

(OF THE ACT 1491.)

1682. February 7. HAMILTON against HAMILTON.

IN the action for aliment, pursued at the instance of Robert Hamilton, fiar of the lands of Airdrie, against Margaret Hamilton, one of the liferenters thereof, wherein he libelled, That the estate, whereof he was fiar, was exhausted by liferents and debts, so that he had not a maintenance:—It was *alleged* for the liferenter, That there could be no aliment, in respect that the liferent was constitute in her contract of marriage, by her husband and father-in-law; and that at the time of her husband and father-in-law's death, there was sufficient estate to have alimented the pursuer's father, who was then heir, being brother to her husband: And that if he has contracted debt, or provided a new jointure to his wife, whereby his son the pursuer is prejudged of an aliment, by exhausting the estate, she could not be prejudged by the subsequent deed of the apparent heir.—And it being *replied*, That the pursuer needed to say no more, but that he was an heir to an estate which was exhausted by liferents and debts:—THE LORDS found, That the estate was to be considered as it was at the time of the defender's husband's death; so that if it was not exhausted by liferents or debts at that time, there would be no aliment sustained at this pursuer's instance, who was not immediate heir, but by progress.

Fol. Dic. v. 1. p. 29. President Falconer, No 21. p. 11.

* * The same case is thus stated by Sir Patrick Home :

ROBERT HAMILTON, eldest son to the deceased Mr John Hamilton of Airdrie, having pursued Margaret Hamilton, relict of the deceased John Hamilton, his uncle, for an aliment, upon the act of Parliament appointing liferenters to aliment the heir:—*Alleged* for the defender, That she could not be liable for an aliment, because the debts that exhaust the rents of the estate were not contracted by John Hamilton, her husband, who granted her the liferent provision, but by Mr Gavin Hamilton, the pursuer's father, who, when he succeeded to the estate, after her husband's decease, it was free of all debts, except for jointure: And the liferentrix is not obliged to give an aliment to the heir, but only in the case when the rents of the lands are exhausted by the person's debts who grants the liferent.—*Answered*: That the act of Parliament makes no distinction, whether the debts, exhausting the rents of the lands, be contracted by the immediate predecessor of the apparent heir, or by the party that constitutes the liferent. But it is provided in general, that conjunct fiars and liferenters, ought to give a reasonable sustentation to the heir, after the quantity of the heritage: So that all that the law considers to make the liferenter liable to aliment the heir is, that the rents of the lands be exhausted by his predecessor's debts, so that he has nothing whereupon to live and be maintained; it being thought unjust that liferenters should enjoy a great part of the estate, as in this case, and the apparent

No 8.

In an action at the instance of the apparent heir against a liferenter, for aliment, the Lords considered the estate as it was at the defender's husband's death; so that, if it was not then exhausted by liferents or debts, no aliment was due.

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No 8.

heir to want. And as the superior is liable by that act of Parliament, to entertain the apparent heir of the vassal, whether the lands fall in waird, by decease of the apparent heir's father, or any other of his predecessors; so likewise by whose deeds forever the rents of the estate are exhausted, the liferenters are always liable to the heir for an aliment.—THE LORDS found the liferentrix only liable for the modification of an aliment, if there was not an estate free for the maintenance of the apparent heir, after deduction of liferents and annualrents, the time of her husband's decease: And that there being a sufficient estate then free, the condition of the estate, the time of the apparent heir's father's decease, cannot be respected to make the former liferentrix liable to the apparent heir in an aliment.

Sir P. Home, MS. v I. No 140.

1636. February 11.

SIBBALD against WALLACE.

No 9.

Aliment was refused to an apparent heir, because the sums liferented by the relict of his brother were small, and not exceeding the interest of her tocher; and because he was 40 years old, and ought to have a trade.

ONE Mr William Sibbald pursuing the relict of Mr Alexander Sibbald, who was his brother, to hear a reasonable modification decerned to be given to him, as heir to his deceased brother for his aliment, out of 400 merks yearly, whereof she was liferenter and conjunct-fiar with her husband; from the which pursuit the LORDS affoizied the defender, because it was neither founded upon law, equity, nor practice; seeing the relict had only investment of 400 merks of annualrent yearly, whereof 200 for the annualrent of 2000 merks given with her in tocher to her husband; and the other 200 merks was for the like sum, which her husband, by her contract of marriage, was obliged to furnish, effeirand to her tocher received by him; no part whereof the LORDS found could be allotted to the pursuer, for his aliment, he being a person major, past the age of 40 years at least; and who either ought to have taken him to a calling, whereby to have lived, or else having an actual calling whereby he might live; and the act of Parliament, which is the ground of the like pursuits, is introduced in favours of persons being minors: Likeas this pursuer designed himself, in this summons, to be a preacher of the word of God; and therefore absolvitor was given.

Fol. Dic. v. I. p. 29. Durie, p. 794.

1636. July 21.

L. RAMORNAY against LAW.

No 10.

Aliment refused to an heir of perfect age, and bred a writer; the whole rents being liferented.

THE young Laird of Ramornay being married upon the Bishop of Glasgow's daughter, and he dying without bairns, his brother succeeding to his fee, pursues his father, and the brother's relict, who had all the liferent of the whole lands, for a modification. And the relict *alleging*, That no part could come off her, for modification; because she having paid a competent tocher of 8000 merks, for her liferent of ten chalders victual, granted to her in conjunct-fee, and contract-