

(OF THE ACT 1491.)

* * * Gosford states the same case thus :

No 11.

JAMES STIRLING pursuing Helen Heriot, his mother-in-law, for an aliment upon that ground, that by her liferent and infeftments, granted to creditors, the whole rent of his father's estate was exhausted.—It was *alleged* for the defender, That her liferent was only four chalders of victual, and 100 and odd pounds Scots; which was no more than a competent aliment to herself; as likewise that the pursuer was now thirty years of age, and had entertained himself as a soldier, or by brewery; and had left to him, by his uncle, the sum of L. 8000 Scots.—THE LORDS found the allegiance so qualified, relevant to elide the pursuit; notwithstanding it was answered, that the said sum left by his uncle, was due by his father, to whom, he being heir, all other creditors were preferred, whereby the whole estate was exhausted.

Gosford, MS. No 97. p. 35.

No 12.

An aliment modified to an heir out of his step-mother's jointure, although he was major, and an advocate, but did not earn a subsistence by his profession.

1705. July 25.

AITON against COLVIL.

MR WILLIAM AITON, of that ilk, pursues Dame Margaret Colvil, his mother-in-law, for an aliment, in respect his father's estate, being 47 chalders of victual, is overburdened with her liferent of 24 chalders, and 40,000 merks of provision to her children, and other 40,000 merks of extraneous debts; so there was no sufficient estate left to sustain the heir.—*Alleged*, This process is either founded on the statute of James V. for superiors alimentering their ward-vassals, or *super jure nature*, where one pursues his own mother; none of which holds here, she being a stranger to him, and secured in a jointure by her contract of marriage, which cannot be diminished, *contra fidem tabularum nuptialium*.—*Answered*, Much of our law is introduced by custom, time out of mind; and this of alimentering heirs is one of them; and much stronger than our positive statutes, and has been ever sustained against step-mothers having exorbitant liferents.—THE LORDS repelled the defence, in respect of the answer.—*2do*, *Alleged*, These aliments were only given in favour of minors, who had no other way of sustenance; but where they were come to age, and had a calling, they were never granted; for that were to encourage idleness; but so it is, the pursuer here is both major and an advocate. And Durie, in two several decisions, 11th February 1636, Sibbald, No 9. *supra*; and 21st July 1636, L. Ramornay, No 10. *supra*—tells, that the Lords refused aliments to such as had callings.—*Answered*, The name of an employment will not afford a man bread; neither is the race always to the swift, nor the battle to the strong; *et officium nemini debet esse damnosum*: And we have known many advocates who have risen to a great eminency and practice, who, at the beginning, have had little or no employment. And the cases cited do not meet; for, in the first, the grandfather was alive, who had a liferent reserved; and it was thought as reasonable he should bear the aliment as the mother. And

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in the second, *non constat*; but he was an actual placed minister, and so had a sure fund to live upon; and the mother had but an aliment herself; and it was thought hard to burden one aliment with another.—THE LORDS also repelled this defence.—Then 3^{to}, *alleged*, That the lady was, by her contract of marriage, burdened with alimenting her own children till they were seven years old; and so cannot be farther burdened with the heir.—*Answered*, The children had an adventitious estate *aliunde* whereon they might be alimented.—THE LORDS repelled this also.—4^{to}, *Alleged*, He was served heir *cum beneficio inventarii*, and behoved to add this to the inventory, which would accrefce and appertain to his father's creditors; and so he could have no benefit thereby: Likeas, there was no real diligence on the estate, by adjudications or infeftments, to debar him from possessing; and so he could claim no aliment; as was found, 13th February 1662, Antonia Birnie *contra* the Liferenters of Rossie, No 14. *infra*; and 18th December 1667, Doby *contra* the Lady Stonyhill, No 15. *infra*; where personal debts exhausting an estate, were not thought sufficient to found an aliment.—*Answered*, Aliments were neither arrestable nor affectable by creditors; and so are not to be added to the inventory; and the law made no difference whether he was served or not: And 5^{tho}, at the time of the father's death, there were no real diligences, but the debts merely personal; yet how soon are they made real, by charging him to enter heir, and adjudging?—THE LORDS also repelled this; and then proceeded to the modification of the aliment; and finding the lady had 24 chalders of victual, they fixed on the fourth part of it. But the debate arose, whether to give him six chalders of victual, or 600 merks of money? Some were for a locality out of her jointure lands; but that not being judged legal, they fixed on the money, and decerned her in the same; the first half year's payment beginning at Martinmas next. And seeing he was quarrelling her liferent in a reduction, as exorbitant; and so it was contended he could not do both; the LORDS thought they might modify in the mean time; for if he prevailed in his reduction, then this aliment would cease.

Fol. Dic. v. 1. p. 29. Fount. v. 2. p. 287.

1687. June 4.

SIMEON RAMSAY *against* RIGG.

SIMEON RAMSAY pursues his mother for an aliment out of her jointure, because he was a minor, (though the President said it imported not whether he was major or minor, if he could not live *aliunde*, and was not bred, by his parents, to a trade which could make him subsist) and she liferented all, and was married again. *Alleged*, He was bound apprentice to a skipper, and was 18 years of age, and had run away, and she had only 600 merks by year.—THE LORDS modified to him L. 100 Scots yearly.

Fol. Dic. v. 1. p. 29. Fount. v. 1. p. 454.

No 13.

A mother decerned to aliment her son 18 years old, and an apprentice.