

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 unaffected 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, unaffected 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 unaffected 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

cause, to one not creditor prior to the assignation; and so it was found at the instance of a substitute in the assignation to bar a conveyance in the assignee's contract of marriage.

No 83.

*Kilkerran*, (PERSONAL and TRANSMISSIBLE.) No 1. p. 396.

1746. July 23. EARL OF ROSEBERRY *against* GEDDES of Scotstoun, &c.

No 84.

THE Earl of Roseberry's estate being sequestrated by the LORDS at the suit of his creditors, and L. 100 Sterling yearly allowed to himself in name of aliment; upon a complaint by the Earl against certain of his creditors for having poinded his horse, which he affirmed to have been purchased by him with the money allowed for his aliment, the LORDS found, "That the horse being by the execution of poinding estimated at L. 9 Sterling, was not poindable, and ordained the poinder to restore."

The day before, the LORDS had found another horse of his poindable, because being of L. 50 Sterling value, such horse could not be presumed purchased by his aliment; but a horse of so low a value as L. 9 was what reasonably might be purchased out of the aliment for his use, and so was as little poindable as the aliment itself was arrestable.

*Kilkerran*, (ALIMENT and EDUCATION.) No 3. p. 22.

1748. January 7. ATCHISON *against* BENNY.

No 85.

ON the verbal report of Lord Elchies for advice, it was found, That the rule in our law books, that tacks not bearing to assignees cannot be assigned without consent of the heritor, does not extend to urban tenements; and that therefore a tack for 13 years of a house in Falkirk might be assigned or subset without consent of the proprietor. But in this the LORDS were not unanimous, as several were of opinion, that there is often no less an *electio personæ* in the tack of a house than of land.

*Kilkerran*, (TACK.) No 5. p. 533.

\* \* D. Falconer reports this case :

A PERSON in Falkirk set a house for thirteen years to one Russel, who removing from the place, let it to Atchison; but the original landlord having sold the house to Benny, he hindered Atchison from taking possession, on this ground, that tacks were not assignable.

*Disputed*, Whether the rule extended to urban tenements.