(OF THE ACT 1491.)

Benefit of diſcuſſion.

As to the benefit of diſcuſſion among thoſe bound to aliment—by the caſe Preſton againſt Liferenters of Airdrie, No 21. *ſupra*, it was found, that two liferenters upon an eſtate, viz. The mother and grand-mother, were liable to aliment the heir, *pro rato*, out of their liferents.—The four following caſes regard the ſame ſubject of diſcuſſion.

1685. *November* 27.

The LAIRD of Kirkland *againſt* His MOTHER and GRAND-MOTHER.

No 32.
Grand-mother found obliged to bear her proportion of the heir's aliment, along with his mother. *See* No 35. where the contrary found.

THE Laird of Kirkland having nothing to live upon, purſued his mother and grand-mother, liferenters of his eſtate, for an aliment, both for bygone years and in time coming.—It being *alleged* for the grand-mother, That ſhe could not be liable for any part of the aliment, becauſe ſhe had quit and given down 800 merks to her ſon, the purſuer's father. 2*do*, That ſhe offered to aliment him. And, 3*tio*, As to bygones, ſhe could not be liable, there having never been any proceſs intented therefor.—It was *anſwered*, That whatever ſhe had quit to the father, was by paction; and that notwithſtanding thereof, the purſuer had nothing to aliment him, the hail eſtate being liferented, either by the grand-mother or mother. To the *ſecond*, That he being an infant, his mother would be preferred to the alimenting of him, rather than his grand-mother; neither was the offer to aliment relevant to elide the purſuit.——THE LORDS repelled the firſt and ſecond defences, and ſuſtained the third defence, and aſſoilzied from bygones; and found, that the liferenter was not liable preceding the intenting of the cauſe, which was but newly intented.

Fol. Dic. v. 1. *p.* 31. *Preſident Falconer, No* 106. *p.* 74.

*** The ſame deciſion is thus reported by Harcarſe:

THE heir and younger children of the Laird of Kirkland, having purſued an action of aliment againſt their mother and their father's ſtep mother, by whom the eſtate was entirely liferented:—It was *alleged* for the ſaid ſtep-mother, That ſhe had already given an abatement of 800 merks to the purſuer's father; and before impoſing any further aliment upon her, their mother ought to give a proportional allowance out of her proviſion.

THE LORDS did not reſpect the abatement given to the purſuer's father, his ſtep-mother having yet an opulent jointure; but found, That the heir could have nothing modified for years bygone, preceding the ſummons, the defenders having *bona fide* conſumed their whole annuities theſe years. And the liferented lands not being ward-lands, which by act of Parliament are expreſsly burdened with the heir's aliment, but lands holding feu or blanch, which are only made liable to the heir's aliment by practice, extending the act of Parliament; yet they found, That the mother having alimented her ſon, the heir, whoſe property

No 32.

was entirely exhauſted by liferents, was preſumed to have done it, *ex pietate*, although action was once competent to him, for theſe years aliment, againſt the old liferenter, becauſe no ſuch action had been intented.

THE LORDS found alſo, That the mother was bound, *jure naturali*, to aliment the younger children *in familia*, they being young.

Harcarſe, (ALIMENT.) *p.* 5.

1697. *February* 20. SETON *againſt* TURNBULL.

No 33.
Diſcuſſed, but not determined, whether the grand-mother muſt bear a proportion or not.

EUPHAME SETON, Lady Kirkland, and Bailie Fife, her huſband, purſue Dame Aliſon Turnbull, and Mr John Stewart of Aſcog, her huſband, to bear a proportion of the aliment of John Butler of Kirkland, ſon to the ſaid Euphame, and grand-child to the ſaid Dame Aliſon, who liferented a great part of his eſtate betwixt them, and ſo both *ſuper jure naturæ*, and on the act of Parliament 1491, were bound to entertain the apparent heir; and, by an interlocutor in 1685, the ſaid Dame Aliſon was appointed to bear a ſhare of his aliment.—*Alleged*, That the ſaid Euphame, the mother, had already alimented him, and ſo preſumed to have done it, *ex pietate materna*, and cannot claim it, ſeeing *nemo alitur de præterito*; but theſe actions only conclude *pro futuro*, and the child ſhould be purſuer here: All which the LORDS repelled, in reſpect of the proceſs in 1685. Then *contended*, That ſhe had quit a part of her jointure to her ſon, the child's father, at her marriage, and ſo there could be no farther burden or deduction laid upon her.—*Anſwered*, He undertook portions for his younger brothers and ſiſters.——THE LORDS found her ſtill liable in a proportion, and modified 400 merks yearly, to be equally divided betwixt the mother and grand-mother, out of their two liferents. But then it was *objected*, That moſt of the time ſince 1685, was when the ſaid Dame Aliſon was married to Mr William Clerk advocate; and he having lifted her jointure out of Kirkland, his executors muſt be *primo loco* liable for theſe years' aliment, which fell within his marriage, and Aſcog, the next huſband, only *ſubſidiarie*, after diſcuſſing of them.

1697. *June* 16. THE LORDS adviſed the bills and anſwers between Euphame Seton, Lady Kirkland, and Dame Aliſon Turnbull, and their Huſbands. Butler of Kirkland having a very ſmall eſtate, and moſt of it being liferented by the ſaid Euphame his mother, and Aliſon his grand-mother, he had purſued them in 1685, for an aliment, and obtained an interlocutor, modifying 400 merks to him yearly, to be paid equally by the two liferenters. Dame Aliſon, the grand-mother, now reclaims on theſe grounds, 1*mo*, That being alimented by the mother, *præſumitur* to have been done *ex pietate materna, et nemo alitur de præterito*; and ſo ſhe can have no repetition of bygones. 2*do*, The interlocutor