do it; and were it not ſo, their condition would be worſe than that of foundlings, the offſpring perhaps of vice and infamy; becauſe the pariſh may juſtly refuſe to aliment thoſe whoſe brother is the man of the greateſt property in it. By the Roman law, brothers, whether they ſucceeded to any thing by their father or not, were bound to aliment indigent brothers and ſiſters, *L.* 1. § 2. *ff. De tut. et rat. diſtr.* And as the Roman law is of great authority with us, in all caſes where our municipal cuſtoms do not differ from it; ſo, in this caſe, when it is ſo ſtrongly founded in nature and humanity, it ought to be our rule. And in fact, brothers have often been found liable to aliment their brothers and ſiſters; and although the judgment has ſometimes been put upon the footing of their repreſenting their father, yet that could not be the only, nor indeed the proper, foundation for it; for, although the alimenting of children, be an obligation binding upon the father, yet, if he has not provided for the diſcharge of it in his lifetime, it has received no civil form; and being therefore merely natural, cannot, in ſtrict law, be made effectual againſt his heir. Nor was it ever found