

# APPENDI

## PART I.

### ALIMENT.

1796. November 19.

Dr. WILLIAM SPENCE, against DAVID MURRAY, Trustee for the Creditors of George Cairncross.

Dr. WILLIAM SPENCE, in a process of aliment against his daughter, obtained decree for £12 yearly.

She was at that time a widow, and her chief source of income was an annuity of £52. 5s. payable by the representative of her deceased husband.

She afterward married George Cairncross, who became bankrupt, and assigned the annuity to his creditors.

In a multiple-pounding, raised in the name of Mrs. Cairncross's debtor in the annuity, the competitors were Dr. Spence, for the annuity awarded to him by the Court; Mrs. Cairncross, for an aliment to herself; and the trustee for her husband's creditors.

The Lord Ordinary "found Dr. Spence's claim preferable upon Mrs. Cairncross's annuity to the claim of her husband's creditors, in respect that annuity fell under the *jus mariti* of Mr. Cairncross, with the burden of his wife's debts; but *quoad ultra*, preferred the claim of Mr. Murray, as trustee for Mr. Cairncross' creditors."

Mrs. Cairncross acquiesced in this judgment; but the trustee, in a reclaiming petition,

Pleaded: The amount of a claim for aliment depends on the circumstances of the person liable to it, and the claim ceases entirely when he becomes unable to support himself. If therefore Dr. Spence had not made his claim for aliment till after the bankruptcy of Mr. Cairncross, it must have been wholly rejected. Nor did the decree obtained by him alter the nature of his claim. It merely fixed the sum which, in the circumstances of his daughter at the time, it was

#### No. 1.

A father having obtained a decree for an aliment against his daughter, whose income arose chiefly from an annuity payable by the representative of her deceased husband, and she having married a second husband, who became bankrupt, the father was preferred on the daughter's annuity to the husband's creditors.

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

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

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

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

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

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

1799. February 19.

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

No. 2.

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

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

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

In defence, Sir John and his tutor

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