

(OF THE ACT 1491.)

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 intended.

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.

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Discussed,
but not de-
termined,
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 Afcog, 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 Afcog, 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, *1mo*, 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 by-gones. *2do*, The interlocutor

(OF THE ACT 1471.)

founded on, wants all manner of warrant; for Dame Alison is neither mentioned in the body of the summons, nor any execution against her. *3^{to}*, During most of those years acclaimed, she was married to Mr William Clerk; and as there is an order of discussion among heirs, so also among husbands; his representatives must be *primo loco* liable for the years he intromitted with the jointure, out of which this aliment is acclaimed, before you can insist against Ascog, her present husband; March 28th 1629, Mathison, Durie, p. 443. See HUSBAND and WIFE; and 18th February 1663, Dunbar, Stair, v. I. p. 181. See HUSBAND and WIFE. 400, No proportion of the aliment can come off the grand-mother, because she renounced already a part of her jointure to his father, and so cannot be farther burdened nor restricted; as was found on the 27th July 1629, Hamilton of Blair *contra* his grand-father, No. 16. *supra*; and the mother's jointure can better allow a retrenchment; and by the 25th act of Parliament 1491, the heir can have no action, if he have any other estate to aliment him.—*Answered* for the mother, That she opposed the Lords' interlocutor, which was in as positive explicit terms as could be; and *est*, the execution had fallen by, yet she had compeared by Mr William Clark, then her husband, which was sufficient to sustain the interlocutor: And for her restriction and down-giving a part of her jointure, it was in contemplation of an additional burden of provisions he undertook for his younger brothers, and so was not *lucratus* thereby.—*Replied*, He was liable to these *utcumque*.—THE LORDS found the interlocutor wanted a warrant, and therefore assolized the said Dame Alison from by-gones; and, before they would determine how far she must bear a part of this aliment in time coming, they allowed either party to prove what she gave down of her jointure; and *quo nomine* she did it; and if he was, *ab ante*, obliged to these provisions, or not.

Fol. Dic. v. I. p. 30. Fountainhall, v. I. p. 770. 776.

1715. July 12.

CUNNINGHAM of Brownhill, against Dame MARGARET RAMSAY, his Grand-Step-Mother.

THE said William Cunningham, a pupil, having raised a process of aliment against his mother and step-grand-mother, upon the act of Parliament 1491, cap. 25. whereby superiors of ward-lands are obliged to aliment the heirs; which, by established practice, *paritate rationis*, is extended to liferenters: Among other defences for the step-grand-mother, this was proponed, That when she married the pursuer's grand-father, she was provided in an liferent of 3000 merks, out of a former husband's estate, the half whereof she allowed to be sold, and applied for payment of Brownhill, her husband's debts; and therefore had scarce enough to herself, having also several children and grand-children of her own; whereas,

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Not sustained as a defence for the grand-mother, that she had voluntarily sold a part of a separate estate to pay the debts of the pursuer's grand-father.