

(Ex debito naturali.)

1778. March 6.

NICOLAS THOMSON *against* DAVID M'CULLOCH, and his TUTOR *ad litem*.

No 70.
Additional
aliment due
to the widow,
when her
terce is ina-
dequate.

HENRY M'CULLOCH of Torhoukie, at his death, left an estate in land, yielding L. 240 Sterling free income, after deducting the interests of all debts. He left no personal effects, and was only infeft in such parts of the lands as yielded a terce to the widow of L. 40. No marriage contract had ever been executed betwixt him and his wife Nicolas Thomson, nor any settlement made on the younger children. An action of aliment was therefore brought, at the instance both of the widow and the younger children, against the eldest son David, to whom a tutor *ad litem* was appointed.

It was not disputed that the younger children were entitled to aliment from the heir and representative of the father; but, as to the aliment claimed by the widow, it was suggested, That having a legal provision of terce, she was entitled to nothing more.

Answered: Where there are no conventional provisions, the widow is entitled to a maintainance out of her husband's estate, suitable to the circumstances of it. This is the necessary consequence of the obligation on the husband to provide for his wife; which, if he does not, the law will do for him. If her legal provisions of terce and *jus relictæ* are not sufficient, an addition to them must be made out of the estate.

The husband's effects may be so circumstanced at the time of his death, that no part of them can be subjected to the terce, or *jus relictæ*, as in the case of his leaving an heritable estate in which he was not infeft, or bonds bearing interest: So that if the widow was restricted to these legal provisions for her maintainance, she might be totally unprovided, while her husband's heirs succeed to great riches.

The widow is in this case the better entitled to this claim, that the heir is her own son, bound to aliment her *jure natura*. Sir John Paterfon of Eccles, 25th June 1751, No 67.

Observed on the Bench: That where there are no conditional provisions, the widow is entitled to an aliment out of her husband's estate, suitable to its free income. When her legal provisions of terce and *jus relictæ*, are not adequate to this, she is entitled to an additional aliment out of it.

The Court 'found the pursuer entitled to an additional aliment of L. 20 yearly, from the first term after the husband's death for nineteen years, or until the same is recalled or altered by authority of the Court.' (See TERCE.)

Act. Al. Gordon tertius.

Alt. Ilay Campbell.

Ogilvie.

Fol. Dic. v. 3. p. 24. Fac. Col. No 19. p. 34.