

No 43.

made moveable; but *jus fuit fundatum*, and' the superveniency accretes. So Stair, Instit. lib. 3. tit. 1. § 29. observes out of Hope, that an arrestment of the price of lands only verbally sold, from which there was *locus penitentiae* (room to refile) was sustained, if a written agreement afterwards followed; and even so of arrestments *currente termino*.—THE LORDS found the company not personally liable, but that the arrestment affected the subject *tanquam nexus realis*; and though they could decern in the furthcoming, yet they decerned in the declarator, that the share due to Crawford fell to Alison, his creditor, who had arrested it, and that the directors ought to transfer it over to him; and when the commiffioners of the equivalent got the African money paid in to them, Alison had right to claim Crawford's share and proportion thereof.

Fol. Dic. v. 1. p. 55. Fount. v. 2. p. 361.

1712. June 11.

ROBERTSON against ROBERTSON.

No 44.

A tocher defined by contract, to the Lady in life-rent, and the heirs of the marriage in fee, found arrestable, as well principal as interest, during the marriage; but under burden of the life-rent, if it should exist.

DUNCAN ROBERTSON, brother to Strowan, having married Mr William Robertson of Inche's daughter, there is 6000 merks of tocher conditioned; but it is expressly destinate by the contract, to her in life-rent, and the heirs of the marriage in fee. Dean of Guild Robertson in Perth being creditor to Duncan, the husband, in L. 900 or thereby, he arrests the tocher in Robertson of Inche's hands, and refers the debt to his oath; who compears, and depones that he was debtor by the contract; but it was by an express clause affected with his daughter's life-rent; the husband was obliged to provide the like sum with the same destination; which he was so far from doing, that he had deserted his wife and children, and gone abroad to be a soldier: And that these sixteen months bygone, he had alimmented his daughter, and her bairns, and so was creditor in their alimment; and behoved to do so still, the husband having left no stock to subsist them, and no probability of his return. This oath coming to be advised, with the contract of marriage produced, several questions occurred; as, *imo*, Whether a creditor of the husband's could legally affect the sum by arrestment, in prejudice of the specific destination in favours of the wife; especially where the prestations on the husband's part were not implemented, nor offered by the arrester to be performed? For whom it was *contended*, That he was not concerned in these mutual prestations, but it was incumbent on Inches, the father, to have seen to their performance; and if he has neglected *sibi imputet*; neither do these clauses divest the husband of the fee, but he still retains the right and power of uplifting and disposal. Likeas it was an event very uncertain if the wife should ever come to her jointure by the husband's dying before her; and if that should not exist, then the creditor's arrestment was infallibly good. It was remembered by some of the LORDS, that, in a late case of the Earl of Bute's assignee to a tocher so qualified, it was found, that he had the *jus exigendi*, but upon caution to pay the annual-rent to the wife, in case she outlived her husband. The 2d doubt was, what this

arrestment affected? Whether only the bygone annualrents, and the current term in which it was laid on, or the subsequent annualrents, during the standing of the marriage, which, *jure mariti*, were the husband's? It was acknowledged, in rents of lands and other debts, where the stock was not arrestable, the arrestment only reached bygones and the current term; but here the principal sum was as capable of arrestment as the annualrent; and therefore the arrestment would affect the whole annualrents, *stante matrimonio*. The 3d difficulty arose from that part of the oath, bearing he had taken home his daughter and her children to his own house, and still must keep them, or else let them starve, and craved retention of the annualrent for their aliment, which resolved in a compensation. Against which it was *alleged*, That it was no way liquid, and so not receivable *hoc loco*, but behoved to be constitute in a process where the alimenter and quantity must be proven.—THE LORDS found the principal sum of the tocher, as well arrestable as the annualrents, and behoved to be made forthcoming to the arrester, as well as the interest, but always with the burden of the liferent in case it exist; and found, where the stock was arrestable as well as the interest, there the arrestment affected in time coming, as well as bygones; and sustained the compensation as to the aliment already furnished; but that if he continued to entertain, the same behoved to be liquidate in a process of aliment, ere he could have retention in time coming; for, though *jure naturæ*, the husband and his means are bound to aliment the wife, which his creditors could not hinder, yet that required a cognition and legal trial, to determine the quota and time it lasts; and if he had not deserted, but stayed with his family, the tocher, though given *ad sustinenda onera matrimonii*, especially as to its annualrents, yet that could not stop creditors to affect it by legal diligence: but a third party, debtor in the tocher, having alimentered them on the husband's failing to do the natural duty incumbent on him, it was thought but reasonable he should have retention of the annualrent, to reimburse him of the aliment afforded to his daughter and grandchildren, the husband having deserted them, and run abroad to the army, because of his great debts. (See HUSBAND and WIFE. See MUTUAL CONTRACT.)

*Fel. Dic. v. 1. p. 55. Fount. v. 2. p. 736.*

1715. January 26.

CAPTAIN JOHN BRODIE *against* MR PATRICK CAMPBELL of Munzie.

CAPTAIN BRODIE having commenced a process against Lieutenant-Colonel Hay, of the Earl of Tullibardyn's regiment; during the dependency, arrests in Munzie (who had been paymaster to the regiment while it stood) his hands, some arrears due to Hay; and after decret obtained against the Lieutenant-Colonel, having insisted in a forthcoming against Munzie: The question came to be discuss, How far an arrestment in the hands of the paymaster could affect money belonging to the officers?

No 45.

The arrears of an officer's half-pay found to be arrestable; in the hands of the paymaster, who was held to be factor, not of