(OF THE ACT 1491.)

1731. *July* ELIZABETH MIRRIE *against* POLLOCKS.

No 25.
It is only heirs of heritage, not of money, to whom, as heirs, aliment is due.

IN a marriage-settlement, the husband obliged himself to lay out the tocher, with another sum of his own, upon good security, to himself and spouse in conjunct-fee and liferent, and to the heirs or bairns of the marriage in fee. Of this marriage, there were three children, who all died without making up any title to their father's effects, whereby the succession opened to his other next of kin. The relict, who, after her husband's decease, was confirmed executrix to him, married a second time; and, after the death of her children, brought an action against the next of kin, for cognoscing the claims of debt to which she was entitled upon her husband's executry; particularly for the sums bestowed by her, out of the said funds, upon the education of her children, and upon their sickness and burials.—Against this article, it was objected by the next of kin, that the whole effects, left by the husband, were no more than sufficient to answer the pursuer's annuity; therefore, the aliment of her infant-children, was a proper burden upon herself, as being their mother, and liferentrix of their whole estate, which is provided by act of Parliament, in case of ward-minors, and extended by practice and analogy to other fiars.

It was *answered*, That the case of ward-minors is singular; and though this statute is, by analogy extended to fiars of land, even this extension seems to be *invita jurisprudentia*. Sir George Mackenzie complains heavily of it, because it must have been a case, in the eye of the legislature, *ex propositio* omitted, and adds, 'as there is not the same parity of reason, so indeed it is contrary to the 'faith of the marriage-contract.' However this be, the law has been extended no further than to fiars of land-estates, who are great favourites in our law; the preserving of ancient families being of great importance with us. Here the practice stops; and there is neither authority nor reason for extending it to fiars in moveable sums. Add, that a liferentrix of land is only obliged to aliment the heir; but, in sums of money, the bairns are generally made heirs, as happens to be the present case; so that she would have the burden of the whole family upon her provision; which is unreasonable.

'THE LORDS found the aliment of the children, their funeral expence, and 'other expences bestowed upon them, may be stated by the pursuer, to affect 'the fee of the subjects provided to the children, if there be not sufficiency of 'fund otherways to pay the same.'

Fol. Dic. v. 1. p. 30. Rem. Dec. v. 2. No 3. p. 5.