(OF THE ACT 1491.)

1712. *January* 16.

JOHN LYON of Brigtoun, and his CURATORS, *against* ELIZABETH GRAY Lady Carſe, and CICILIA DENMURE Lady Allantoun.

No 3.
Heir renouncing found not entitled to aliment.

JOHN LYON of Brigtoun, apparent heir-male to Patrick Lyon of Brigtoun, his grand-uncle, (who came to poſſeſſion of the eſtate as a creditor by ſingular titles, tranſmitted to him by his grand-father,) finding the ſame exhauſted by debts and two liferents, viz. One to Elizabeth Gray Lady Carſe, his grand-uncle's relict, and another to Cicilia Denmure his mother, purſued an aliment againſt theſe life-renters.

Alleged for the Lady Carſe: Abſolvitor, becauſe the purſuer doth not poſſeſs the eſtate as heir to his grand-uncle, her huſband, but as heir to his grand-father, who did not only renounce to be heir to his brother the grand-uncle, but acquired ſingular titles and poſſeſſed *tanquam quilibet*. For aliment provided by law muſt go to the heirs of law, and not to heirs of tailzie or proviſion; and far leſs to the purſuer, who is only heir to a creditor, and not heir of the family or blood; ſeeing his accidental title of apparent heir-male, is cut off by upwards of forty years poſſeſſion of the eſtate by ſingular titles, as *feudum novum* or conqueſt.

Replied for the purſuer: His grand-father having been undoubted apparent heir-male to the defender's huſband, the neceſſity he was under to ſucceed by apprifings and adjudications for fear of debt, ſhould not wrong the purſuer's natural claim of an aliment; which, though commonly aſcribed to the act of Parliament, appointing wardaters to aliment their wards, ſeems rather to have ariſen from the civility of our law, that judged it hard for liferenters to cut off, as it were by ſtarving, the heir from any hope of ſucceſſion. Upon which ground it may be gathered from the ſtrain of our practicks, that a fiar having the right of blood, debarred by liferents, ought to be alimented by the liferenters, whether he came to the ſucceſſion by ſervice or ſingular titles; albeit the heir of a ſtranger purchaſer could have no recourſe to an aliment off a liferenter, whoſe right affected the purchaſe. Yea, the intereſt of blood entitled an apparent heir to aliment, even againſt his grand-father's ſecond wife, to whom he had no blood-relation, 12th December 1677, Preſton of Ardrie *contra* his Liferenters, No 21. *infra*.

Duplied: It being abſurd to pretend, That the purſuer can both enjoy the eſtate as a creditor, and claim benefit as heir to the perſon whom his diligence and ſingular titles diveſted. Aliment can no more be decerned upon that account, than it could be decerned at the inſtance of the heir of a ward-vaſſal againſt the ſuperior, when the ward-lands are poſſeſſed by an appriſer. The caſe of Ardrie is a ſingle deciſion; beſides it doth not appear, that there the eſtate was enjoyed by ſingular titles.

THE LORDS found the defence for the Lady Carſe relevant, That the purſuer poſſeſſeth not as heir to her huſband, but as a creditor by ſingular titles.

Fol. Dic. v. 1. *p.* 28. *Forbes, p.* 575.

(OF THE ACT 1491.)

No 3.

*** The ſame caſe is thus reported in Fountainhall.

DAME ELIZABETH GRAY was firſt married to Lyon of Brigtoun, and then to Sir Patrick Lyon, Lord Carſe; and by her firſt huſband had a jointure of L. 100 Sterling; and having only two daughters, they got portions, and the eſtate fell into her huſband's brother, as the heir-male. John Lyon now of Brigtoun, his grand child, finding his eſtate exhauſted by two liferents, the ſaid Lady Carſe his grand-uncle's relict, and alſo by his mother's jointure, beſides other debts affecting it, he purſues a proceſs of aliment againſt them both. The mother *contended* ſhe could bear little or none of it, ſhe having only 1000 merks; whereas the Lady Carſe had now poſſeſſed near theſe forty years bygone almoſt the double. It was *alleged* for the old Lady, abſolvitor from any modification on her; 1*mo*, Becauſe ſhe brought an opulent tocher of L. 1000 Sterling to the family, by which they were *lucrati*, for which ſhe got but a very moderate retribution of a jointure; ſo ſhe being an onerous creditor on the eſtate, can never be burdened.—*Anſwered*, The bringing a portion does not change the matter, nor take away the heir's claim; for women have right to a jointure, either legal or conventional, whether they bring tocher with them or not: And the action for aliment of apparent heirs is founded in that natural decency, requiring that eſtates be not carried away by liferenters, to the ſtarving of the heir, who has no acceſs till their death; and which is confirmed and ſupported by the 25th act 1491, where the ſuperior, or his donatar, are to aliment the ward-vaſſal during his minority.—2*do*, *Alleged*, That Brigtoun has no right to ſeek an aliment from her, becauſe his grand-father was not heir to her huſband, who left two daughters, his heirs of line; and he entered not as heir-male; but finding the eſtate burdened, he renounced to be heir, and ſuffered it to be adjudged, and then brought in theſe adjudications; and by that ſingular title they poſſeſs the land to this day; ſo bruiking *tanquam quilibet* and as a creditor or ſtanger, he has no claim for an aliment againſt her; eſpecially ſeeing he has no contingency of blood with her, neither being deſcended of her body nor her huſband's; ſo that a creditor-adjudger might as well crave an aliment from her as he.—*Anſwered*, Her daughters' exorbitant proviſions did ſo incumber the eſtate, that he was forced to enter by ſingular titles, and poſſeſs as an adjudger; but he being ſtill the heir of blood, though not deſcended of her body, his renouncing to be heir can never deprive him of his juſt claim, which he has both *jure ſanguinis*, (his grand-father being her huſband's brother) and likewiſe by the feudal contract, which gives him a relation to the fee, and an intereſt to be alimented out of it; as was found 12th December 1677, Preſton *contra* the Liferenters of Airdrie, No 21. *infra*: See alſo 21ſt July 1636, Heriot of Ramornay *contra* Law, No 10. *infra*; 11th Feb. 1636, Wallace and Sibbald, No 9. *infra*; and 16th July 1667, Hamilton *contra* Symington, No 2. *ſupra*.—*Replied* for the Lady Carſe, That having renounced, he is in no conſtruction an heir, except of one who enters as a

creditor-adjudger. It is true, theſe aliments were a ſtretch and extenſion of James IV's act, and were more *actus imperii* than *juriſdictionis*, but were never extended to a creditor's heir: And the caſe of Hepburn *contra* Seaton, 12th February 1635, No 1. *ſupra*, (and a hard deciſion it was) ſuſtained the aliment; but there was no renunciation there. And Sir George M'Kenzie, in his obſervations on that act of Parliament, reaſons againſt theſe extenſions with great freedom and evidence; nor have the deciſions been uniform on which the authority *rerum judicatarum* ſtands; but this is the fate of all deciſions which ariſe from no certain principles of law; and, as to ſuch, all occaſions are to be taken to reſtore them back to the true principles of juſtice and equity. —3*to*, *Alleged*, At her huſband's death, the fortune was in a tolerably free condition, and the burdens being ſupervenient, they cannot prejudge her liferent, or draw an aliment on her, eſpecially he having his mother to recur to, who is bound *jure naturæ* to maintain him; and was ſo found in Preſident's Falconer's Deciſions, 7th February 1682, Hamilton, No 8. *infra*.—*Anſwered*, That is but a ſingle practick; but the current has been, that the liferenters, both old and new, take the burden proportionally effeiring to their quotas; for *quem ſequitur commodum eundem ſequi debet etiam incommodum*; and the mother, out of her ſmall aliment, has hitherto maintained him.——THE LORDS found the Lady Carſe not liable in any part of his aliment, eſpecially he bruiking by ſpecial ſingular titles, and having renounced to be heir.

No 3.

Fount. v. 2. *p.* 707.

1700. *January* 27. SANDILAND *againſt* his MOTHER.

No 4.
A fiar has no longer title to aliment, upon the act of Parliament, after he has ſold the lands.

SANDILAND of Cowſton purſues his mother for an aliment, as liferenting his whole eſtate. *Alleged*, The lands came by myſelf, which I diſponed to your father in our contract: I educated you a writer; but you deſerting that, I bought you an enſign's place in the army, where you were likewiſe turned out, and married unworthily, and have ſold the fee of the lands worth 2000 merks *per annum*, whereof I only liferent the half; and ſo an aliment being only due to an apparent heir, or a fiar, you are neither, but are denuded; and what reſts to me is no more than a competency.—*Anſwered*, He can be in no worſe caſe than an heir left with an overburdened eſtate by adjudications, and other diligences and rights, whether legal or conventional; and though they have renounced to be heirs, yet they have been allowed to crave an aliment off liferenters, 16th July 1667, Hamilton *contra* Symington, No 2. *ſupra*; *ergo a pari* a fiar who has ſold his heritage for his father's debt may purſue his mother for an aliment, though he be major.——THE LORDS found this defence relevant to aſſoilzie from an aliment, that he was denuded of the fee of the whole by an irredeemable diſpoſition made by himſelf; and granted diligence to the defender to prove it, ſeeing he was no more fiar.

Fol. Dic. v. 1. *p.* 28. *Fount. v.* 2. *p.* 84.