

No. 1. thought he was entitled to; a sum liable to be afterward modified, in proportion as her fortune was increased or diminished. It would be singular, if he were entitled to an aliment out of the fund *in medio*, in right of his daughter, when her own claim has been rejected.

Answered: Although the sum awarded to Dr. Spence was not expressly declared to be a burden on his daughter's annuity, it was meant to be paid out of it; and it must therefore be held to have passed *cum onere* to her husband and his creditors.

There is no occasion to inquire what would have been the case if Mrs. Cairncross had not married again, and there had been a change in her circumstances. As matters now stand, she has no interest. The respondent's only competitors are her husband's creditors, who have no right to deprive her father of the sum awarded to him before the marriage was contracted.

Upon advising the petition, with answers, several of the Judges thought that Dr. Spence could rank only as a personal creditor.

The Lords, however, adhered, by a narrow majority.

Lord Ordinary, Swinton. For Dr. Spence, Bruce. Alt. W. Erskine. Clerk, Pringle.
D. D. Fac. Coll. No. 3. p. 7.

1799. February 19.

ISABELLA CLERK, and her Tutor *ad litem*, against SIR GEORGE CLERK,
and his Tutor-at-law.

No. 2.

A sister found in strict law to have no claim for aliment against her eldest brother, although in possession of the family estate, where he did not represent his father, and represented his grandfather only as an heir of entail.

SIR GEORGE and ISABELLA CLERKS were children of the late James Clerk, who predeceased his brother, Sir John Clerk of Pennycuik. On Sir John's death, Sir George succeeded to the estate, worth upwards of £2000 yearly. Sir George did not represent his father at all, and he represented his grandfather only as heir of entail; but he represented universally his great-grandfather, who held the estate of Pennycuik in fee-simple.

Miss Clerk being wholly unprovided for, and Sir George's tutor-at-law not thinking himself entitled to afford her a suitable maintenance from his ward's estate, without the authority of the Court, an amicable suit was brought, concluding for an aliment of £60 yearly.

In defence, Sir John and his tutor

Pleaded: The pursuer's claim must rest on the defender's being bound to aliment her either *ex debito naturali*, or as representing some predecessor who, had he been alive, would have been under that obligation. But, whatever moral tie there may be on a brother to support his sister, the legal one extends only to her immediate parents; 16th January 1756, Malcolm against Malcolm, No. 72. p. 439. And as little can the pursuer be subjected as representing his predecessors, because the claim for aliment on that ground at the instance

of a sister, lies against her brother only as representing their father, and does not extend against a brother, who represents only his grandfather; 25th June 1761, Seton and Patersons against Paterson, No. 67. p. 429.

No. 2.

Answered: The Court have enforced the moral obligation to afford aliment in cases of a very similar nature; 15th December 1786, Lowther, No. 71. p. 435. Besides, the eldest son possessing the family estate, has been found liable in aliment to his sister, where he represented their common grandfather; 11th February 1764, Younger Children of Seton against the Heir, No. 68. p. 431; 14th December 1788, Dalziel against Dalziel, No. 84. p. 450; and there is no good reason why the representing a great-grandfather should not have the same effect. It may be said, that by ascending to remote ancestors, the obligation to aliment might be extended in favour of distant relations; but, in all cases, the Court will pay regard to the relative situation of the parties, and will sustain the claim, on the footing of the defender's representing a common parent, when it is made at the instance of a sister, although they would repel it if made by a cousin.

The Court ordered memorials; on advising which, several of the Judges were for supporting the claim. The rest so far agreed with them, as to be clearly of opinion, that every disbursement made by the defender's tutor in the maintenance and education of Miss Clerk in a style suitable to her rank, would be sustained in accounting with his pupil; but they thought that there was no ground in law which entitled them to award the pursuer a specific aliment.

The Lords accordingly found, "That, in the circumstances of this case, the pursuer has no such claim of aliment against her brother, as can be enforced in a court of law; and therefore assoilzied from the present action, and decerned; without prejudice to any discretionary power which the tutor may be advised in such a case to exercise; and reserving all questions of accounting between him and his pupil, when the term of his office expires."

Act. Ro. Craigie.

Alt. H. Erskine.

Clerk, Sinclair.

R. D.

Fac. Coll. No. 112. p. 255.

1799. July 6.

The CREDITORS of JOHN NEWLANDS, against JOHN NEWLANDS, junior.

DURING the dependence of the question between John Newlands junior and the creditors of his father, No. 73. 4289. with regard to the fee of certain heritable subjects destined to the father "in liferent, for his liferent use allenarly, and his children *nascituri* in fee," the Court, with consent of the creditors, granted young Newlands an aliment of £30 yearly.

But the judgment of the Court, finding that the fee could not be attached for the debts of the father, having been affirmed on appeal 26th April 1798,

No. 3.

The creditors of a liferenter are not bound to aliment the heir.