

(OF THE ACT 1491.)

No 34.

in all modifications of aliment, the Lords do always consider the quantity of the liferent, the quality and circumstances of the liferentrix, &c.

*Answered* for the pursuer, That whatever tocher or provision she brought, makes no difference here; because, still the heir, at least under pupilarity, must be alimented, which is *provisio legis*, and by no paction can be evacuated: And as the law did openly intimate to her this act, as a burden which she was in hazard to undergo, she ought to have provided for his liferent suitably; for the rule is, that whatever portion of burden each liferenter have from the fiar's estate, and whatever the portions were that they brought, yet that since he finds them liferenters, they must contribute to his maintenance.

THE LORDS found the defence not relevant to affoilzie the step-grand-mother from contributing a proportion of the pursuer's aliment.

Act. Boswell.

Alt. Sir Thomas Wallace.

Clerk, Robertson.

Fol. Dic. v. 1. p. 31. Bruce, No 115. p. 143.

1729. July 12.

Lady ANN ALLARDICE, against MARY MILL, Relict of James Allardice of that ilk.

No 35.  
Contrary to  
No 32.

IN a pursuit, at the instance of an apparent heir for aliment, against his mother and grand-mother, liferentrixes upon his estate, the grand-mother was affoilzied, because she had formerly given down to her son, the pursuer's father, more of her liferent provision, than the Lords would have decerned to this pursuer, had her provision remained with her entire.

Fol. Dic. v. 1. p. 35.

An offer to 2-  
alimnt in fa-  
mily not re-  
levant.

By the case, the Heir of Kirkland against his Grand-mother, No 32. *supra*, an offer to aliment in family was found not relevant to elide the claim.

The same law was recognized in the case, Finnie against Oliphant, from Auchinleck, No 17. *supra*. That case is reported likewise by Durie; referred to be placed here to illustrate this principle, as follows:

1631. February 22.

FINNIE against OLIPHANT.

No 35.  
A mother li-  
able in ali-  
ment, and,  
having mar-  
ried a second  
husband, not  
permitted  
the custody of  
the minor.

A FACTOR for a tutor-dative, pursuing the mother for a modification, to be given yearly to the minor, for his entertainment; wherein the LORDS found, That albeit the defender bruiked no ward-lands of the minor, and that the minor had no ward-lands; yet, seeing she was liferentrix of all the minor's means, viz. Houses, and annualrents of money, that a modification ought to be taken there-

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of. And albeit the mother offered to keep and entertain the bairn herself, upon her own charges, yet that was not sustained, seeing she was married on a husband; and the tutor and his factor was found might nevertheless crave this modification; but consideration was had of the moveable heirship due to him, which proportionally bore a part of the modification.

No 36.

A&C. Nicolson.

Alt. Oliphant.

Fol. Dic. v. I. p. 31. Durie, p. 573.

1627. July 14.

NOBLE *against* NOBLE.

JOHN NOBLE, tutor to Alexander Noble, his pupil, having obtained the pupil delivered to him in presence of the Lords, by a preceding decret, obtained by him against the mother of the bairn, and her husband, detainers of the bairn for the time; he now pursuing the said pupil's mother and her husband, who was in feft in liferent, and was in possession of his whole lands; and who also had the gift of his waird and marriage, for an yearly modification, to be given for the entertainment of the said bairn; and the defender's compearing and offering to entertain the bairn herself, and to keep him:—THE LORDS admitted the mother's offer to entertain and keep the bairn herself; and found, in respect thereof, that the bairn ought to be delivered to her for that effect, and therefore that no modification ought to be given to the tutor; which was so found; albeit, that by a preceding sentence, as said is, against the mother, the bairn was decerned to be delivered by her to his said tutor; and that, conform thereto, the bairn was in the tutor's keeping; and also, albeit the mother was married with a second husband.

No 37.  
To the same effect with the above.

This was thereafter altered, and the bairn ordained to remain with the tutor, and the action for aliment sustained. (See TUTOR and PUPIL.)

Clerk, Gibson,

Fol. Dic. v. I. p. 31. Durie, p. 310.

1679. February 19.

SIBBALD *against* FALCONER.

SIBBALD of Kair, pursues Sir Alexander Falconer, donatar to his ward, for a modification for his aliment, both for bygones and in time-coming. The defender *alleged*, *imo*, Absolvitor from bygones, because aliment is only due in the case when the heir cannot be entertained otherways, as neither having feu or blench-lands, moveables, or calling; but here this heir was alimented by his mother; and is neither engaged nor distressed for satisfaction thereof, nor cannot for years since his pupillarity; because the Lords have oft-times found, That enter-

No 38.  
A donatar of ward, found liable to aliment the heir, whether he had introduced or not, unless he instructed how he was bar-