

(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<sup>to</sup>*, 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,

No 33.

No 34.

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.

(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-