(OF THE ACT 1491.)

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.

Act. *Nicolſon.* Alt. *Oliphant.*

Fol. Dic. v 1. *p.* 31. *Durie, p.* 573.

1627. *July* 14. NOBLE *againſt* NOBLE.

No 37.
To the ſame effect with the above.

JOHN NOBLE, tutor to Alexander Noble, his pupil, having obtained the pupil delivered to him in preſence of the Lords, by a preceding decreet, 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 infeft 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.

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. 1. *p.* 31. *Durie, p.* 310.

1679. *February* 19. SIBBALD *againſt* FALCONER.

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

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*, 1*mo*, 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. red. An offer by him to aliment the heir in his own houſe, not relevant. An aſſignee to a gift of ward liable.

tainment of a perſon who can contract, infers no obligation, but is a mere donation without paction. 2*do*, The defender is but aſſignee to a gift taken by the Lyon, and can only be liable for the time ſince his aſſignation. 3*tio*, He cannot be liable, unleſs it had been alleged, he had intromitted with the minor's rents. 4*to*, He offered to the purſuer to take him home to his own houſe and aliment him.

THE LORDS found the defender liable in a modification, ſuitable to the eſtate and quality of the heir; and found the heir not obliged to go to his family, as in the caſe of heirs or pupils; and found him liable, ſince the time of his aſſignation, whether he intromitted or not, unleſs he inſtruct how he was excluded from intromiſſion legally; but found him not liable for bygones, ſince he was freely alimented by another.

Fol. Dic. v. 1. *p.* 31. *Stair, v.* 2. *p.* 696.

1699. *July* 14. OGILVIE *againſt* GORDON.

No 39. Onerous aſſignee to the liferent, cannot be affected by the heir's claim of aliment.

OGILVIE of Linksfield purſues Jean Gordon, his mother, as liferentrix of his lands for an aliment.—*Alleged*, All ſhe now poſſeſſes is not L. 200 Scots, which is not a competency for herſelf, and can allow no defalcation to her ſon.—*Anſwered*, The liferent ſhe entered into was much larger; and if ſhe, by miſmanagement, or contracting of debts, has diminiſhed the legal fund out of which his aliment is due, *ſibi imputet*; and it muſt be conſidered, not as it now ſtands, but as her huſband tranſmitted it to her, and ſhe ought not to lucrate by her own fact or fault.—The LORDS conſidered theſe aliments were founded not only *ſuper jure naturæ*, but on the 14th act of Parliament 1535, and act 25th 1491, anent ſuperiors of ward lands, their alimenting their vaſſals; which is a real burden, and and follows all ſingular ſucceſſors; but it is not ſo clear *quoad* other liferenters, who are indeed named in the preamble, but not in the ſubſumption or ſtatutory part of the act; and whatever might be ſaid againſt liferenters, who, by voluntary or gratuitous deeds, have diminiſhed their liferents; yet, where they are diveſted by creditors adjudgers, for onerous cauſes, the aliment can never be real to affect the liferent they poſſeſs, either by paction or legal diligence, providing there be neither fraud nor colluſion in the caſe.—THE LORDS found her creditors, nor ſingular ſucceſſors for onerous cauſes, no way liable nor affectable *quoad* any part of the liferent they had; and the aliment was not real againſt the liferented lands nor them; nor that her ſon had any regreſs againſt her upon her warrandice, from her fact and deed, for diminiſhing her jointure, being done long before the intenting his action for aliment; and ſo that her jointure muſt be conſidered as it now ſtands, and not as it was in the beginning; and finding it ſo mean now, they refuſed to modify any thing out of it to her ſon. There was another point here (which the Lords did not conſider) that he was major; and the act of Par-