

*(Ex debito naturali.)*

Ordinary on the bills, to hear parties procurators upon the quantum of the said aliment."

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

A&C. Dean of Faculty et Cullen.  
Clerk, Colquhoun.

Alt. Lord Advocate, M<sup>c</sup>Cleod Bannatyne, et W. Campbell.

Stewart.

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

1756. January 16.

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

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

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

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

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A son succeeding to his father, as heir of an entailed estate, found not obliged to aliment his brothers and sisters of a second marriage.

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to be effectual against a man's heir, except in the case of a brother. Thus, although the Crown, taking by forfeiture, is *successor titulo lucrativo* to the forfeiting person, yet the Crown was never found to be obliged to aliment the children of the attainted person; and therefore it is rather the near relation which is betwixt brothers and sisters, than the representation of the father, that is the foundation for giving the aliment.

*Replied* for the defender: That by the law of nature, there lies an obligation on those who are able to give charity towards the alimending of persons in indigent circumstances; but by no civil sanction is this obligation enforced, nor its extent ascertained: And to load one person with the burden of the whole aliment, even of his nearest relation, were unreasonable, except in the case of parents and children.

A father is bound to aliment his children; if he refuse, the laws of this country will compel him; and the obligation which the laws render effectual against the father in his lifetime, can also be made effectual against his representatives: this Court, therefore, has often found, that an elder brother was bound to aliment his father's younger children; because he represented his father *passive*; and the putting the judgment upon that *medium*, was in effect finding, that had he not represented his father, he would not have been liable in such aliment. The case of a forfeiture is singular; and there the Crown is not bound to aliment the children of the attainted person; because the forfeiture cuts off or corrupts the blood; so that the children can claim and enjoy nothing by or through their father.

There is no arguing from the relation betwixt parents and children, to the relation betwixt brothers and sisters; the relations being altogether of a different kind: And if a brother should be found liable to aliment his brothers and sisters, by a parity of reasoning, failing brothers, cousins would also be liable; for their relations differ not in kind, but in degree.

'THE LORDS found no aliment due.'

A.G. Wedderburn.

Alt. Hew Dalrymple.

Fol. Dic. v. 3. p. 24. Fac. Col. No 176. p. 263.

Bruce.

1759. March 8.

MARY SCOT, against MARY SHARP and her HUSBAND.

No 73.  
A daughter who was executrix and universal legatar to her mother, found liable to ali-

MARY SCOT brought an action against Mary Sharp and James Lumfden of Ranniehill, her husband, for an aliment, founded upon the following grounds:

That she was the only daughter of Lady Mary Sharp, by her first husband Mr Scot of Haychester: That Lady Mary was again married to Sir James Sharp, by whom she had a son, who predeceased her and the defender Mary Sharp: That