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*Respondents.*—It is settled law, that a disposition or entail, excluding the heir of law, and conferring the right to the estate on a stranger, deprives the heir of his right to an action of exhibition, unless he shall succeed, in the first place, in setting the deed aside. But the entail of Earl David has been recognized and acted on for more than thirty years, and it is not competent, under an action of exhibition ad deliberandum, to allow the heir to ransack the charter-chest in order to find out grounds for reducing the deed which excludes him.

The House of Lords ‘ordered and adjudged, that the appeal ‘be dismissed, and the interlocutors complained of affirmed, ‘with L. 200 costs.’

*Appellant's Authorities.*—3. Stair, 5. 1. ; 4. Stair, 33. 4. ; 3. Bankton, 5. 7. ; 3. Ersk. 8. 56.

*Respondents' Authority.*—4. Ersk. 8. 56. and cases there.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

No. 31.

Honourable WILLIAM MAULE of Panmure, Appellant.  
*Warren—Brougham—Moncreiff—Murray.*

FOX MAULE, Esq. Respondent.—*Cranstoun—Jeffrey—Cockburn.*

*Aliment.*—The Court of Session having found, that a son who had a commission in the army as an ensign, with L. 90 of pay, and an allowance of L. 100 a-year from his father, (who was an heir of entail in possession of an estate yielding an income of L. 10,000), was entitled to an aliment of L. 800 per annum from his father; the House of Lords reversed the judgment, and assoilzied the father.

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1ST DIVISION.

IN 1822, the respondent, Fox Maule, Esq. (who was then about twenty-two years of age), raised an action of aliment before the Court of Session against his father, the appellant, the heir of entail in possession of the estate of Panmure. In the summons, after founding on the deed of entail, he set forth, ‘that the pursuer ‘is apparent heir of entail under the said deed to his said father, ‘and has been educated in a manner suitable to his rank and ‘prospects, and is entitled, besides, as the lawful son and presumptive heir of his father, to a suitable aliment and maintenance out of the ample estates that belong to him; but the only ‘provision which the pursuer’s father has made for his support ‘has been to settle upon him L. 100 a-year, and to obtain for ‘him an ensign’s commission in our 79th regiment of foot, which

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‘ the pursuer at present holds : That the said defender, ever since  
 ‘ the month of May 1819, harbouring a groundless dislike  
 ‘ against the said pursuer, refused to provide for the aliment of  
 ‘ the pursuer in a manner suitable to his early education, present  
 ‘ rank, and future prospects, as apparent heir of entail of the  
 ‘ said lands of Panmure. And although the pursuer has often  
 ‘ and divers times desired and required the said William Maule,  
 ‘ defender, to grant him such reasonable aliment, proportioned  
 ‘ to the said rents and produce of the said lands and estate, as to  
 ‘ enable him to support his rank suitable to his education and  
 ‘ quality in life, and for the maintenance of the said pursuer,  
 ‘ nevertheless the said defender refuses, at least delays, so to do :  
 ‘ And seeing, that by the law of nature, as well as the laws of  
 ‘ Scotland, the said Fox Maule, pursuer, as representing the  
 ‘ said noble family of Panmure, and as next in succession to the  
 ‘ said lands and estate of Panmure after the said defender, is  
 ‘ entitled in the mean time to be alimented out of the proceeds  
 ‘ and profits of the said lands and estate in a manner suitable to  
 ‘ his rank and station ; therefore it ought and should be found  
 ‘ and declared, by decret of our said Lords of Council and Ses-  
 ‘ sion, that the said pursuer is entitled to a suitable aliment from  
 ‘ his said father ex debito naturali, and that the said Fox Maule,  
 ‘ pursuer, is in the mean time entitled to a maintenance for him-  
 ‘ self, and to an aliment suitable to his elevated rank and station,  
 ‘ out of the rents, produce, and profits of the said estate, where-  
 ‘ unto he is entitled to succeed after the said defender, in terms  
 ‘ of the said rights and investitures of the same. And it being  
 ‘ so found and declared, the said William Maule ought and  
 ‘ should be decerned and ordained, by decret of our said Lords  
 ‘ of Council and Session, to make payment to the said Fox  
 ‘ Maule, pursuer, of the sum of L.2000 yearly, as a reasonable  
 ‘ and suitable allowance, according to the rank and station, for  
 ‘ the support of the rank of the said family to which he is entit-  
 ‘ led to succeed, or such other sum as our said Lords may think  
 ‘ fit and reasonable in the circumstances of the case, and that at  
 ‘ four terms in the year, Candlemas, Whitsunday, Lammas, and  
 ‘ Martinmas, by equal portions, beginning the first term’s pay-  
 ‘ ment thereof at the term of Martinmas last, and quarterly  
 ‘ thereafter, during all the years and days of the lifetime of  
 ‘ the said defender.’

In defence to this action, the appellant stated: ‘ The defen-  
 ‘ der is possessed of the fee, and his son, the pursuer, is next  
 ‘ in the succession of the entailed estate of Panmure; but by the

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 ' have any controul, may entirely deprive the pursuer of any  
 ' chance of the succession to that estate. The defender has  
 ' always acknowledged and performed his duty as a father, in  
 ' educating and alimending the pursuer. He gave him an excel-  
 ' lent education, and purchased a commission for him in the  
 ' army. In other respects, the defender has made such allow-  
 ' ances to his son as he concluded (by the advice of the colonel  
 ' of the regiment, and other eminent officers) to be proper and  
 ' adequate to his situation in his profession. But while the  
 ' defender is ready to perform his duty to his son, he denies the  
 ' competency of the present action, and maintains, that the pur-  
 ' suer has no right, as an heir of entail, or in any other character,  
 ' to apply to this Court, and desire them to interpose between a  
 ' son and a father, and assume the discretion of measuring out  
 ' and apportioning the aliment which he shall give him. It is  
 ' the defender's duty to alter, vary, or increase, according to  
 ' existing circumstances, that aliment, he, as a father, may think  
 ' most advisable in the particular case; and while he is willing  
 ' to perform it, he submits that a Court of law is not called upon  
 ' or entitled to exercise any jurisdiction in the matter.' The  
 appellant farther denied the allegations of the respondent, that  
 he harboured a groundless dislike against him, or that the res-  
 pondent represented the family of Panmure, or that he was in a  
 state of that destitution which was essential to found an action  
 of aliment. He farther averred, and offered to prove, ' 1. That  
 ' he was proprietor of large landed estates held by strict en-  
 ' tail, but affected by very heavy burdens, reducing his actual  
 ' income to about L.10,000 a-year, with a capital of debt of  
 ' nearly L.30,000, besides a variety of contingent claims of a  
 ' serious nature. 2. That the respondent is the next heir of  
 ' entail; but that, while in this respect his rights are not diffe-  
 ' rent from the rights of any other heir of entail, his chance of suc-  
 ' cession may be entirely defeated, even though he should survive  
 ' the appellant, in consequence of a provision in the entail, by  
 ' which, in the event of the honours and estates of Dalhousie,  
 ' now vested in the appellant's elder brother, devolving on the  
 ' appellant, the estates of Panmure shall devolve to other heirs,  
 ' to the exclusion of the appellant's eldest son. 3. That the res-  
 ' pondent was fully educated in a manner suitable to his rank  
 ' and station. 4. That the respondent, by his own choice,  
 ' entered into the army, and that the appellant purchased for  
 ' him a commission, which he still holds. 5. That the appel-

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‘ lant made an allowance to the respondent, in addition to his  
‘ pay, of L.100 per annum. 6. That this allowance was more  
‘ than the sum which the colonel of the regiment to which the  
‘ respondent belongs, as well as other persons qualified to give an  
‘ opinion, advised the appellant to be proper and adequate to the  
‘ situation. 7. That persons of great eminence in the British army,  
‘ and in particular the late Sir John Moore, had acted upon a rule,  
‘ by which the ensigns in such a regiment were prevented from  
‘ having a larger allowance than L.100 a-year in addition to their  
‘ pay.’ And he further stated, that although the Court had no right  
to take cognizance of the matter, he was ready, when a proper  
opportunity occurred, of purchasing the respondent’s promotion  
in the army. No proof was taken as to the respective allegations  
of the parties; and the Court, after a hearing in presence, and  
advising memorials, ‘ repelled the defences for the Honourable  
‘ Mr Maule, and found him liable in a suitable aliment to the  
‘ pursuer; but before further procedure appointed the defender  
‘ to give in a condescence of his free income.’ A condescen-  
dence was accordingly lodged, from which it appeared that his  
income was L.10,515. 10s. 1d., but that he was burdened with a  
capital debt of L.30,000, and was fifty-two years of age. No  
answers were lodged by the respondent, (he being willing to hold  
the statements in the condescence as true), and thereupon  
the Court, on the 9th of July 1823, ‘ modified the sum of  
‘ L.800 sterling yearly for aliment to the said Fox Maule, the  
‘ pursuer, and decerned the defender to make payment thereof  
‘ at two terms in the year, Whitsunday and Martinmas, by equal  
‘ portions, commencing at Whitsunday last for the half-year im-  
‘ mediately preceding, and the next term’s payment at Martin-  
‘ mas next, and so forth half-yearly, during the joint lives of the  
‘ pursuer and defender, or until the said aliment shall be altered  
‘ or recalled by this Court;’ and found him liable in expenses.\*

The Honourable Mr Maule appealed.

*Appellant.*—The plea maintained on the part of the respon-  
dent, and which has been sanctioned by the Court of Session, is,  
that by the law of nature, and by the law of Scotland, founded  
on it, a father is bound to maintain his children; that this obli-  
gation is perpetual, and subsists even after a child, whether male

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\* 2. Shaw and Dunlop, No. 452.; and see Opinions of Judges, Fac. Coll,

June 1. 1825. or female, is of full age, as long as in point of fact the child has not the means of maintaining itself; that by the law of Scotland, according to various authorities and decisions cited, this obligation of aliment varies according to the rank and station of the parties, and that in all cases the child must be alimented in a manner suitable to the rank, station, and fortune of the father; that therefore in each particular case it belongs to the Court of Session, and is competent for them to determine, whether the child is or is not alimented in a manner suitable to the rank, station, and fortune of the father; that the case of the father refusing to aliment the child at all, and the case of his giving an aliment with which the child is dissatisfied, and which the Court of Session shall think not to be suitable to the rank and fortune of the father, are the same in point of law: And therefore, according to these principles, although the respondent is an officer in the King's army, drawing pay, with the additional allowance made by the appellant of £.100 a-year, this must be considered as unsuitable to his rank and station, and as placing the respondent entirely in the same situation as if he were totally destitute, and the appellant had refused to give him any aliment at all; so that the action for aliment was competent and well-founded, and the Court were entitled to order the appellant to give in a condescence of his whole means and estate, disclosing the state of his private affairs; and that they were thereafter called upon and entitled to give to the respondent, by the force of a decree of the Court, a right to such a proportion of the appellant's yearly estate or income as they might think suitable to the rank, station, and fortune of the appellant. Such a plea, however, is not only groundless in itself, but of the most alarming nature, as it tends to establish a principle which would unhinge the most important relations of civil life. The appellant has no occasion to enter into any question in the present case as to his obligation both to educate and to maintain the respondent in the rank and condition of a gentleman;—he had always done so—he had given him, as admitted in the summons, a most liberal education, becoming his rank and station, and had subsequently, with the respondent's own full concurrence, placed him in the profession which was perhaps of all others the most suitable to his rank, condition, and prospects. A person who has adopted a profession is only entitled to be maintained in a manner suitable to that profession; and it is absurd to maintain, that a person who was in fact enabled to live as a gentleman, in the pursuit of an honour-

able profession, and in the society of other gentlemen, is not maintained or alimeted, or is in any sense of the term in a state of indigence or destitution. A father has by law the uncontrolled administration of his own estate, and a discretion in the allowances which he chooses to make to his own children, whether in minority or of full age; and therefore it is altogether incompetent for a Court of law or equity to interfere with him in the administration of his own property, or in the management of his own family. The appellant therefore was not accountable to any Court for the reasons which influenced his judgment in the allowances made to his children; and there were not wanting the most substantial grounds on which that judgment, in the case of the respondent, might be defended as positively right. But, besides, the case of the proprietor of an entailed estate was for many reasons the strongest of all against the interference of the Court. As an heir of entail, the respondent has already a *jus crediti*, which gives him a reversionary estate, his right to which could not be defeated by his father, and which some of the Judges held to be more valuable in the market than the appellant's own estate. At any rate, the proprietor of an entailed estate, with a large family like the appellant, had more urgent reasons than any other person for exercising caution and prudence in the allowances made to his eldest son; and on the other hand, where the son was already to so great a degree independent of the father's will, there were the most serious considerations to prevent the interference of Courts of law with the exercise of that discretion which still legally remained with the father. But the plea now maintained by the respondent, if well founded, depends on a principle which will entitle the next heir of entail in all cases to call upon the Court to require an account of the rents and burdens of the estate, and then to give decree for a large proportion of those rents to be paid to the substitute heir of entail; in other words, a principle which renders it competent for the Court, on arbitrary notions of what is suitable and reasonable between father and son, to take what is confessedly the property of one man and give it to another. Even, however, were it to be assumed that a father is bound to maintain his son in a manner suitable to his rank and condition, and farther, that if he does not do so, and the son has not other means of so supporting himself, an action for aliment is competent, and the Court has power to determine what is a suitable aliment; in this view, the appellant denies that this resolves the question of law and competency which arises in the

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June 1. 1825. present case. The question remains, what is legally meant by a man having the means of living according to his rank and condition in the world? The respondent's position adopted by the Court is, that he must have a sum allowed to him bearing in all cases a certain proportion to the extent of the father's estate or property, to be fixed by the opinion of the Court. If he has not such an allowance, or rather if he chooses to say that he has not, he is entitled to come to the Court by an action of aliment, and the Court, upon his averment, is entitled, and imperatively bound, to compel the father to make a complete disclosure of his whole private affairs, the title by which he holds his estates, the rents which they yield, the burdens by which they are affected, all the private debts, transactions, bonds of annuity, &c. in which he may be engaged, under the penalty of being held as confessed on any statement, however exaggerated, which the son may make; and that then the Court are entitled to judge, by no rule but their own discretion, whether the son already has a suitable aliment, and if they think not, what shall be held suitable for each of ten thousand varieties of cases which may be so presented to them. If the doctrine were sound, it would be more properly a jury question, or a question of accounting in every case. But the whole theory proceeds on a violent abuse of words, and a refusal to look at the plain distinctions which lie on the surface of the common sense of the question. When it is said, or even laid down by lawyers, that a person entitled to aliment must be alimented suitably to his rank and condition, the statement has no reference to any precise standard of money, or to any proportion connected with the debtor's income. It means, that the son of a tradesman must be alimented like the son of a tradesman, and that the son of a gentleman must, in a general sense merely, be alimented in the condition of a gentleman. It refers to the general description of the various status which exist in society, and imports only that the broad lines which palpably separate them are not to be transgressed. But in all such general descriptions, there are comprehended very various degrees and ways in which the status may be maintained. The condition of a gentleman may be maintained in ways and degrees infinitely diversified. And therefore, when a question arises upon a claim of aliment by a person in the condition of a gentleman, (granting the general position that that condition is to be taken into view), the appellant denies that the meaning of the doctrine is, that you are in every case to estimate the degree and manner in which he is so supported, by a reference to that which a Court of law may

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be pleased to think the estate of the father might possibly, or even fairly afford. The question on the hypothesis is, whether the son is alimeted in the condition of a gentleman, or in that condition is destitute of aliment. The question is not, whether he has a liberal allowance from his father; not whether he has what others of the same apparent fortune might give to their sons; not whether he is in every view made independent of the good will of his father; not whether he has what the Court, or any of them, may think they would give in similar circumstances. The very term 'aliment,' and the nature of the action as an action of aliment, have a plain meaning, which excludes all such questions. If the party is alimeted as a gentleman, the rule of law (granting it in the terms assumed) is satisfied, whether that aliment bears a proportion to an estate of L. 20,000 a-year, or to an estate of L. 5000 a-year, or to an estate of L. 1000 a-year. Every thing beyond the aliment necessary for a gentleman is, by the laws of nature, the rights of property, and the order of society, left in the discretion of the party on whom the obligation lies. But that which cannot be denied to be the aliment of a gentleman in one case, must necessarily bear the same character in every case; and where it exists, must exclude altogether that case of necessity which alone can justify the interference of a Court of law.

It is a mistake to suppose, that because the civilians lay it down that a father is bound to aliment his children *pro modo facultatum*, they mean, that he is therefore to proportion the aliment to the extent of his funds, however large they may be. The dictum has reference to the situation of a person whose funds are small, and means that he can only be obliged to aliment his children according to his ability. But it is impossible for the respondent to allege that he is in a state of destitution. He has confessedly not only that which the State regards as sufficient for his support, but also L. 100 a-year; whereas, according to the doctrine of the Court of Session, he must be considered as destitute unless he has L. 800 a-year, being more than twice the amount of the pay of the commander of the regiment in which he is a subaltern.

The statute 1491, c. 25. has no application to the present case, for the appellant is not a liferenter, but, so far as not fettered by the entail, is a *fiar*.

*Respondent.*—Although the respondent's claim rests both upon the statute and the law of nature, yet he admits that it is chiefly upon the latter that it is rested. The claim which a child has



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against a parent; arises entirely from the duty under which parents are laid by nature of maintaining their offspring, and from the interest which society has in enforcing the fulfilment of that duty. This does not depend upon any presumed contract or agreement of parties, but is one of the provisions of nature which are antecedent to all private compacts and to all written laws. Its existence is distinctly laid down, and its general principles explained, in various parts of the Roman code. The respondent need not quote these, but he may refer in general to the title in the Pandects, ‘De agnoscendis et alienis liberis.’ The rules which were acknowledged in the civil law, have been incorporated for ages into that of Scotland. Accordingly, the following may be safely laid down as elementary and indisputable rules:—1st, That, in its origin, the claim is coeval with the paternity of the child, and forms one of those *jura sanguinis* which no private agreement can defeat: It is indissoluble. According to Bankton, B. 6. tit. 45. § 17. ‘No compact between parents and children, that they shall not maintain each other, when the one is reduced to extremity, and the other in condition to support him, can be effectual in law.’ 2dly, That in its amount it does not merely comprehend the means of subsistence. It reaches beyond what is strictly necessary for the bare support of animal existence, and is measured, not merely by a consideration of the wants of the one party, but by a still stronger consideration of the duties of the other. It therefore includes not only the means of education, but general maintenance suitable to the claimant’s rank and situation in life. And, 3dly, That there is no particular period at which the duration of this natural and indissoluble claim terminates. It has been supposed, that where it is preferred derivatively against collateral relations, it stops on reaching majority; but no such limitation has ever been affixed to it when it has been made directly against a parent. ‘The obligation,’ says Erskine, (B. 1. tit. 6. § 56.) ‘which lies on parents to maintain their indigent children is perpetual.’ Indigence is the criterion of the claim, and this is only strengthened by the addition of age. Numerous decisions have been pronounced, and the great basis on which they all rest, and the great result which they all imply, is, that the demand is always to be judged of with reference to practical life, and to the real situation of the parties; that the *jus naturæ* is no more to be converted into a pretence by which the child may encroach upon the independence of the parent, than the *patria potestas* is to be made an instrument by which the parent may degrade the child; but that wherever there is

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such helplessness as amounts, in the common sense of mankind, to a disqualification from following the pursuits, or maintaining the station which becomes the condition of the family, the claim for aliment, being one of those moral duties which the father is under a natural obligation to fulfil, is to be liberally considered. Accordingly, the great dispute in almost every one of the adjudged cases has been, whether or not aliment was exigible, and not what should be its amount. Because it seems always to have been felt, that when it was once settled that the claim was well founded, the adjustment of the sum was a very simple matter. Whether it should be a greater or less proportion of the father's funds, may have given rise to some doubt in particular cases; but the whole title of 'Aliment' in the Dictionary attests, that it has uniformly been felt that it must bear such a reasonable proportion as no parent, who was really anxious to fulfil his natural obligation, would ever think of falling below.

The appellant, however, attempts to make the determination of the claim depend upon a principle which was never hitherto brought into operation in any question of this description. Although he admits, 1st, That the father is bound to maintain the son; 2dly, That this obligation does not cease upon the son's reaching majority; 3dly, That it is not superseded by the son's having a trade or possession which does not yield him an adequate support; 4thly, That therefore, though the respondent be twenty-two years of age, and has an ensign's commission in the army, he is entitled to have aliment from his father;—yet he contends, that in fixing the amount to be given, the father is omnipotent. But although there is no doubt that a father has a right to exercise his discretion in the first place, it must be fairly exercised, and not abused; and consequently, where it is alleged that it is abused, the Court is entitled to interfere and do justice. Now, the basis of the respondent's complaint is, that although he had confessedly a legal right of aliment, yet, speaking practically, the discretion of his father in fixing its amount, with reference to the situation in which he is placed, the various duties which his station in society imposes upon him, towards his own family, to himself, to the public, and the profession in which he is engaged, has not been exercised, but has been evaded. The Court, therefore, was entitled to award an adequate aliment to the respondent.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be reversed, and that the defender be 'assoilzied.'

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**LORD CHANCELLOR.**—My Lords, Your Lordships were pleased to appoint the case of *Maule v. Maule* for the judgment of your Lordships this morning; and recollecting the hour of the day to which we have now got, and considering that there are Counsel attending in other cases, I shall go no farther than to state the circumstances of this case, in order that the House may be in possession of the case standing for judgment; and the state of the cases in progress to judgment appears to make it necessary to make some arrangement with the noble and learned Lord who is not now present, by which the House may be enabled to proceed to some judgment at ten o'clock in the morning on some particular days, instead of beginning those judgments at this period, in consequence of Committees of Privilege sitting on Mondays and Thursdays; that we should be enabled to commence at an earlier period of the day, and to apply the day to the purposes of judgment, instead of calling on parties to attend by their Counsel, when it would be quite impossible to hear them. I will endeavour to make some such arrangement as may be necessary for that purpose.

My Lords,—This cause of *Maule v. Maule* is perhaps one of the most important, at least it appears to me to be so, that the House has ever been called upon to consider; and I very well recollect, when it was in the course of hearing, it had frequently occurred to your Lordships, who had heard something of the cause, that if the law as pronounced in this judgment was the law of Scotland, it ought not to be the law of Scotland any longer;—but if that proposition can be maintained, your Lordships, I am sure, will bear in recollection, that the alteration of the law cannot be made in judgment in any case now depending, but must be made by an Act of Legislation. The question, therefore, you have to determine in this case is, whether the law of Scotland has been properly declared, attending to the particular circumstances of this case. If it has, you must be bound in judgment; if your Lordships are satisfied that it has not, of course the judgment must be reversed.

My Lords,—The facts of the case, as I understand them, may be represented to your Lordships in the following manner:—This was a summons, which they call a summons for aliment, in respect to which considerations arise out of the Act 1491, and out of the question, what is the law with respect to aliment *jure naturæ*? This was a summons brought by Mr Maule, who represents himself to be the ‘eldest lawful son of the Honourable William Maule of Panmure, and heir of entail next in succession to the lands and estate of Panmure after the said Honourable William Maule:’ Then it represents, ‘that the now deceased Right Honourable William Earl of Panmure, for the better preservation of his family and memory, and continuation of his estates with his relations and heirs of tailie therein mentioned, executed a deed of entail, which is dated the 12th of October 1781, registered in January 1782 in the Register of Entails, and in the Books of Council and Session the 8th of February of the same year, of his lands and

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‘ estate of Panmure, and others particularly described, with and under  
 ‘ the conditions, restrictions, limitations, prohibitions, clauses irritant  
 ‘ and resolute, declarations and reservations therein mentioned.’ And  
 by this instrument ‘ he gave, granted, and disposed to himself, and the  
 ‘ heirs of his body, whom failing, to the now deceased George Earl of  
 ‘ Dalhousie, his nephew, in liferent,’—making George William Dalhou-  
 sie the liferenter;—and to the ‘ said William Maule, therein designed  
 ‘ William Ramsay, his second son,’—not as the liferenter, but to him as  
 second son in fee, ‘ and the heirs-male of the body of the said William  
 ‘ Maule; whom failing, to the other heirs therein mentioned, with and  
 ‘ under the condition, that in case the succession of his said lands and  
 ‘ estate should, in consequence of the foresaid destination of succes-  
 ‘ sion, devolve upon the said George Earl of Dalhousie in liferent, and  
 ‘ the said William Maule his second son, or any of the heirs substituted  
 ‘ to him, in fee, as the said George Earl of Dalhousie would during his  
 ‘ life have the total liferent of his said estate, so on that account he,  
 ‘ by acceptation of the liferent, was bound and obliged to aliment, main-  
 ‘ tain, and educate the said William Maule, and failing him the other  
 ‘ heirs substituted to him in the order set down, in manner suitable to  
 ‘ their rank and station, until the said William Maule or the other  
 ‘ heirs should arrive at the age of fourteen years complete, when he,  
 ‘ the said William Maule, was to have L.500 sterling a-year; and after  
 ‘ the said William Maule, or any of the heirs succeeding to him, ar-  
 ‘ riving at the age of twenty-one years complete, he, the said William  
 ‘ Maule, was to have an additional annuity of L.500 sterling yearly,  
 ‘ making in the whole an annuity of L.1000 sterling. That in case the  
 ‘ said William Maule, and failing him, the heirs therein mentioned, ac-  
 ‘ cording as they should succeed in virtue thereof, should either be mar-  
 ‘ ried or in Parliament, in either of those events a farther additional an-  
 ‘ nuity of L.1000 sterling, making in the whole the sum of L.2000 ster-  
 ‘ ling:’ from which conditions it appears, that the entailer had an anxious  
 desire that the heir-apparent should be amply provided for—the estate  
 at that time not exceeding L.10,000 a-year, while it is now L.25,000.  
 Your Lordships will see what the value of the estate therefore is,  
 when I come to state some of the disclosures that have been called  
 for by the Court of Session.

My Lords,—I have pointed out, in the manner in which I have ex-  
 pressed myself, the fact, that George Earl of Dalhousie was a liferen-  
 ter, and that William Maule had the estate to him and the heirs-male  
 of the body of the said William Maule; because it may possibly, when  
 you come to see what persons had the estates in the year 1791, be  
 considered as applying in construction,—it may be material that the  
 Earl of Dalhousie was the liferenter, and that William Maule by the  
 disposition took to him, and to the heirs-male of his body. With respect  
 to the particular part I have read, as to the aliment the Earl of Dal-  
 housie was to make to the next heir, whether William Maule or any  
 one taken by substitution after him, it may be material to state the

June 1. 1825. order. This settlement is made on the Earl of Dalhousie in liferent, paying William Maule or the heirs substituted calling for it, an allowance of L. 500 a-year, from the age of fourteen to twenty-one; and after twenty-one an annuity of L. 1000 sterling; and in case of being married or sitting in Parliament, an additional annuity of L. 1000 sterling; making in the whole a sum of L. 2000 sterling yearly. I find that, with respect to those to take after William Maule, the other heirs substituted, there are in the entail various directions, which it is not necessary to detail; but this clause inserted in the summons takes no notice of what is to be or what is not to be allowed by way of annuity to the person to take after the person in possession, with reference to the clause in the same deed of entail, by which persons divest themselves in certain cases of the possession of this estate.

The next allegation is, 'That in virtue of this deed of entail, the said George Earl of Dalhousie succeeded to the liferent of the said lands and estate of Panmure, which he enjoyed till the year of his death in 1787, when the Honourable William Maule, the pursuer's father, and institute under the deed, succeeded to the lands and estate of Panmure, which he has enjoyed ever since.' It then charges, 'that the appellant is apparent heir of entail, under the deed to his father, and has been educated in a manner suitable to his rank and prospects.' And I take leave to repeat those words, because I think, in the consideration of this very important case, it will be necessary to attend, not only to what has been declared to be the opinion of the Lords of Session, who have decided with respect to what a father is bound to do after a son attains the age of majority; but also, how far the Court do or do not actually interfere in what he does with respect to the expectations of the son, previous to his attaining the age of twenty-one years. It is quite obvious with respect to what a father may be called upon to do, after a son attains the age of twenty-one, that what may be proper to be done with reference to a son educated in one way during his minority, may or not be proper with respect to a son educated in another way, or with reference to the maintenance of that son after he has attained the age of twenty-one. 'And that he is entitled besides, as the lawful son and presumptive heir of the father, to a suitable aliment and maintenance out of the ample estates that belong to him:—the pursuer stating his claim, as a claim resting on two grounds; first, That he is apparent heir of entail to his father,—and I repeat the words, 'apparent heir of entail to his father' again, referring to the particular expressions to be found in the Act 1491. 'And that he is entitled to a suitable aliment and maintenance out of the ample estates that belong to him,'—resting his claim, as your Lordships observe, both upon the parental obligation, and also upon the obligation which is understood to result from the relation which each of the parties bear to the estate, of which the one is in possession and the other is in expectation.

Then he states, 'That the only provision which the pursuer's father has made for his support, has been to settle upon him L. 100 a-year,

‘ and to obtain for him an ensign’s commission in our 79th regiment of  
 ‘ foot, which he at present holds. That the defender, ever since the  
 ‘ month of May 1819, harbouring a groundless dislike against the pur-  
 ‘ suer, refuses to provide for the aliment of the pursuer in a manner  
 ‘ suitable to his early education, present rank, and future prospects as  
 ‘ apparent heir of the lands and estates of Panmure.’ My Lords, with  
 respect to this allegation, namely, that the defender harboured a  
 groundless dislike against the pursuer, we may throw that entirely out  
 of the question ; there is no proof of it ; the evidence on that point does  
 not appear to me to have the least reality.

Then it alleges, ‘ That though the pursuer has often and divers times  
 ‘ desired and required the said William Maule, defender, to grant him  
 ‘ such reasonable aliment, proportioned to the rents and produce of  
 ‘ the lands and estate, as to enable him to support his rank suitable to  
 ‘ his education and quality in life, and for the maintenance of the pur-  
 ‘ suer ; nevertheless he refuses, or at least delays, so to do.’ And then  
 there is this allegation, ‘ And seeing that by the law of nature, as well  
 ‘ as the laws of Scotland, the pursuer, as representing the noble family  
 ‘ of Panmure, and as next in succession to the lands and estate of  
 ‘ Panmure after the defender, is entitled in the mean time to be ali-  
 ‘ mented out of the proceeds and profits of the lands and estate, in a  
 ‘ manner suitable to his rank and station,’ and the claim is then put on  
 the laws of nature as well as upon the laws of Scotland. I should  
 apprehend that this claim to be alimented in a manner suitable to his  
 rank and station, by the law of nature as well as the laws of Scotland,  
 will finally be found to rest upon the law of nature, and that it does  
 not rest upon the laws of Scotland.

Then it prays, That it shall be declared by the Lords of Session,  
 ‘ that the pursuer is entitled to a suitable aliment from his father ex  
 ‘ debito naturali, and that he is in the mean time entitled to a mainte-  
 ‘ nance for himself, and to an aliment suitable to his elevated rank and  
 ‘ station, out of the rents, produce, and profits of the estate, where-  
 ‘ unto he is entitled to succeed after the defender, in terms of the  
 ‘ rights and investitures of the same.’ And then it prays, that the fa-  
 ther might make payment to the son ‘ of the sum of L. 2000 yearly,  
 ‘ as a reasonable and suitable allowance, according to his rank and sta-  
 ‘ tion, for the support of the rank of the family to which he is entitled  
 ‘ to succeed, or such other sum as the Lords of Session may think fit  
 ‘ and reasonable in the circumstances of the case, and this during all  
 ‘ the years and days of the lifetime of the defender.’ So that the  
 prayer of this summons, your Lordships observe, is, that this gentleman  
 claims and insists that he ought to be declared entitled to a suitable  
 aliment from his father, and that he ought to have L. 2000 a-year, or  
 such annuity from his father, as the Lords of Session should think a  
 father ought to make to him as the son of that father during the joint lives  
 of the father and the son ; and of course, as it seems to me, submitting  
 to the Court of Session a case, in which, if they can determine that the

June 1, 1825.

father shall, upon the grounds here stated, in the next year pay to his son a sum of L. 2000, they must have a jurisdiction from time to time, as long as the father and the son live, upon the application of the son to have the annuity increased, to give him an increase; or upon the application of the father, disclosing all the changes in his circumstances with respect to this family, to have a decrease made from time to time. My Lords, the defence which was put in for Mr Maule, the father, was to this effect, that he was possessed of a fee,—these are words which would create an estate tail in our law,—the whole estate was limited to his heirs in strict settlement; ‘but by the provisions of that entail,’—that is, the entail of Panmure,—‘events, over which neither of them ‘have any controul, may entirely deprive the pursuer of any chance of ‘the succession to that estate,’—which is a material circumstance when so much is to depend upon discretion—I say discretion, looking to the nature of the property which the father at the time has, and which the son at the time may have a right to succeed to, but which in certain events he may not have a right to succeed to. He then says, that ‘the defender has always acknowledged and performed his duty ‘as a father in educating and alimending the pursuer;—And I observe, that one of the Lords of Session, adverting to this passage, did state, that it was unnecessary for him to consider whether the law of Scotland subjected a father to this duty of educating and alimending his son after he has attained the age of 21; because the appellant has acknowledged that this is his duty. Now I do not apprehend, at least in our law, it would have that effect. I conceive, that if a man had so acknowledged what he conceived to be the doctrine of law, that the Court here would not consider that as being the law; merely because he had acknowledged it. The admission of a fact is one thing, the admission of a doctrine of law is quite another thing. ‘He gave him, he says, an excellent ‘education, and purchased a commission for him in the army. In other ‘respects, the defender has made such allowances to his son, as he concluded (by the advice of the Colonel of the regiment, and other eminent ‘officers) to be proper and adequate to his situation in his profession.’ And I observe that this allowance, in reference to the station he held in the army, was an allowance represented to have been made by the advice of a very eminent person,—I mean Sir John Moore, and other persons to whom reference was made, it being conceived by them to be adequate to his situation. Then he further alleges, that ‘while the ‘defender is ready to perform his duty to his son, he denies the competency of the present action; and maintains, that the pursuer has ‘no right, as an heir of entail, or in any other character, to apply to ‘this Court,’ that is, to the Court of Session, ‘and desire them to interpose between a son and a father, and assume the discretion of ‘measuring out and apportioning the aliment which he shall give him. ‘It is the defender’s duty to alter, vary, or increase, according to the ‘existing circumstances, that aliment he, as a father, may think most ‘advisable in the particular case; and while he is willing to perform



‘ it, he submits that a Court of law is not called upon or entitled to June 1. 1825.  
 ‘ exercise any jurisdiction in the matter.’

My Lords,—The parties having represented their arguments in the memorials and petitions which have been laid upon your Lordships’ table, the Court of Session proceeded to decide upon this matter. The first interlocutor appealed from is expressed in these words:—‘ The  
 ‘ Lords having advised the mutual memorials for the parties, they repel  
 ‘ the defences pleaded for the Honourable Mr Maule, and find him liable  
 ‘ in a suitable aliment to the pursuer ; but before farther procedure, ap-  
 ‘ point the defender,’ that is, the father, ‘ to give a condescendence of  
 ‘ his free income.’ The expressions to be found in this interlocutor which call for attention are, first, the words ‘ a suitable aliment.’ In what respect the amount of that aliment was to be fixed, so as to entitle it to the character of being a suitable aliment, this interlocutor in no manner explains ; except so far as you can consider it to be an aliment that a Court ought to consider as suitable by what should appear upon the condescendence of the father’s free income.

Another interlocutor was afterwards pronounced in these words:—  
 ‘ The Lords having resumed consideration of this process, and advised  
 ‘ the same with the condescendence for the defender, modify the sum  
 ‘ of L. 800 sterling for aliment to the said Fox Maule the pursuer, and  
 ‘ decern the defender to make payment thereof at two terms in the  
 ‘ year, Whitsunday and Martinmas, by equal portions, commencing at  
 ‘ Whitsunday last for the half-year immediately preceding, and the next  
 ‘ term’s payment at Martinmas next, and so forth half-yearly thereafter,  
 ‘ during the joint lives of the pursuer and defender, or until the said  
 ‘ aliment shall be altered or recalled by this Court. Find the defender  
 ‘ liable in expenses of this process.’ What, therefore, is pronounced in this interlocutor, as the law of Scotland is this, that upon the representation made by Mr Maule in the condescendence stating his income, the Court was of opinion that they had a jurisdiction which authorized them to state to the father, that L. 200 a-year (that is, the amount of an ensign’s pay as an officer in the army, and L. 100 a-year which the father allowed him) was too little, the father thinking it enough—and the father I see intimating a disposition to purchase in the army in case an opportunity offered ; but they thought themselves justified in ordering L. 800 a-year to be paid during the joint lives of the pursuer and the defender, or until the aliment should be altered or recalled by the Court. The terms, therefore, of this interlocutor embody what may be stated to amount to a judicial declaration, that at present the father had no discretion, but that he must allow L. 800 a-year ; and that the power of altering or recalling that did not rest with the father in any circumstances that might occur in the course of the joint lives of the father and son, unless the son chose to agree to what the father so proposed ; but that, on the contrary, the Court itself was, during the joint lives of the pursuer and defender, to take upon itself to determine what



June 1. 1825. was not to be allowed more or less than this L. 800 a-year between the father and the son.

My Lords,—Taking the law to be as it is expressed in this interlocutor, it must be considered to have been pronounced to be not only the law as between Mr Maule and his son, but the law as between all persons standing in this relation to each other, under all circumstances; namely, that the Court has a jurisdiction, wherever the son of a parent—any son of a parent, (for I do not see how, if it is to rest on the natural obligation, another child may not apply also)—called upon the Court from time to time to oblige the parent to inform the Court of Session what are the circumstances of that father, what property he has, what is (as they express it) his free income, what debt he has; because it is not a mere statement by him that such and such is his free income that will do, they must have a right somehow or other to determine what is his free income, in order to ascertain what allowance can be taken out of that free income to his son; and then they must, during the period which the annuity is directed to be paid, until altered or recalled, have a right to take cognizance of this at the instance of the son, on the one hand, to call upon his father de anno in annum to state to the Court of Session, and to the world, his circumstances, as they vary from time to time, for the better and for the worse; and that, on the other hand, the father is put under the necessity, if his circumstances change for the worse, of applying de anno in annum to the Court of Session, representing what that unfortunate change of circumstances is, and to publish them to the world, and then of calling upon the Court either to recall the allowance altogether, looking at the change of circumstances as operating a dissolution of the parental obligation, or looking at the change of circumstances as so far diminishing the extent of parental obligation as to call for a change favourable to the father. It should seem also, that if the parental obligation is to be looked at as founded on the law of nature, it must be regarded not only as an obligation between the father and the eldest child, but as an obligation which the father must be considered as being under to every child; and therefore, that in every case the Court of Session, if it is to determine what allowance ought to be made to the eldest son, must have some regard to what is the extent of the obligation which the father must be under in reference to every other person to whom he owes the same species of obligation; and that if it can be fixed in the beginning, for instance, of the year 1825, inasmuch as the parental obligation must require more or less according to the changes in circumstances of every other child in which the parental obligation is to be looked to, that must vary de anno in annum; and therefore, in truth, the question comes to be this, whether the Court of Session has a jurisdiction, on the application of a son, to take into its own hands, as between the father and that son, and the father and his family, all the duties of a father of a family; and to state that, upon application once made to them, the whole administration of that family may be placed under

their hands, and may remain there as long as the natural obligation of the father and the son exist. June 1. 1825.

My Lords,—I should mention, however, to your Lordships what is the state of the property as given in under this defence to the Court of Session. In obedience to the interlocutor the defender condescends and states the particulars,—that the gross income amounts to L.19,513. 17s. 2d.; that from this there is a deduction, as therein particularly stated, of L. 8998. 7s. 1d. upon the estate; that the true income, therefore, amounts to L. 10,515. 10s. 1d. He then states, that the capital of his debts, the interest of which is stated in the account as a deduction, is L. 29,576. 19s. 11d. Your Lordships will permit me to observe, that it is the interest of this debt which is stated as a deduction; but the capital of this debt is what the father owes to the creditors, and the capital of this debt being a sum of L. 29,576, in considering this question, what is or is not a fit allowance, one should think it natural and proper to have regard to that fact, that the person who had that income owed a debt amounting to pretty nearly three years' gross income of his estate; and that, in considering what it was proper for him in a moral view as a parent to do in respect to his children, it was not altogether unfit to have it considered what in a moral view, as between the father and his creditors, he ought to do for those creditors when he is determining what he ought to do with respect to his children; and this the rather, because, unless I misapprehend the circumstances of this case, this gentleman has not the power of charging for those creditors one shilling of that capital upon the estate: and how far the Court, judicially determining what it is fit for a moral man to do, is to say, You shall not make a just provision for your creditors, but you shall make a certain provision for your children,—is a question which may admit, to say the least of it, a great deal of consideration.

Then he says, there are claims likewise for damages brought against him by the upper heritors on the river Tay, on account of the tenants of his salmon fishings having used stake-nets, and those are now in dependance: That there is likewise in dependance an action at the instance of William Maule, Esq. of Kilminny, against him for eviction of parts of his estate;—what parts of the estate those were in respect of which that action was brought, does not appear in the condescence. Then he says likewise, that he was a cautioner for different friends to the amount of a great many thousand pounds, the effect of which it is impossible to estimate; and certainly one should apprehend some regard ought to be had likewise to the consideration of this fact.

My Lords,—When the learned Judges came to decide what was to be done upon this condescence, they seem to have formed very different opinions. The mode in which this allowance was made by the Court, was represented at the Bar to be something like an auction. The *Lord President* says, 'You have the condescence by Mr Maule; the statement is acquiesced in; the free income comes to be clear about L.10,000 a-year;—that is a proposition to

June 1. 1825. which I think it is a little difficult to agree to, considering what has been stated in respect of the debt. ‘ You have now to discharge the disagreeable duty put on the Court by the law, of putting our hands into another man’s pocket. There is no help for it; but the Court is always very properly as moderate as possible in exercising such power; perhaps about L. 600 a-year is a proper aliment to be awarded in this case.’ Then another Lord of Session says, ‘ I think it rather too little—the sum to be awarded this gentleman should be L. 800 per annum at least, or L. 1000. I really conceive the allowance proposed is too small; L. 100 over or under cannot be of much consequence to the father. We all know we must make this aliment suitable to the condition and society of the parties; and we all know how little way a sum of this kind goes in a particular sphere of life; and there is no impropriety alleged or insinuated as to the son’s conduct.’ My *Lord President* observes on that, ‘ He has no family.’ The Lord who mentioned L. 1000 then stated, ‘ It is material a young man of that rank should keep a certain rank of life. A certain kind of manners are only to be acquired in a certain society,—all the learning in the world will not give them,’ that is, the manners; ‘ and that society is not to be kept but by a certain expense; even the common necessaries of life are a source of considerable expense to persons in that rank of life. I confess I think we should award a larger sum than that which has been proposed.’ Then my *Lord President* says, ‘ What do you say, Lord Gillies?’ *Lord Gillies*, ‘ I am ready to acquiesce in any thing which your Lordship suggests; I have nothing to say.’ Then *Lord Hermand* said something, but the reporter could not hear it. Then *Lord Gillies*, ‘ L. 700.’ *Lord Balgray* says, ‘ I would prefer L. 1000. It is the meaning of the Court to give a suitable aliment.’ *Lord President*, (to *Lord Gillies*) ‘ L. 800?’ *Lord Gillies* nodded assent. The *Lord President* then said, ‘ The Court awards L. 800.’

My Lords,—This case will fall to be determined by reference to the Act 1491: that statute which has been referred to is the 25th statute of the reign of James IV. passed in 1491. The words of that statute are these:—(Here his Lordship read the statute).

This Act of 1491, I see, it has been contended, applied only to cases in which personal estates were in ward; and that has been insisted upon considerably, not only from what is in the beginning of this short statute, but more particularly from what is at the end of it; ‘ and ane reasonable living to be given to the sustentation of the air, after the quantitie of the heritage, gif the said air has no blanche ferme nor feu ferme land to susteine him on, als weil of the waird’s lands that fallis in our Sovereign Lorde’s handes as ony uther.’ And it is contended, with a good deal of colour of reasoning, that if we had been talking in 1492, we should have said that this statute really meant only to provide for those cases in which an estate was in ward, and that there the person who had the estate in ward was to give a reasonable sustentation to the

heir whose estate was in ward, provided the heir had nothing else out of which he could be sustained: but there appears to be in the beginning of this statute these words, 'lands given in conjunct feftment or liferent, als weil to burgh as to land.' And although the last clause of the statute seems, in the terms of it, to have no reference whatever except to estates left in ward, those formal words, 'lands given in conjunct feftment or liferent, als weil to burgh as to land,' have been construed to create an obligation in this way on the possessor of the conjunct feftment and liferent to sustain, by a stipulated allowance out of the heritage, the person who was to take after him. June 1. 1825.

My Lords,—I may have occasion, in the course of what I shall have the honour to address to your Lordships, when we come to look at the text writers, and the cases on this subject—and many of the text writers treat on the subject,—and the cases being very very many upon the subject, all of them, to the best of my power, I have made a point of reading,—I shall have occasion to point out to your Lordships, from some of the cases which occur in the text writers, or the cases themselves, that they admit that the Court of Session have, in the progress of their proceedings, applied this statute as the rule of what they are to do in cases to which, as it appears to me, the statute has no reference, unless you can say they are in *pari ratione*, and on that principle, that you could so apply them. Give me leave to remark in this stage, that if we were talking in the year 1492, it could not be contended that Mr Maule the father has the estate of his son in ward, nor could it be contended that Mr Maule the son had a contingent fee, nor that Mr Maule the father was a liferenter of this estate, for he is the absolute feoffer of the estate, subject to what is contained in the deed of entail, as it seems to me; therefore, regard being had to what is the interest of the father in this estate, and what is the interest of the son in this estate, the question for your Lordships to decide will be, Whether this decision of the Court of Session is right upon the ground of any obligation that arises out of the settlement, or out of the nature of the estates which they might respectively be said to have? if these are the proper terms to apply to a case where one has the whole estate, and the other (the son) will have a right to have the whole estate? or whether this decision is right upon the ground of the *jus naturalis*? and whether it is right as to such doctrine as would obtain in any system of law, rather upheld as the system on which the Court of Session is to act upon the *jus naturalis* of the son, as contrasted with the *patria potestatis* of the father? for it may, perhaps, become a matter of some difficulty, of more difficulty I confess, as it strikes my mind, than it has appeared to those whose decision and whose doctrines I have had occasion to look into, how you are to infer either from the Act of Parliament, or by analogy from what you find, that, in respect of persons who have estates expressly referred to in the Act of Parliament, or who have property which is not expressly referred to in this Act of Parliament, you are at liberty, *pari ratione*, to fix

June 1. 1825. on one person having the estate, an obligation in respect to another person that may hereafter have the estate. On what is that to be founded, unless there is some pure, unlimited, and unfettered discretion in a Court of justice, to say they will create analogy between cases of that sort, and the cases where the father is intrusted by nature with the education of his son while he is a minor? The father must, as it seems to me, because he is intrusted with the education of his son, be, in all human probability, as much better judge of what is proper to be done at the time he becomes a major, than any Court on earth can be.

I think I have now stated to your Lordships enough to bring to your knowledge what the question is in this case. It is impossible to discharge one's duty without humbly calling on your Lordships for the application of a good deal of time to the consideration of stating what must be stated on the subject in matter of doctrine. I shall therefore conclude to-day; by only stating again to your Lordships, that the real question, as it appears to me, is this, Whether, in such a case as this, under the particular circumstances of such a case as this, the *jus patriæ potestatis* in this family no longer belongs to Mr Maule, but belongs to the Court of Session? and whether, in the suit instituted by the son after he became major, there is this discretion to the Court of Session to judge, *pro hac vice*, what shall be done between the father and the son;—that the Court of Session has (what it must necessarily have, if this decision be right) a right to say from this moment, until either the father or the son shall drop into their graves, what is the extent to which the son is to have, or is not to have, a demand on his father to participate in the enjoyment of his property, regard being had to all the circumstances which affect that property? That is the question that your Lordships have to determine; and let it be remembered, it is a question which goes to all land-owners in Scotland, whatever distinctions may be taken between land-owners and claimants of money; for there is a distinction between land and money in this respect. It is a distinction which, when taken, may nevertheless affect monied property; and while that distinction has effect, it is a distinction which ought to be acted on, and it seems difficult to say, that many of the cases reported do not prove that the distinction has existed. I have looked into those cases, which are cases that require a good deal of consideration of another nature; for where your Lordships know, that, by the practice, there is a sort of discretionary right which has been declared in matters in Scotland as to the doctrines of trust, and as to portions of children, and in respect of many other matters which are rather considered in this country as matters to be decided in a domestic forum than in any Court of justice, we must take care, whatever our decision in this case is, not to touch much upon what may be called the established law of Scotland,—repeating again, as I did at first, that whatever might be your Lordships' opinion on the law as applied to this case in judgment, if it be the law, you must

not alter it in judgment. But when one puts the question in that way, one is fairly entitled judicially to say, that if the law be attended with all the consequences, to which I hope I did not do wrong in adverting, before you affirm that such is the law in this particular case, you ought to be really satisfied that it is the law in this particular case. June 1. 1825.

**LORD CHANCELLOR.**—My Lords, In this case of Maule and Maule I have already endeavoured to state to your Lordships the facts of the case, for the purpose of satisfactorily explaining the nature of the questions your Lordships have now to decide; and in stating the deed of entail which is mentioned in this case, I have particularly taken notice, that the Earl of Dalhousie was a liferenter, and that the father of the present respondent had an estate destined to him and the heirs-male of his body. Taking notice therefore of the distinction, that he was not merely a liferenter, I have also pointed out to your Lordships' attention that the author of this entail had directed that Mr Maule was to have L.500 sterling when he reached the age of fourteen from Lord Dalhousie as liferenter; and when he came to the age of twenty-one, he was to have an additional annuity of L.500, making L.1000; and in case he married, he was to have a further additional annuity of L.1000, making in the whole the sum of L.2000 sterling yearly; and I take notice of this circumstance, because I observe it in the notes of the Judges which we have as to what passed in the Court of Session; some of the Lords of Session allude to this circumstance as a circumstance upon which they might very much rely in directing the augmentation of alimony which their decision has given to Mr Maule the respondent.

Now, my Lords, the author of this settlement that created Lord Dalhousie a liferenter on whatever estate he had, being the author of this settlement, might direct any payment he thought proper to be made to any particular object of his bounty,—that forms the law between these parties; and to argue from the instrument that creates the obligation upon a particular person to whom the bounty is given, the gift of the estate—to argue from that obligation, resting upon him by the express terms of the entail, that therefore an obligation of a like kind, though not of a like extent, should rest upon others who are to take the properties under the same entail, where no such direction is given, appears to me not a very conclusive way of arguing that question as to them. What obligations they are under, is not to be inferred from the obligation in the entail. Where there is an express obligation upon one person in a deed, but which omits to throw any obligation upon the other, it is very difficult to argue that the other was under the same obligation, as no such obligation was expressed in the instrument; and upon the papers before your Lordships, your Lordships will discover there is a provision about the heirs of tailie coming into possession of the peerage, and that this estate is to be divested when they come to the age of fourteen; and therefore, although there was no

June 1. 1825. divesting directed as to the Earl of Dalhousie, there was a divesting under which this estate would have gone to a person when he arrived at the age of fourteen, and that would account for the obligation in the one case and not in the other.

But, at all events, the question decided in these interlocutors must be a question that turns upon the law of Scotland, and not upon the rule given in this entail, as to the person with reference to whom no such provision is made; therefore, if the decision now in question is right, and I do not repeat to your Lordships the extreme importance of it as to family settlements, it must be right under the construction of the Act of 1491, or it must be right upon the doctrine of the *patria potestas*, the obligation that a father is under *ex debito naturali*, and the relation in which children stand to him by the *jus naturale*, to make or not to make such provision, as it is contended in this case has been adjudged ought to be made by a father for a son above the age of minority, or a gentleman having a commission in the King's service, and having an allowance to the extent I have mentioned on a former occasion from that father; and I would observe again, upon the terms of these interlocutors, that they direct the father to give in an account of his free income. Now, if the Court has a jurisdiction to say that a father shall, during the joint lives of himself and his son, make such an allowance to that son, not as he the father thinks right, but as the Court of Session think right and suitable to the rank and fortune of the father, and the expected rank and fortune of the son, it does appear to me there ought to have been a great deal more inquiry made as to what constituted the free income of the father; because, if the father is by the *jus naturale* bound to provide for one child, he is bound to provide for all his children; and he is bound, not by the *jus naturale*, but by every moral view, to take care of his creditors. He must attend to all his relations in life, to know the extent of the obligation resting upon him that arises from any one particular relation. And accordingly it must be quite obvious, that if the Court has jurisdiction in 1824 in the case of a father having an eldest son, who had attained his age of majority, and eight or ten other children in their minority, but who may, from time to time, in the course of that minority, require, for the purposes of education and sustenance, more and more from the father, where the demands are increasing upon him from time to time,—in order to see if you have this sort of jurisdiction, as what is right between the father and son, you must judge what obligation the father is under as to all the others, upon the same principle upon which a son, as a son, can form a demand upon a father, as a father. I observe in the reasoning upon this, there is a great mixture of the consideration as arising out of the Act of 1491, and the *jus naturale*; it becomes necessary therefore just to put your Lordships in mind again, that Mr Maule is not a liferenter,—that Mr Maule is not a person having an estate in his possession which may be said to be in ward.

The Act of 1491 runs in these words:—(Here his Lordship read

the statute). The words which are in the former part of this Act of Parliament, 'lands given in conjunct fee or liferent,' are expressions that do not suffer much by the concluding words in this Act, because the concluding words, *prima facie* at least, apply to no one but the heir whose estate is in ward to the King. That has, however, been long applied in Scotland to the case of a liferenter, and what that liferenter's obligations are in respect to the heir to take after him. There has been a good deal of reasoning in this case founded upon those decisions, which apply to the case, not of a superior who has got lands in ward, but to a liferenter with respect to the person who is afterwards to take under the same vestment.

My Lords,—It is impossible, I think, not to perceive and to feel, that in arguing a case where a father is neither liferenter, nor has an estate in ward, that the principles of this Act of Parliament, which have been alluded to as furnishing something of a rule as to the nature and extent of the obligation that arises from the rights and duties of a parent, and as applying to the *patria potestas*, has no relation to a consideration of that kind: and I cannot help feeling what is stated in one of the cases under the head of aliment, (*Lyon against Gray*, 16th January 1712), that Sir George Mackenzie, in his observations on that Act of Parliament, reasons against the extensions that have been made of the doctrine with great freedom; that the decisions on which the authority *rerum judicaturum* stands, have not been uniformly one way: but this is the fate of all decisions that arise from no certain principles of law; and as to such, all occasions are to be taken to restore them back to the true principles of justice and equity. In truth, that may be said of all judicatures; and therefore I desire not to be understood as applying this observation to the judicatures of Scotland alone: but there certainly have been very considerable stretches of authority adopted with reference to Acts of Parliament, the language of which is quite clear as to the cases to which those Acts ought to be considered as applying; for instance, here to the case of an estate in ward, or taking the Act to apply to a liferenter, or the heir of the heir of a liferenter, you have reasoned upon the principles that the Legislature have applied to those particular cases, to form rules and adopt measures which such Acts of Parliament by no means authorized you to adopt: and I cannot help, therefore, thinking, that in the present case the question before your Lordships is this, whether, under the circumstances of the present case, regard being had to all the decisions you can find—taking this case as a case between father and son, as a case where the father is not a liferenter, where the father has not the son's estate in ward, but where the limitation of the estate being to the father and the heirs-male of his body—you can apply those principles that have been applied in the construction of the Act of 1491, to a case in which it seems to me the obligations to be fixed upon the father are obligations which must be taken to arise from the *jus naturale*, and not from the circumstance that



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that the estate in possession is so and so. The question then would be this, whether all the decisions taken together are decisions that authorize you to say, that the Court of Session is empowered, upon the principles of the *jus naturale*, and the doctrines that belong to the *patria potestas*, where the eldest son is provided for, whether they have a right to assume, in a case circumstanced precisely as this case is—for I desire not to be understood to give any opinion upon any case not exactly the same in its circumstances—whether they have a jurisdiction to say, Mr Maule's eldest son being provided for by a commission in the army, and having an allowance of so much a-year from his father, “ We do not think that allowance is what Mr Maule ought to make to him, regard being had to his rank in life, and to the quantum of the estate which Mr Maule his father has ; and we will, therefore, take upon ourselves to say, in a suit instituted in any given year, that we will administer as between the father and the son the portions—for in truth it comes to that,—the respective portions in which that estate is to be enjoyed between the father and the son during the remainder of the joint lives of both ;” an administration which it is perfectly incompetent for the Court to take upon itself to make, without examination at the time the parties come into Court, and by examination from time to time, and at a variety of times, when any one thinks proper to apply to the Court, into the circumstances of the father as well as the wants of the son.

My Lords,—To state that there are not cases—nay, not many cases—which go to shew that, upon some ground or other, jurisdiction to this extent has been assumed, is a great deal more than can be alleged. On the other hand, if you look at the cases, taking them altogether, the impression upon my mind is extremely strong, that they are very contradictory in this respect. I think you will find a case in which a person, placed in the military service, was held to be provided for ; and there is a case applying to a gentleman at the Bar, where a mother having brought her son up to the Bar in Scotland, after he was an advocate,—I think it is the case of a mother and son, but it makes no difference,—he applied to the Court of Session to call upon her to give him aliment, which they did. We have sometimes heard—I dare say there is no truth in it—that when questions formerly arose in our Courts upon dower and courtesy, it was asked, how comes it that the husband has courtesy upon the wife's equitable estate, but the wife has no dower upon the husband's equitable estate ? The only answer that has been given to that is, that the Judges were males and not females ; and, therefore, they decided in favour of themselves when they decided against the other sex. Whether that had any effect upon the Judges in that case, I cannot undertake to say, but they give a reason perfectly founded in truth for what they do. They put that case upon this—and I know it in my own person to be perfectly true—that if a gentleman bring his son up to the Bar, in as much as the race is not always to the swift, nor the battle to the strong, there is many an advocate,—I do not say of myself the few

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words that follow,—there is many an advocate who deserves to be employed, who is not employed at all: One part of that has been illustrated in the case of the person who is now addressing your Lordships—whether he deserved any employment is another thing: But in that case the Courts go upon this, that a parent having placed his son in a respectable profession, the son, deserving a great deal of employment but having none, and being unprovided for, they conceive the parental obligation to exist as between the father and the son, though the son is at years of majority, if the son is not otherwise provided for. Your Lordships very well know, in that respect, the law of Scotland goes a great deal farther than our law goes, because the obligation of the father to maintain the child is of a very small extent in England, after he comes to years of majority; but the true question is, whether all the circumstances put together do prove this, that the Court has a right, in a case where the circumstances of it are precisely such as are the circumstances of this case, to go the length that the Court of Session has gone.

My Lords,—See how it is reasoned with respect to the persons in different situations of life. It is said, that a father who brings his son up to the army, must make such a provision for him as will enable him to travel all over the world to see the works of art—foreign countries: He must be a great mathematician, and learn every thing,—that his father must be at the expense of all that. They say indeed, (and here I cannot agree with them), that the law is learnt all at once, but that military service cannot be learnt except in a long course of years. I do not know how it may be as to Scotch law, but I have been very nearly fifty years in learning English law; and if I am to admit the justice of the remarks of other persons who know very little of law, but are very ready to express their opinions,—if I am to accede to their opinions, even at this period I know very little of it,—that I have forgotten a great deal of it is most certain,—but I cannot agree that a legal education may not require as much time as a military education. Of the one I know a great deal,—of the other I know nothing except when I had the honour of being a volunteer in the Lincoln's Inn corps; but it does appear to me from what I do know of it, that I could learn to be a soldier much sooner than I could learn to be a lawyer; and therefore I take the liberty of differing from the learned Judge who has expressed that opinion. But, upon the whole, it does appear to me, that the circumstances do not authorize the Court to go to the extent that they have gone. To go through the whole of the cases would be only reading to your Lordships the decisions that are to be found in the books,—the question is, whether it is possible for you to say, that a Court of judicature is to take upon itself, in a case circumstanced as this case is—and I desire to have it again expressed, that I confine my opinion to this particular case, and this particular case only, taking leave to say that I do so, because, though I find a great many cases that go much farther, I think, than in pro-

June 1. 1825. bability I should be induced to go, yet there are cases which, from what has been said, we shall be obliged to hear, but I do not think any case has been established that calls upon your Lordships to affirm this judgment to the extent of this judgment; and upon these grounds I cannot think that it is advisable that your Lordships should say, under the circumstances of this case, that the law of Scotland has, with respect to the family of this Mr Maule and his son, put matters into this situation, that the judgment and the discretion of the father no longer belongs to him, but that that judgment and discretion, as long as he lives, is to be exercised in a Court of justice, and that you are to remit to a Court of justice from the moment the son comes to the age of twenty-one. Under the circumstances that this young gentleman stands, you are to place in a Court of justice the right to decide upon the manner in which a father shall administer his estate and property between his eldest son, his creditors, his younger children, and all others to whom he owes a natural or moral obligation, during the rest of their joint lives,—is a proposition I cannot hold; and I only repeat what I said before, that if I found it so decided in any case that had a direct application to the present, (although I think if such a law existed it ought not to be suffered to endure a moment longer, but it must be corrected by the Legislature), still I do not think there is any thing that compels us to adopt that decision, when we are acting, not as Legislators, but as Judges; and therefore, in my opinion, this defender ought to be assoilzied.

LORD REDESDALE.—My Lords, Before I say any thing as to the case now before your Lordships, I would say a word upon the accusation which has been brought against Courts of Equity, for having determined that women are not entitled to dower of their husband's equitable estates, but that men are entitled to courtesy upon the equitable estates of their wives. That was a question that was very much considered. The Judges at first determined otherwise, but they were compelled to alter their judgment for this reason, because there are certain persons called conveyancers, who have been, for a vast length of time, advising purchasers that they might take estates of that description without being liable to dower, the husband being capable of alienating the estate without the wife; but with respect to courtesy, the wife could not alienate the estate without the husband. I have often heard the same thing observed, and I think it is a false accusation against the Judges of the Court of Equity, as many of those accusations are.

The question in this case is really whether, by the law of Scotland, a child can by this suit compel a parent to make an allowance for the maintenance of that child? and supposing such suit can be instituted, and the parent can be so compelled, in what circumstances, and to what extent, that is to be done?

My Lords,—This has been argued upon two grounds,—the moral

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obligation of the parent to maintain his child, and the supposed obligation, also arising reciprocally upon what we find in the cases the supposed law of tenure under the law of Scotland, as is to be collected from the statute 1491, which has been mentioned by the noble and learned Lord. The moral obligation is, I believe, the law of every country, that is, that the father is bound to support his children so far that they shall not be a burden upon others. That is the extent of the obligation, according to the law of most countries, as far as I have been able to ascertain. My Lords, accordingly, whatever may have been the cases which have been determined, some of which go one way and some another, it does seem to me that the rule is properly laid down by Lord Kames, that the whole goes to this,—support beyond want,—and that all that is beyond that is left to parental affection. And if we look into the text writers, Stair, Bankton, and Erskine, all seem to hold the same language; and therefore the construction I put upon the cases that have been decided seems to me to be that which was the construction put upon them by my Lord Kames. That the decisions are various is perfectly true; but when that conclusion is drawn from them by all the text writers upon the subject, it does appear to me that that is what your Lordships ought to abide by.

My Lords,—There has been a considerable allusion to what is the doctrine of the civil law. As far as I have been able to look into the doctrine as laid down by the writers upon the civil law, the writers of various parts of Europe, they all lay down the same rule,—that all that a parent is obliged to do is to take care that his child shall not be indebted to the charity of others; that the charity belongs to him, and that he shall not throw the burden upon others. My Lords, that that may be different as to persons in different circumstances, and in different situations in life, is perfectly true. Suppose a person of high rank is without the means of maintenance, and he is thrown upon the charity of others, the amount of that charity will be very different in that case to the amount of charity that in such instances would be bestowed upon the child of a labourer; but that is the whole difference according to what I can collect either from the civil law or the commentators upon the civil law, and other writers, or the text writers upon the law of Scotland. That this case goes infinitely beyond that is unquestioned, for the provision made by Mr Maule for his son was purchasing for him a commission in the army, and an allowance of L. 100 a-year. Is it possible to say, under those circumstances, the son is in want? Prima facie there is no obligation to go beyond that. Upon what is the obligation to go beyond that founded in this case? Upon the extent of the father's property; and for that purpose the Court goes into a minute inquisition as to what is the income of the father, as the noble and learned Lord has observed. They have not entered into an inquiry what are the other obligations of the father, although it should appear to your Lordships he is in debt to the amount of L. 30,000, for which he has not any means of payment but his interest in this estate, which

June 1. 1825. will terminate with his death, and may terminate sooner, if he has the misfortune to become a peer instead of a more affluent commoner.

The statute 1491 has been observed upon in this case in a most extraordinary way; it is most clear, that it has no relation whatever to the case of a liferenter. It has no relation whatever. The title of the statute is—though I believe the title is not a part of the statute—the title is, ‘The wardator sall not destroy the landes, he sald susteine the minor;’ and it is ordained, ‘that where any land or landes happen to fall in ward to our Sovereign Lord, or any other Baron of this realm, spiritual or temporal, or lands given in conjunct feofment or life-rent,’ he shall maintain the minor. Therefore this title shews, that the person who corrected this statute, and gave it this title, meant the maintenance to apply to the wardator, that is, the person who had the lands of the minor in ward, and by the very law which gave him a right of ward, compelled him to sustain the minor: it was as much an obligation upon him to sustain the minor, as it was under the entail of this estate for Lord Dalhousie to sustain Mr Maule; it was part of the law under which the wardator held the lands; and therefore to say that, by the language of this statute, the liferenter is to maintain a person who is no relation to him—for that is the reasoning, that if the person is liferenter of an estate, the next taker is entitled under this statute to maintenance—is the most monstrous misconstruction of an Act that was ever brought under the view of a Court of justice; it is clearly so treated by the ablest writers, and particularly by Sir George Mackenzie,

My Lords,—Only conceive what is the consequence that would arise from your affirming this decision. Would you not give a ground for every child in Scotland to call his father to an account for not making a sufficient allowance, and to compel the father to disclose all the circumstances of his own affairs, my Lords? a disclosure that might be attended with very mischievous consequences to him?—compelled to do more in many cases, perhaps to disclose all the misconduct of his son, which might shew that the very embarrassments of the father had been produced by the misconduct of the son, or by the misconduct of other children; and a variety of circumstances which really make this appear to me one of the most dreadful cases that can be conceived. I am bold to say, that if this is the law of Scotland, I should be sorry to be under the dominion of the law of Scotland. But I take it not to be so. I take it that the statute has nothing to do with the subject. I take it that the decisions, contradictory as they may be, are against what has been laid down in this case; and that all the text writers upon the subject hold doctrines extremely different from what has been held in this case.

My Lords,—Looking at what has been attributed to have fallen from the Judges in this case, I think it is impossible not to feel the greatest regret that any such expressions should have passed; because it strikes me, that if you are to attend to all the circumstances that

are laid down as the grounds of decision, the endless variety of opinions that are formed upon the subject, no two seeming to agree, we shall leave the law of Scotland in a state of uncertainty, dreadful to every body in the situation of a parent, and mischievous to every one. Upon these grounds I agree with the noble and learned Lord, that the judgment ought to be reversed, and the defender assoilzied. It is a case between father and son, and therefore no costs should be given. June 1. 1825.

*Appellant's Authorities.*—3. Ersk. 9. 16, 17.; Kaimes' Pr. Eq. p. 80.; 25. Voet, 3, 4.; Maidment, May 27. 1818; 6. Dow, 259.; Mack. Ob. p. 101.; Moncreiff, Jan. 27. 1736; 3. Stair, 5. 3.

*Respondent's Authorities.*—Dig. 25. 3.; 1. Stair, 5. 7.; 1. Ersk. 6. 56.; 1. Bank. 6. 13.; 4. Bank. 45. 17.; Dick, Jan. 13. 1666, (409.); Aytoun, July 25. 1705, (390.); Ramsay, July 1. 1687, (391.); Adam, March 1662, (398.); De Courcy, July 3. 1806, (No. 8. Ap. Aliment); 2. Craig, 17. 20.; 25. Voet, 3. 3.

J. CAMPBELL—J. RICHARDSON,—Solicitors.

Duke of GORDON, Appellant and Respondent.  
*Adam—Abercrombie.*

No. 32.

Reverend JAMES GILLAN, Respondent and Appellant.  
*Keay—Wilson.*

*Teinds—Title to Pursue—Process.*—Found, (affirming the judgment of the Court of Session), 1. That a decree of approbation of a sub-valuation, pronounced in absence of the minister of the parish, may be competently challenged by reduction. 2. That the feudal proprietor is the proper pursuer of an action of approbation. And, 3. That the minister who has been presented to the parish, and his presentation sustained, but who has not been inducted at the date of citation, and not the moderator of the Presbytery, is the proper defender.

IN 1629 the whole teinds of the parishes in the presbytery of Elgin, including specially the parishes of Dipple and Essil, were valued by the sub-commissioners. These two parishes were afterwards united, under the name of Speymouth, to which the lands of Garmouth, lying in the parish of Urquhart, were subsequently annexed, quoad sacra. The property of these united parishes belonged to the Earl of Fife; but, in 1779, his Lordship exchanged them with the Duke of Gordon, who entered into possession at Whitsunday in that year. Lord Fife, still remaining feudally invested on his infestments,

June 7. 1825.

TEINDS.

Lord Meadowbank.