No 30.

son's wife after his son's death. And the Judges, by a great plurality, found, That after the dissolution of the marriage, Sir Andrew was not bound to aliment his daughter-in-law.

Fol. Dic. v. 3. *p.* 21. *Select Dec. No* 220. *p.* 284.

1751. *July* 10. AUCHINLECK of Woodcockdale *against* JANET WINRAM.

No 31.
No aliment found due to an heir, where the provisions due by the proprietor's contract of marriage to younger children, exceeded the value of the estate.

James Auchinleck of Woodcockdale, left at his death, 1735, James, a son, and several other children; and his estate burdened with the liferent of the lands of Woodcockdale, of 800 or 900 merks yearly rent, and a house in Edinburgh of 300 merks rent, to Janet Winram his mother; an annuity of 1300 merks to Elizabeth Turnbull, his relict; and the liferent of the lands of Balglaffie, of 800 merks, to Katharine Garden, relict of George Turnbull of Balglaffie, his mother-in-law: With these burdens, and the interest of his debts, without reckoning children's provision, the estate was more than exhausted.

James Auchinleck of Woodcockdale, the heir, pursued the three liferenters for an aliment; in which the defence was chiefly made for Janet Winram; and for her it was *pleaded*, That being a woman now above ninety years of age, she was not obliged to aliment the heir out of what was no more than sufficient for her own aliment.

2do, The estate, when her liferent was laid upon it, afforded, besides, a competency to the proprietor: And as it is since reduced by the contractions, not of the granter of her liferent, but a subsequent heir, these contractions cannot bring a burden upon her, to which she was not originally subject.

3tio, There is no estate to which the pursuer can succeed; his father being bound, by his contract of marriage, to pay 54,000 merks to the children of the marriage, according to a division thereby settled, and not to leave him the estate, which is not of the value of this sum.

Pleaded for the pursuer: He is an heir in the estate of Woodcockdale; and is entitled to an aliment from the liferenter thereof. By considering the civil and feudal law, it appears there is a foundation for this obligation, older than the statute 1491; by analogy from which it is generally supposed to have been introduced. Justinian statutes, that when an universal liferent is left to the relict, the children shall be entitled to a third of the effects for aliment, 18. Novel. c. 3. Craig, l. 2. D. 17. § 20. says on this constitution, 'Providendum filiis putat ne 'egeant; quod ad heredem feudi traductum est; ut semper aliqua ejus cura ha-'beatur ne egeat; ita tamen detrahendum, vel ex custodia, vel usufructu uxoris, 'si heres non habeat aliunde quo alatur;' and cites a decision in the case of the Laird of Swinton. It is the same thing whether the estate is subject to an universal liferent, or if that part of it which is not subject, is exhausted by debts; Hope, *de heredibus*; Stair B. 2. tit. 6. § 5.; Mackenzie, title *Servitudes*, § 45.

No 31. Inſtitute of the Law, p. 157. And when a defence has been offered, that the heir had ſucceeded to a ſeparate eſtate, it has been ſuſtained in reply, that it was exhauſted by debts; 13th February 1662, Birnie againſt the Liferenters of Roſſie, No 14. *ſupra*;—25th July 1705, Ayton againſt Colvill, No 12. *ſupra:* As alſo, whether the debts were contracted after conſtitution of the liferent, or by a ſubſequent heir, as different liferenters, whoſe rights have been conſtitute at different times, are liable proportionally; Birnie's caſe above-cited; Balfour, word, Heirſhip Goods, the caſe of the Earl of Huntly cited by him, 13th May 1525, *infra h. t.*—12th December 1677, Preſton againſt the Liferenters of Airdrie, No 21. *infra*—27th November 1685, Heir of Kirkland againſt his Grandmother, No 32. *infra.*—20th February 1697, Seton againſt Turnbull, No 33. *infra.*—18th January 1712, Lyon of Brigtoun againſt Liferenters, No 3. *ſupra*—12th July 1715, Cunningham againſt Ramſay, No 34. *infra.*

For the defender: All the deciſions found the obligation to aliment the heir upon the conſtruction of the act of Parliament 1491; and this conſtruction has been at firſt ill made; for the act, in the firſt clauſe, ſubjects wardatars and liferenters to find ſecurity for preſerving the ſubject; but, in the ſecond, where the wardatar is made liable to aliment the heir, the liferenter is not mentioned; and there was reaſon for the difference; both were obliged to preſerve the ſubject by the nature of their right; but the wardatar was obliged to aliment by our old law, *Reg. Maj.* l. 2. c. 42. § 5. The novel cited from the civil law only ſtatutes, That by an univerſal liferent, children ſhould not be deprived of their legitim: The practice has been to give aliment, when the liferent exhauſted the eſtate, not when the remaining eſtate was afterwards incumbered; and though this was found in the caſe of Preſton of Airdrie, (*above-mentioned*) the contrary was determined, 7th January 1682, Hamilton againſt Hamilton, No 8. *ſupra.* In the caſe of Kirkland the defence was not pleaded, but the liferenter offered to aliment in family.

Obſerved, The conſtruction made of the act of Parliament was right; for thereby the wadſetter or liferenter is obliged to take his reaſonable ſuſtentation, without deſtruction or waſting of the ſubject; and then the act ptoceeds in theſe terms: 'And a reaſonable living to be given to the ſuſtentation of the air after 'the quantity of the heritage, gif the ſaid air has na blanch-farm nor feu-farm 'to ſuſtain him on.' Here neither wardatar nor liferenter are mentioned; but the ſtatute having made both liable in the former preſtation of preſerving the ſubject, goes on, in a continued ſtile, to enact the heir ſhall be alimented, without ſaying by whom, neceſſarily intending the perſons formerly expreſſed.

THE LORDS, 21ſt February, 'Found no place for an aliment in this caſe.' And, on bill and anſwers, 'adhered.'

Act. *Brown.* Alt. *A. Macdowal.*

Fol. Dic. v. 3. *p.* 21. *D. Falconer, v.* 2. *No* 220. *p.* 264.

(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