

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 alimentering 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

No 45.  
the Colonel  
as an indivi-  
dual, but for  
the behoof of  
the officers.

It was excepted for Munzie, That, by the Roman law, such an arrestment was so far from being supported, that, by Nov. 88. C. 1. the user thereof was punishable. And that pay cannot be arrested, appears further from l. 4, 6. *de execut. rei jud.* where it is said, That even *ob rem judicatam stipendia retineri non possunt, except in subsidium; & si aliis rationibus exequi nequeat*: And much less, where the arrestment is only on a dependence. Nay, according to L. 5. 6. *Qu. res pig. oblig. poss. athletarum premia pignori dari non possunt*; much less then can *stipendia militum*, which only *in subsidium etiam ob rem judicatam capiuntur*. And this is also supported by our acts of federunt in *annis 1613 and 1626*, whereby *pensions and fees of the king's public ministry and others, are declared not arrestable*: Specially considering, their pay is to be looked upon as alimentary. *2do*, By King William's regulations 1695, founded on an act of Parliament, *6to & 7mo Gulielmi, cap. 7.* the pay of the army seems not arrestable, for there, § 9. it is statute, 'That all agents, clerks, &c. for, or on the account of, any Colonel, or commanding Officer, &c. shall, before they receive any pay, give bond to his Majesty, with two sufficient securities:' The condition of which bond is, to answer the sums so by them to be received, &c. And, § 10. it is enacted, 'That no Colonel, officer, or agent, shall, in accounts by them stated, be allowed any sums of money, upon pretence that they had been by them advanced or lent to any officer or soldier thereafter:' So that to imagine agents liable to arrestments, and at the same time obliged to fulfil the conditions of the bonds given, is to suppose manifest contradictions.

*Replied* for the pursuer, That the question is not here anent subsistence, which is indeed necessary for the public service, but anent arrears, which is a subject over and above what is necessary for subsisting in the service, and is arrestable; specially when the fund is still due after the regiment is broken, and the Lieutenant-Colonel out of the service; so that there is no occasion of detaining it on account of the necessity of the service. Which distinction is well established in parallel instances, by the Lord Stair's institutions, lib. 3. tit. 1. § 37. where he says, 'That it is a competent exception against arrestments, that the thing arrested is a proper aliment, and not exceeding the measure of aliments; and the fee of a servant was not found arrestable, in so far as it was necessary for the service he was in; but only for the superplus, more than was necessary for his aliment in such a service. July 9. 1668. Boag *contra* Davidson, preceptor of Heriot's Hospital.\*' And as to the act of Parliament, and regulations above-mentioned, though they can have no influence on this decision, being English acts before the union; yet even they seem more to favour the pursuer; for there it is expressly appointed, That the factors for regiments shall issue forth their payments to the officers, conform to their respective proportions, but no prohibition of legal diligence against arrears.

THE LORDS found the sums in question were arrestable.

\* Stair, v. 1. p. 550. *voce* PERSONAL and TRANSMISSIBLE.

Another point having fallen to be determined, viz. Whether Munzie was factor for the Colonel only, or both for him and the officers? As to this, it was excepted for the defender, That he opposed his factory, in the terms whereof he is only liable, which is only from the Colonel, and to whom alone he is declared accountable; and, by the forefaid instructions by King William, the factor is only to issue out the money conform to his Majesty's directions; so that where no such directions were, it behoved to be by the Colonel, who had the only power to receive, and was accountable to his Majesty for the money of his regiment. And, though other officers also contributed for the agent's pay, yet such an office was absolutely necessary for management of the regiment's affairs.

*Replied* for the pursuer, That Munzie's discharge from the Lieutenant-Colonel was opposed, which bears *in terminis*, that he hath made full and complete payment of what arrears he had in his hands, notwithstanding of arrestments laid in his hands by the pursuers. *2do*, Though, out of respect to Colonels, they have the nomination of the factor, yet still, by the nature of the trust, he was factor also for the regiment, and liable to count to every officer for his pay, as well as to the Colonel for his. *3tio*, The defender owned this by clearing with the several officers, without noticing the Colonel, or receiving his warrant to pay any of them. *4to*, There is a decision of the case *in terminis*, 20th February 1712,\* James Napier *contra* George Grant, paymaster of Grant's regiment; where the whole above defences were proponed and repelled.

THE LORDS found, That the defender was factor for the behoof of the officers the time of the arrestment, and therefore that their money was then arrestable in his hands.

Act. Boswell.

Alt. Se.

Clerk, Mackenzie.

Bruce, Nos 44. 45. p. 57.

1729. December. JAMESON *against* LECKIE.

MATHEW STEWART having some bills payable to himself, signed blank indorsations, and gave them to Leckie of Arnmore, to be delivered to some of his creditors; before delivery arrestment was used in Leckie's hands, and a forthcoming insisted in.—THE LORDS found, That exhibition, not arrestment, was the *habile* diligence to affect bills thus deposited, and therefore that Leckie had warrantably given up the bills according to his commission, notwithstanding the arrestment.

*Fol. Dic. v. I. p. 56.*

No 46.  
Bills deposited, blank indorsed, cannot be arrested in the hands of the depository.

1736. February 12. HALE, Minister of Linton, *against* HIS CREDITORS.

OF this date, I find it marked in the diary, That, on report of Lord Coupar, the LORDS found a minister's stipend arrestable.

*C. Home, No 12. p. 33.*

No 47.  
Minister's stipend arrestable.

\* Examine General List of Names.