The Right Honourable THOMAS GEORGE LYON BOWES, Lord GLAMMIS, Appellant. No. 21.

Sir JOHN D. PAUL and Others, Earl of STRATHMORE'S Trustees, Respondents.

Aliment.—A nobleman having left his estates to his eldest son, and a provision of L. 12,000 to his second son; and the eldest having made an entail, excluding his brother from the estates, but calling his son as institute; and conveyed the estates to trustees, to be held for a number of years, so as to exclude his brother's son from the enjoyment of them during that period; and on his death, his brother's son having made up titles under the entail, subject to the burden of the trust; and the trustees having been infeft; and he having an income by his wife of L. 500 per annum;—Held, (affirming the judgment of the Court of Session), That he had no claim against the trustees for aliment, either under the Act 1491, as representing his grandfather, or on any other ground.

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1ST DIVISION. Lord Gillies.

IN 1776 the Earl of Strathmore died, possessed of extensive estates, leaving two sons, John, (who succeeded to him as Earl of Strathmore), and Thomas, to whom he left L. 12,000. Earl John made up titles to the estates in fee-simple, and during his minority they were greatly enlarged. His brother, Thomas, married and had a son, the appellant, who was born on the 5th of February 1801.

In 1815 Earl John executed three deeds unico contextu—an entail of his estates, a trust-disposition, and a deed of nomination of heirs. By the entail he disponed the lands to himself, 'and 'the heirs-male lawfully to be procreated of my body, succes- 'sively in order, according to their seniority, and the heirs-male 'respectively to be procreated of their bodies successively; whom 'failing, to my other heirs after-written.' He then granted a procuratory for resigning the lands to them, 'whom failing, to 'any person or persons to be named by me, in any nomination 'or other writing to be executed by me at any time of my life; 'and failing such nomination, and of the person or persons to be 'therein named, and their heirs, then to the persons having right 'for the time to the titles, dignities, and honours of Earl of 'Strathmore and Kinghorn,' &c. By this deed he empowered the heirs in possession of the estate 'to provide and infeft their 'lawful wives and husbands, and the wives of their eldest son 'or grandson, &c. in liferent annuities during their lifetimes, 'and in lieu of terce and courtesy;' and declared, 'that the 'heir succeeding should be holden and obliged to obtain himself 'timeously entered with the superiors of the said lands and estate,

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'and infeft and seized therein,' and that action should be competent against him to compel him so to do.

The relative deed of nomination proceeded on the narrative of the entail, and of the trust-disposition, 'whereby, in the event of 'my death without heirs of my body, the same will be vested in 'trustees for the uses and puposes therein specified;' and on the farther narrative, 'that the right of the said trustees would be 'preferable to, and exclude all the heirs of entail herein after 'named and appointed, other than and except the heirs of my 'own body: and being resolved to exclude the honourable 'Thomas Bowes, my only surviving brother-german, and John 'Lyon of Hetten-House, and Charles Lyon, his brother, from 'ever succeeding to my said estates,' he declared and appointed, 'that in case of the failure of heirs whatsoever of my body, 'and the heirs of their bodies, my said lands and estates shall 'devolve and belong to the heirs-male lawfully procreated, or 'to be procreated, of the body of the said Thomas Bowes, suc-'cessively in their order;' whom failing, a series of other heirs, but excluding always the said Thomas Bowes, John Lyon, and Charles Lyon; and he farther declared, 'that the said disposi-'tion and entail executed by me, of the date hereof, is granted, 'and shall be accepted by the heirs of entail hereby appointed 'to succeed to my said lands and estates, failing heirs of my own 'body, with and under the burden of the foresaid trust-disposi-'tion,' &c.

By the trust-deed, which narrated the entail and deed of nomination, as containing a provision 'that the said disposition 'and entail should be accepted by my said heirs of tailzie, there-'by appointed to succeed to my said lands and estate failing 'heirs of my own body, with and under the burden of the trust-'disposition after-written,' he conveyed his whole estates to the respondents in fee; but that in trust for various purposes, and, in particular, for uplifting the rents and produce of his estates, and applying the same to the purchase of lands to be annexed to his estates, and entailed in the same manner; declaring, 'that this 'trust shall subsist till all the debts, legacies, donations, and 'others payable out of my Scotch estate as aforesaid, shall be paid 'and extinguished, and for the space of 30 years from the day of 'my death, and until the death of the longest liver and survivor 'of the said Thomas Bowes, my brother, and of John Lyon and 'Charles Lyon; and immediately after the expiry of 30 years 'from the day of my death, and after the death of the longest 'liver or survivor of the said Thomas Bowes, John Lyon, and

'Charles Lyon, and whenever the said debts, legacies, dona- May 6. 1825.
'tions, and others shall have been paid as aforesaid, this present
'trust shall fall and become extinct.' He also provided, 'that
'in case the said Thomas Bowes shall die, leaving a child or
'children succeeding to my title and dignity of Earl of Strath-
'more and Kinghorn, and having right to succeed to the said
'estates as heir of entail therein, my said trustees may, after the
'expiry of 30 years from the day of my death,' convey and make over his estates to such child or children, although John and Charles Lyon should be alive, but who should always be excluded from the estates; and, in the event of their succeeding to the titles, should be allowed L.2000 a-year.

The Earl died on the 3d of July 1820, and was succeeded in his titles by his brother Thomas, whose son, the appellant, then became Lord Glammis, and as such had right to the estates under the destination in the entail. In virtue of it he made up titles, but under the burden of the trust, and was infeft; and the trustees likewise made up titles under, and in terms of, the trust-disposition.

By the effect of the above deeds, Thomas Earl of Strathmore, and the appellant, were entirely excluded from the enjoyment of the estates. The appellant, by his marriage with an English lady, acquired right to a property yielding an income of L.500 per annum, which he alleged was the only source of support which he had. He then brought an action against the trustees, stating, 'that by the law of nature, as well as by the laws and
'practice of Scotland, some fair proportion of the rents of the
'estates foresaid, that are destined to and vested in manner fore-
'said, should be allotted and set apart for his maintenance and
'support, and that of his family, corresponding in some measure
'to the rental of the estates, and to their rank and station in life;
'so that he and they, with such large prospects of future wealth,
'may not in the mean time be left destitute and exposed to
'necessities and want;' and therefore concluded for payment of an aliment of L.3000 a-year, or such other sum as might be modified out of the rents of the estates.

In support of this demand he maintained,—

1. That as he was the fiar of the estates, and was only excluded by the trust from the power of drawing the rents, the parties stood precisely in the relative characters of fiar and liferenter of the estates; or that at least, if the respondents held a fee, it was of a subordinate nature, and merely to the effect of uplifting the rents; so that there was no substantial distinction between this case and

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those in which aliment had been awarded under the statute 1491, c. 25.

2. That upon general principles of justice and expediency, independent of the statute, a party in the situation of the appellant was entitled to an aliment from those who drew the rents of his estates; and that at all events, by combining these principles with the provisions of the statute, he had an undoubted claim against them.

3. That as the respondents represented the late Earl of Strathmore, who again represented his father, who was the appellant's grandfather; and as he, if alive, would have been bound to have alimented him, seeing that his own father was unable to do so, that obligation had descended upon the respondents. And,

4. That although it was true that he had an income of L. 500, yet, in judging of a question of aliment, that circumstance could not affect the question of right, but only the amount to be awarded; and that, in order to ascertain that amount, the case must be considered as if he enjoyed no such income; and then, on the amount being ascertained to which he was in law entitled, a deduction corresponding to his income might be made, and decree pronounced for the difference; and that the circumstance of his being major could not invalidate his right to aliment.

On the other hand the respondents contended,—

1. That as the decisions pronounced under the Act 1491 plainly went beyond the enactment of it, the Court could not be warranted by these decisions in extending the statute to cases for which there was no such authority: That the statute had been confined to the case of a proper fiar and liferenter, whereas the respondents were not liferenters, but were vested in the fee as trustees; and that, according to the doctrine of the appellant, a debtor might contend that he had right to aliment from his creditor, who was uplifting the rents in virtue of an heritable bond and disposition in security, since the debtor, who was the fiar, was excluded from the rents.

2. That there was no authority for maintaining that a claim of aliment lay against a party, on general principles of justice and expediency, or by combining them with the statute 1491.

3. That there was no claim on the footing of representation, as the appellant was not alive at the death of his grandfather, and as his own father had received a suitable provision; and that, if such a principle were admitted, any person who could trace his descent from the most remote ancestor, would be en-

titled, at the distance of centuries, to claim aliment from his heir. May 6. 1825.

And, 4. That as the appellant enjoyed an income of L.550 per annum, and as aliment was only due on a principle of necessity, all claim for it in this case was entirely excluded.

The Court, on the report of the Lord Ordinary, and after a hearing in presence, and advising mutual memorials, on the 1st February 1823, sustained the defences, and assoilzied the respondents.*

The Judges were unanimously of opinion, that the statute 1491 was inapplicable, and that the other circumstances of the case excluded any claim for aliment.

Lord Glammis having appealed, the House of Lords, after hearing the Counsel for the appellant, 'ordered and adjudged, 'that the appeal be dismissed, and the interlocutor complained 'of affirmed.'

Lord Gifford.—My Lords, In this case I am bound to state to your Lordships, that after attentively considering the interlocutors complained of, it does not appear to me that there are any grounds whatever for altering the decision of the Court of Session. It does not appear to me that Lord Glammis has made out, in point of law, any claim whatever for the aliment which he seeks, against the trustees under the settlement which was executed on the 15th December 1815 by Lord Strathmore.

My Lords,—This claim, if it can be supported at all, can be supported only on the equity of the statute to which reference has been made. I am not one at all inclined to extend the equity of that statute, but it is sufficient for me to say, looking at that statute and the facts of the case, that the appellant has failed in making out his claim to call upon the trustees, as representing his grandfather; and therefore it does not appear to me that it is necessary, in this case, to call upon the Counsel for the respondents to support the decision of the Court of Session. I therefore humbly propose to your Lordships that this interlocutor be affirmed.

Appellant's Authorities.—1491, ch. 25.; 2. Craig, 355.; Whiteford, 1619, (386.); Hamilton, Feb. 7. 1682, (387.); Eaton, July 25. 1805, (390.); Kirkland, Nov. 27. 1685, (403.); Cunningham, July 12. 1715, (405.); Ford, Feb. 1722, (396.); Balfour, 237.; M'Kenzie, Obs. Stat. 1491, ch. 25.; 2. Ersk. 9. 62.; Reid, March 5. 1813; Dalziel, Dec. 4. 1788, (450.); Clark, Feb. 19. 1799, (No. 2. App. Aliment); Netherby, Jan. 24. 1663, (419.); Thomson, July 23. 1778, (422.); Seaton, Feb. 11. 1764, (451.); Lowther, Dec. 15. 1786, (435.); Tait, Feb. 28. 1802, (No. 3. App. Aliment); De Courcey, July 3. 1806, (No. 12. App. Aliment.)

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* See 2. Shaw and Dunlop, No. 208.

Respondents' Authorities.—Mirrie, July 17. 1731, (397.); Stuart, June 24. 1780, (398.); Speid, June 14. 1806, (F. C.); Reid, March 10. 1809, (F. C.)

ALISTON and HUNDEBIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 22. THOMAS WATSON and Others, Trustees of JAMES STORMONTH, Appellants.

MRS STORMONTH or DARLING, Respondent.

Husband and Wife—Trustee.—A husband and wife, along with other parties, having been named trustees under a deed of settlement;—Held, (affirming the judgment of the Court of Session), That the wife was entitled to act and vote as a trustee.

May 11. 1825.

2D DIVISION. Lord Pitmilly.

ON the 17th October 1803, James Stormonth of Lednathy, writer in Edinburgh, executed a trust-deed and settlement, by which he conveyed his estates to 'James Darling, writer in 'Kelso, Margaret Stormonth his wife, my niece, Robert Wil- 'son, accountant in Edinburgh, Thomas Watson, farmer at 'Laurieston, and James Adamson, writer in Edinburgh, my 'nephew, and to the survivors or survivor of them, in trust;' and thereafter, by another deed of settlement, executed on the 18th of February 1805, he disponed his estates 'to the said 'James Darling, writer in Kelso, Margaret Stormonth his 'spouse, Robert Wilson, Thomas Watson, and James Adam- 'son, and to the surviving acceptors or surviving acceptor of 'them, the major part of such surviving acceptors being always 'a quorum, in trust, for the uses, ends, and purposes after-men- 'tioned.' These purposes were then enumerated, of which the most material were to entail his estate of Lednathy upon his nephew, James Stormonth Darling, son of Mr Darling, and for selling the rest of his heritable property, of which three-fourth parts of the price were to be paid to the other children of Mr and Mrs Darling, and the remaining fourth to James Adamson, one of the trustees. He also further declared, that the trustees should not be liable for omissions, nor the insolvency of factors, 'nor shall they be answerable for the intromissions of one 'another, but each of them allenarly for his or her own actual 'intromissions.'

After executing three different codicils (which were not material to the present question) Mr Stormonth died in October