

1737. February 8.

NAIRNE *against* FREEBAIRN.

No 81.

A GIFT from the crown of being King's sole printer for the space of forty-one years, bearing, 'To heirs, assignees, and substitutes,' found adjudgeable, though it was pleaded to be an office of trust, where there was a *delectus personæ*. See APPENDIX. *Fol. Dic. v. 2. p. 77.*

1738. December 15.

URQUHART and Others, Creditors-Arresters, *against* DOUGLAS of Glenbervie.

No 82.

AN assignation being made to a person, his heirs, executors, or assignees, of certain moveable debts, with the burden of the granter's debts and legacies, and declaring the residue to be alimentary; the same was accordingly found not affectable by his creditors; notwithstanding that a grant to one and his assignees was argued to be incompatible with the nature of an alimentary provision; in respect assignees were construed only such as might furnish the aliment.

An alimentary provision, though made to the granter and his assignees, not affectable by creditors.

*Kilkerran, (ALIMENT and EDUCATION.) No 1. p. 21.*

\* \* \* C. Home reports this case:

December 19.—MARGARET DOUGLAS disposed to Glenbervie all her moveables, such as household furniture, &c. in which she also assigned him to certain bonds to the extent of about L. 3000 Scots, burdening him with the payment of some legacies; and likewise she provided, "That any superplus or benefit arising to Glenbervie from the said disposition, should be no ways arrestable or affectable by his creditors, any manner of way whatsoever; but all right, benefit, and interest, that might, or could accresce to him by virtue of the right, she provided to him after her decease, for his necessary aliment and subsistence allenarly."

After Margaret Douglas's death, Glenbervie transferred the particular debts mentioned in the disposition to William Forbes, as trustee for himself, with provision to lay out the residue (after payment of the legacies,) upon security for his aliment in terms of the above clause.

However, some of Glenbervie's creditors having arrested the sums in the debtors of the bonds their hands, insisted in a forthcoming; in which, it was pleaded for William Forbes, the trustee, That, as to the residue, Glenbervie himself was preferable, in regard that by the deed in his favours, the same was declared alimentary and unaffectable by his creditors, which was at least good against all those whose debts were prior to the disposition:

No 82.

*Answered* for the Creditors-arresters, That it was not in the deviser's power to secure moveables, settled in the person of their debtor, from the diligence of his creditors; seeing the subjects were made his, and declared to belong to him, his heirs, executors, or assignees; and consequently, must be subject to arrestments or diligence affecting the same at the suit of his creditors. No body doubts but a yearly sum may be granted to one as alimentary, and made un-affectable by his creditors, in which case, *heret ossibus*, it is unassignable by the party for whose aliment it is destined, and, by the same rule, cannot be affected by arrestments for his debts, since it is for his natural subsistence the grant is made, and consequently must be subservient to that purpose, and no other. It is true, the nature of certain rights renders them alimentary, such as servants' fees, soldiers' pay, salaries, or the like; but a right to a great estate, or large sums of money, cannot be provided to one under that colour; for the law will lay open the subjects to the diligence of creditors, and void the fraudulent contrivance to disappoint them, *pactus privatorum jure publico derogari nequeunt*; such likewise is the doctrine taught us by Stair, B. 3. T. 1. § 37. Hence it is plain, that principal sums cannot be established as alimentary, or the *ipsa corpora* of moveables; it must be consituted as a yearly fund, to answer the intent of an aliment, and cannot exceed the measure of such; therefore, as the subjects here are made over *per aversionem*, they cannot subsist in Glenbervie's person, un-affectable by his creditors.

*Replied* for the trustee, The benefit, after payment of the legacies, and other burdens, which Glenbervie will get by the assignation, amounts to a mere trifle, such as would scarce be a reasonable aliment to him for one year, and, at most, only a moderate gratuity for the necessary trouble attending the management of the subject. In the next place, any person may grant a gift *sub modo* and with a quality that will be effectual *contra communes juris regulas*; e. g. one may gift a sum of money to a wife, which would fall under the *jus mariti*, consequently affectable by his creditors; and yet this may be prevented by adding a quality thereto; for the will of the donor must always be the rule by which the gift is to be regulated; so that it must either take place as gifted, or be of no effect at all, *uti quisque rei suæ legasset, &c.*

THE LORDS found, That the residue over payment of the legacies being declared to be alimentary and un-affectable by Glenbervie's creditors, could not be affected by the pursuer's arrestments for a debt prior to the disposition granted to him.

*C. Home, No 109. p. 175.*

No 83.

1740.

FORBES against FORBES.

A CLAUSE in an assignation (or bond) excluding assignees, will not bar the creditors of an assignee, but it will bar an assignation, though for an onerous