

son. *2do*, That which here is in question, is Harmiston's rent, which falls within his liferent-escheat, whereunto Pilton is donatar upon this very account to secure himself, that he might without hazard, employ the sum for Sinclair's aliment, which gift is declared before any arrestment. And as the King might freely gift the liferent, excluding creditors who had not done diligence *in cursu*, so he had given it to Pilton for securing this bond, as appears by Pilton's back-bond; and albeit it could be presumed that the gift was also to Sinclair's behoof, yea though it had been given in Sinclair's name, it being an aliment granted by the King, would not be affected with Sinclair's creditors, much less could Pilton be called in question when he had expended the same.

THE LORDS preferred Pilton upon his gift against these creditors, as they had done against the other creditors in the former decret of preference.

Fol. Dic. v. 2. p. 77. Stair, v. 2. p. 288.

1676. December 22.

DICK against DICK.

DICK of Grange, arrests a sum of £. 100 Sterling yearly, granted by the King in favour of Sir Andrew Dick, his Lady and children, and pursues to make forthcoming; it was *alleged* for the Lady and Children, That this being a free donation, granted by the King out of compassion, and upon a supplication, bearing, to prevent the perishing of this Lady and family, it is an aliment granted to a wife, not by her husband's means, and, therefore, can be affected by none of his debts and deeds, and falls not under his escheat, nor *jus mariti*. It was *answered, imo*, That alimentary donations are never presumed but when they are so expressly granted, and are necessary for the maintenance and subsistence of the party; but this donation of the King is not upon these terms, but proceeds upon the husband's means, because he opposed not the reduction at the King's instance, of the Earl of Morton's right of Orkney, whereupon there were 80,000 merks due to Sir Andrew; *2do*, Though this donation were alimentary, and thereby had a privilege, yet it cannot defend against this pursuer, whose bonds are granted for furnishing to the family, which, therefore, being alike privileged, *et privilegiatus contra privilegiatum non utitur privilegio*. It was *replied*, That alimentary provisions not being affected with their debt, is not by any privilege, but by the nature of the right, which being granted for the necessaries of life, can be applied to no other use but for the current provision, and not for the provision of anterior years; and the formality of stile is not to be regarded in the King's donations, where the substantial requisites are clear, as in this case, where the gift is not granted to Sir Andrew Dick, but to his wife and children, to prevent their perishing; nor is it by the husband's means, the right of Orkney being reduced against the Earl of Morton, and Sir Andrew compearing, whose right fell in consequence with the

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A gift made in exchequer of a sum to a man's wife and children, not expressed to be alimentary, found not to be attachable by his creditors, nor even for alimentary furnishings of prior years.

No 67. Earl's, and he neither had, nor hath any defence; and, therefore, it is an act of mere favour.

THE LORDS found, that this donation of the King's was merely alimentary, and that it was not affected with the husband's *jus mariti*, debts, or escheat; nor with bonds granted by Sir Andrew for aliment of prior years.

Fol. Dic. v. 2. p. 77. Stair, v. 2. p. 483.

* * Dirleton reports this case :

SIR ANDREW DICK having obtained, upon a petition to his Majesty, a warrant to the Exchequer, to pay to his wife and children L. 130 Sterling yearly; the said annuity being arrested at the instance of Dick of Grange; it was *alleged*, in a process to make forthcoming, That, being alimentary, it could not be arrested: Whereunto it was *replied*, That the said sum was not alimentary; so that it could not be affected with Sir Andrew's debts; in respect, whatsoever belongeth to a debtor, either on his own right or *jure mariti*, is liable to his debts, and it is not in the power of a debtor to make any thing belong unto him alimentary, but there must be an express constitution to that effect; which is only in that case where the King, or any other person doth give any thing, and doth qualify their own gift with that express provision, that it should be only for the aliment of the person gratified, that it should not be affected with any debt or execution for the same; whereas his Majesty's grant was only in the terms foresaid, and was procured from his Majesty, not upon any special consideration or respect to Sir Andrew's Lady, but upon a representation made by Sir Andrew, that he had a former wadset from the Earl of Morton of his estate of Orkney, and the same being taken from him by a reduction at the instance of his Majesty of the Earl of Morton's right of Orkney, he and his family would be in a said condition; and therefore, the said annuity being granted by his Majesty in lieu and *in tuitu* of the said former right, *surrogatum sapit naturam surrogati*.

It was further *replied*, That albeit the said annuity were alimentary, the pursuer's debt ought to affect the same, being likewise alimentary, in respect it was for money furnished for the aliment and entertainment of the said Sir Andrew and his Lady, *et privilegiatus non utitur privilegio contra privilegiatum*.

THE LORDS found, That the said annuity was alimentary, and could not be arrested; and the aliment being *de die in diem*, the debt due to the pursuer could not affect the same, unless it had been for aliment, while the annuity in question was *in cursu*.

Reporter, Forret.

Clerk, Hay.

Dirleton, No 414. p. 202.

* * This case is also reported by Gosford:

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IN an action to make arrested goods furthcoming, at the instance of Grange against Sir William Sharp, upon whom a precept was drawn by the Exchequer, and accepted for payment of the sum of L. 100 Sterling yearly to Sir Andrew, his lady and children; it was *alleged* for Sir Andrew and his Lady, That the sum contained in the precept was not arrestable, because it was granted by his Majesty's special favour to his lady and children, for their entertainment and subsistence, and so did not fall under his *jus mariti*, and unarrestable by his debts, being an aliment not granted by him, but by the King's Majesty. It was *replied*, That the pursuer being a most favourable creditor, not only to Sir Andrew, but to his lady and children, and the ground of his debt being a bond of L. 200 Sterling, advanced to him for his own, his children and lady's entertainments, when they were at London; and the Lady, by a special letter, having acknowledged that great kindness, and promised to see the same thankfully paid, neither he nor she could in law nor conscience hinder the pursuer to arrest this sum, which was granted for the same cause: Likeas, upon that same ground, and the practicks of Garberry and Frenndraught,* husbands, having granted aliments to their ladies, it was found that the same could not prejudice lawful creditors, but the same were arrestable and affectable at their instance. And as to the precept granted by the King, for payment to Sir Andrew's lady and children, it not bearing that Sir Andrew's *jus mariti* would be secluded, and being granted in contemplation of a right he had from the Earl of Morton upon the estate of Orkney, and by his own procurement, it ought not prejudice his lawful creditors, especially the pursuer, whose debt is for alimending himself, his lady and children. It was *duplied*, That by the conception of the precept, it being for maintainance of his lady and children, and so appointed by the King's special favour, it was not arrestable at the instance of his creditors; and it were to invert the King's pious donation; and where the Exchequer, by the King's special orders, grants precepts to particular persons for their subsistence, the Lords have never found that they could be affected with creditors, and being alimentary; and as to the lady's missive letter, it cannot be obligatory, being subscribed *stante matrimonio*, and only in testification of gratitude. As to the practicks adduced, it was *duplied*, That they do not meet this case, the ground of the decision being, that the husbands *intuitu* of a subsequent marriage, or *stante matrimonio*, had granted a part of their own estate, for aliments to their ladies, not to be affected during the marriage, which was justly found could not prejudice prior and lawful creditors; but here the case is only as to an aliment granted by the King out of favour, and upon his precept; and as to that pretence, that it was granted in contemplation of a right which Sir Andrew had to the estate of Orkney; it was *duplied*, That his right, and the Earl of Morton's his author, being reduced by a decret of the Lords, before this precept, it could be no cause thereof, but ought to be looked upon as

* See General List of Names.

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his Majesty's special favour and bounty. It was *triplied*, That any decreet against the Earl of Morton and Sir Andrew, at the King's instance, was for null defence and no compearance, which they willingly agreed to, being confident of a remuneration another way, which Sir Andrew did procure by his yearly pension; and albeit he pretended that he hath not whereupon to aliment his family, yet it is too well known that they have fortunes secured in the name of Sir John Lesly, who is only a trustee, as likewise that he hath a process depending against the Earl of Kinghorn for a great sum. THE LORDS did find, That this pension was not arrestable for payment of this debt, which was due before the precept, which seems hard, being contracted for alimenting his wife and children; and albeit it was prior, yet being of that same nature, and advanced when Sir Andrew and his family were procuring this pension and precept, *et privilegiatus contra privilegiatum non utitur privilegio*; and until it had been made appear, that Sir Andrew had no other estate to aliment his wife and children, it was hard to hinder the payment of this debt by this precept of Sir Andrew's own procurement, in consideration of his interest in the estate of Orkney; and if the true cause had been represented to the King, it is like it had not been of that nature to seclude a creditor for aliment.

Gasford, MS. No 928. p. 605.

1677. June 14.

BLACKWOOD against BOYD.

No 68.

An aliment to an apparent heir, which was considerable, was found affectable by creditors.

BLACKWOOD having arrested the rents of Pinkill upon a bond, wherein Pinkill became debtor for Adam Mushet, he pursues the tenants for making forthcoming.—It was *alleged* for Pinkill, That his father disposed the lands in question to the defender's son, reserving his own liferent, except 500 merks yearly to the oye; by which disposition the defender's liferent was expressly constituted as an alimentary provision; and as the disponent might have disposed all to his oye, without reservation; in which case the defender's creditors could have no access for the defender's proper debt; and all aliments expressly so constituted being *propter victum et amictum*, are still free of any debt, but what is for these ends; so the pursuer cannot quarrel the defender's aliment.—It was *answered*, That albeit aliments so expressly constituted by persons who are not ways obliged, when only sufficient for intertainment of the party according to their quality, have been sustained against that party's other debts, but for aliment; yet here the liferent reserved is in favour of the disponent's apparent heir, and of his whole estate, which were of dangerous consequence to allow; especially seeing the estate doth far exceed a sober aliment in three or four thousand merks yearly; and if in any thing it were restricted, the pursuer's debt being very small, it would have effect.

THE LORDS repelled the defence, in respect of the reply.

Fol. Dic. v. 2. p. 77. Stair, v. 2. p. 523.