

1750.

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JULIA HOG, and Others, - - *Appellants.*
 JOHN HOG, of Cammo, and MARGARET, his Daughter, - - } *Respondents.*

27 March 1750.

BENEFICIUM COMPETENTIÆ.—Circumstances under which *beneficium competentiæ* refused to a grandfather in a question with his grandchildren, claiming under their father's marriage contract. (Judgment in absence.)

[Elchies, *h. t.* No. 3.—Mor. 4862 and 1390.]

JOHN HOG, senior, in the marriage contract of his son John, settled a jointure of L.150 upon the wife, and conveyed his lands of Ladykirk and Cammo, with other heritable and personal property, (specified in a rental and valuation under his own hand) under the burden of his own debts, in favour of his said son and the heirs-male of the marriage; reserving to himself a certain liferent annuity, and under the burden of L.1000 to his younger children, in terms of a bond of provision granted of the same date. By the contract, John, (the son) obliged himself and his heirs, in the event of there being no son of the marriage, and of there being three or more daughters, to pay to them the sum L.2500, to be divided as he should think fit.

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The marriage was dissolved by the death of the husband, leaving issue four daughters, the appellants; but before this time, it had been ascertained, that the representation made by Mr. Hog, se-

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nior, of the amount of his estate had been extremely erroneous, the funds being considerably less, and the debts greater than he had stated them to be. Mr. Hog, younger, had, in consequence, been obliged to sell the bulk of the estate, so that at his death the only funds remaining were, *first*, some small heritable subjects, the rents of which were insufficient to pay the widow's annuity of L.150; Mr. Hog, senior, was infeft in these subjects in an annuity of L.90, instead of his reserved liferent in the lands which were sold; but it was admitted that the widow's jointure was preferable to this. *Secondly*, the sum of L.1000, being the balance still due by the purchaser of Cammo, and which was burdened with the provision made to the younger children of Mr. Hog, senior.

In these circumstances the tutors of the appellants, being advised that their claim under their mother's marriage contract for the provision of L.2500 was preferable to the interests of Mr. Hog, senior, and of his children under the voluntary settlement made by him in their favour, adjudged the remainder of their father's property; and thereafter brought an action of reduction and declarator against Mr. Hog, senior, and his younger children, for declaring them preferable to the reserved annuity and bond of provision, and for setting the same aside, in so far as their interests were affected by them. In support of this action, it was urged, that as Mr. Hog's estate had turned out totally unequal to meet what he represented and undertook it to be sufficient for, the loss arising from such deficiency ought not to fall upon the innocent parties with or for whom he contracted, but ought to be deducted from the stipulations which he made in

his own favour; viz. his own annuity, and the revocable bond to his younger children.

Upon the report of the Lord Drummore, Ordinary, the Court (1 Dec. 1748,) “found the provisions in the contract of marriage in favour of the daughters of this marriage, are preferable to the reserved liferent of the defender, and to the provisions to his younger children; reserving to the defender to be heard how far he is entitled to plead the *beneficium competentiæ*, and remitted to the Lord Ordinary to hear parties thereon.”

A reclaiming petition being presented for the defender, and for Margaret, (the only survivor of the three children in whose favour he had granted the bond of L.1000, and to whom he had provided in lieu thereof the interest of 3000 merks Scots,) the Court (12 July 1749) “adhered to their former interlocutor, reserving to the said Margaret Hog to be heard upon her claim for the interest of the 3000 merks after her father’s death,” &c.

The parties having been heard upon these points, the Court, on the report of the Lord Ordinary, (25 July 1749,) found “the defender entitled in this case to the *beneficium competentiæ*, to the extent of a necessary aliment, which they modify to the sum of L.30 Sterling for himself, and during his life; and L.100 Scots money for his daughter Margaret, payable to the defender during his and her joint lives, and to herself after his decease during her life; and find the same is to take place from Martinmas 1744, and remit to the Lord Ordinary to hear parties as to the manner of making the said aliments effectual.” And they adhered, (1 Dec.)

Thereafter the Lord Ordinary, (16 Dec. 1749,)

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found “ the said John Hog preferable to the pursuers, in virtue of his liferent infestment on the aforesaid houses in Edinburgh, to the extent of the said sum of L.30 Sterling of aliment yearly, commencing from Martinmas 1744 during his lifetime ; and finds the said Margaret Hog also preferable to the pursuers to the extent of the said L.100 Scots, in virtue of the bond of provision from her father in favour of her and his other younger children, upon the principal sum of L.1000 Sterling and annualrents thereof, in Watson of Saughton’s bond, also commencing from Martinmas 1744 during her life, and decerns, &c.”

Entered,
19 Dec. 1749,
and 6 March
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The appeal was brought from part of the interlocutors of 1 December 1748 ; part of that of 12 July 1749, and from those of 25 July, 1 and 16 December 1749.

Pleaded for the Appellants :—They are onerous creditors under their mother’s marriage contract for the provision of L.2500 ; and as such clearly preferable to any interest reserved to Mr. Hog, senior, and to the gratuitous and revocable bond in favour of his daughter.

There are not in this case *termini habiles* for the *beneficium competentiæ*. The appellants are not making any claim against either of the defenders, or against any estate belonging to them. As creditors upon their father’s estate, they have attached the small residue of it, and upon that title dispute their preference with the defenders claiming against it.

The *beneficium competentiæ* is founded upon the supposed natural obligation of that party against whom it is pleaded to aliment the other party who claims it ; so that wherever there lies any relevant

defence against the claim of aliment, the same must *a fortiori* exclude the *beneficium competentiæ*. In the *first* place, the appellants cannot be obliged by any law in the world to aliment the defenders, because they have not a sufficiency wherewith to aliment themselves. In the *second* place, they are not primarily liable to aliment either of them. Mr. Hog has two sons in opulent circumstances, who, as in duty bound, do regularly furnish such supplies as are necessary for his own and his daughter Margaret's support; and while they live and discharge this obligation, the respondents can have no claim of aliment against the appellants. At all events, such a claim never can be competent to Margaret, who does not stand in such a degree of relationship as to afford any ground for it.

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“ No counsel appearing for the respondents, and
 “ the appellants' counsel having fully stated the
 “ case and facts, and having prayed a reversal ;”

“ It is ordered and adjudged, &c. that that part of
 “ interlocutor of the 1 December 1748, reserving
 “ to the defender to be heard how far he is entitled
 “ to plead the *beneficium competentiæ*, be, and the
 “ same is hereby reversed ; and that that part of
 “ the said interlocutor of the 12 of July last, re-
 “ serving to the petitioner, Margaret Hog, to be
 “ heard upon her claim for the interest of the 3000
 “ merks after her father's death be also reversed ;
 “ and it is further ordered and adjudged, that the
 “ said interlocutor of the 25 July, and 1 December
 “ 1749, be, and are hereby likewise reversed ; and
 “ it is also ordered and adjudged, that so much
 “ of the said interlocutor of the 16 of the same De-
 “ cember, whereby the Lord Ordinary found the
 “ said John Hog preferable to the pursuers, in vir-

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“ tue of his liferent. infestment on the aforesaid
 “ houses in Edinburgh, to the extent of the sum of
 “ L.30 Sterling of aliment yearly, commencing
 “ from Martinmas 1744, during his lifetime ; and
 “ found the said Margaret Hog also preferable to
 “ the said pursuers to the extent of the said L.100
 “ Scots, in virtue of the bond of provision from her
 “ father, in favour of her and his other younger
 “ children, upon the principal sum of L.1000 Ster-
 “ ling, and annualrents thereof, in Watson of Saugh-
 “ ton’s bond, also commencing from Martinmas
 “ 1744 during her lifetime, and decerned in the
 “ said preference, and assoilzied the defendants
 “ from the reductions, in so far as concerned the
 “ aforesaid liferents, be, and the same is hereby
 “ also reversed ; but without prejudice to any re-
 “ medy the said respondent, Margaret Hog, may
 “ be entitled to, in respect of any claim she may
 “ have to the annualrent or interest of 3000 merks,
 “ under the marriage-agreement, and bond of pro-
 “ vision in the appeal mentioned, after the death
 “ of the said John Hog, her father.”

For Appellants, *Alex. Lockhart.*

This case is founded on by Bankton, (l. 9. § 8.) without notice of the reversal.