

No 36.

payment, he was obliged to pay annualrent therefor, whereby the same became heritable, and so not arrestable. This exception was repelled, because the arrestment was laid upon this sum before the term of payment; at which time the heritable clause could not take effect: Likeas after the term, how soon it was payable, he pursued for the same; and, as if the creditor had died before the term, the sum would have pertained to his executors, and not to his heirs, notwithstanding of that heritable clause; so the arrestment before the term was found to affect the sum, notwithstanding of the tenor of the bond: It is ever doubted by me, if these preceding decisions be good, whereby sums owing by such bonds, after the terms of payment, are found not arrestable; for I think the clause to pay annualrent therefor, nor no surety, nor other right following thereon, ought to exempt the same from arrestments. (*See case between the same parties; voce Jus quasitum tertio.*)

Act. Craig.

Alt. ———

Clerk, Gibson.

Fol. Dic. v. 1. p. 55. Durie, p. 745.

* * Spottiswood states the same case thus :

WILLIAM KER, donatar to Robert Mudie's escheat, arrested in Mr Christopher Knows' hands 4000 merks, addebted by him to James Craw, who was debtor to the rebel in as much; and having, in a special declarator, summoned Mr Christopher to make the same sum forthcoming, it was *alleged* absolvitor, because the same was heritable, and so not arrestable. *Replied*, This ought to be repelled, because an heritable bond may be arrested; and, however, this sum was moveable the time of the arrestment, it being made before the term of payment. *Duplied*, Although it might appear to have been moveable the time of the arrestment, yet the pursuer could not seek it to be made forthcoming before the term of payment was come, at which time it was heritable, and so could not be arrested. THE LORDS repelled the exception, and found that an heritable bond might be arrested.

Spottiswood, (ARRESTMENT.) p. 18.

1637. June 28.

GALBRAITH *against* LENNOX of Blairfhogel.

No 37.

In opposition to No 29. p. 696; A sum destined to heirs, and to be employed on land, found arrestable after the term of payment.

By contract of marriage betwixt Andrew Galbraith and Janet Lennox, his future spouse, John Lennox of Blairfhogel, father to the said Janet, is obliged to pay in tocher, the sum of _____ money to the said Andrew Galbraith, to be employed upon land by the said Andrew, to the behoof of himself in liferent, and and his spouse, and the longest liver of them two, and the heirs to be gotten betwixt them; which failing, the one half to pertain to John Lennox, younger of Blairfhogel; which sum being arrested by Mr John Galbraith, minister, for satis-

fyng of a debt owing to him by the said Andrew Galbraith, and upon the arrestment, having obtained sentence before the Sheriff of Strivling, against Blair-shogel, as holden as confessed: Which decret being suspended upon this reason, that the sum was owing by contract of marriage foresaid, and was destined to be employed upon land, as is before related; in respect of which destination, the sum was heritable, and so not subject to arrestment: And also he alleged, That seeing he had conditioned these sums in favours of his daughter, for her lifetime and her husband's, and to their heirs, with provision in case of failzie of heirs betwixt them, that *eo casu* the equal half thereof should return to his son, in respect he was obliged to pay these sums only with these provisions; and, in that manner, therefore, with no reason can he be compelled to pay the same to any use, otherwise than to that use whereto he had provided and obliged himself particularly, and so ought not to be paid or made furthcoming, for satisfying the debt owing by his son-in-law to his creditor, contrary to the mind of the contract, and provisions of the parties: And the creditor compearing and opposing his decret recovered against him, and alleging this sum to be arrestable:—THE LORDS, notwithstanding of the destination foresaid, contained in the contract of marriage, found the sum was arrestable; but declared that the creditor, who had obtained sentence therefor, to make the same furthcoming, ought to fulfil the conditions with which the money was affected by the said contract of marriage; and that the money ought to be paid to him, he finding caution to make the same furthcoming to the relict, in case she survive her husband; and to the heirs gotten betwixt them, in manner as the contract proports: And found, That he ought not to have the said sum paid to him, except upon finding caution, as said is; and found it not competent in this place to dispute, if the sum might be evicted for the husband's debt, and thereby the bairns (if any were gotten in the marriage) prejudged of the fee of the money, or the person substitute, if there were no heirs in the marriage; but reserved that in its own time to be considered, when the case should fall out; and, in the mean time, the husband living, who was provided to this liferent, at least of the money, it was found that the creditor, during his lifetime, ought to have the use of the money, he finding caution *ut supra*; for the arrester's debt being far less than the sum arrested, the profit thereof might pay him before his debtor died, and so the doubt anent the heirs could not occur. (See FIAR ABSOLUTE and LIMITED. See MUTUAL CONTRACT.)

Clerk, Gibson.

Fol. Dic. v. I. p. 55. Durie, p. 846.

1666. February 22.

LOCKHART against LORD BARGANY.

THE umquhil Lord Bargany, being addebted in a sum of money to Sir William Dick, he apprised, but no infestment nor charge followed. Thereafter a

No 38.

A party having led an apprising, the sum was