

No 101. "THE LORDS, in respect, that the sum for which the pursuer is imprisoned, was not imposed upon him as a fine for a delict, but is a civil debt, adhered to their former interlocutor, and refused the desire of the petition."

Act. *M^rLaurin.*Alt. *Rae.*Clerk, *Pringle.*

J. M.

Fol. Dic. v. 4. p. 139. Fac. Col. No 135. p. 316.

1768. March 5.

JAMES GRIERSON *against* CAMPBELL and Others, His Creditors.

No 102.

Whether half-pay must be assigned to creditors in a *cessio bonorum*.

JAMES GRIERSON, a Lieutenant in the Navy, upon half pay, having brought a process of *cessio bonorum*, some of his creditors insisted that he should surrender his half-pay.

Pleaded for the Creditors; The benefit of the *cessio bonorum* is introduced into our law from the civil. The text of that law allowed of no exception from the surrender by the bankrupt; and the only exception admitted by the commentators is his wearing apparel. Adeo autem (says Voet) bonis omnibus cedere debitorem oportet, ut jure quidem civili nihil omnino sibi servet, præter vestem viliores et quotidianam. De cætero non præsentia tantum bona cedi necesse est, sed et futura, si modo talia sint quæ jam spe acquisivit; Voet, De cessione, bon. § 7. He had indeed the beneficium competentiæ; but this was only of any effects he might afterwards acquire. Cedit debitor creditoribus (says Struvius) omnia sua bona, ita ut ipsi nihil præter vestes quotidianas, sub quibus et lectum comprehendunt, relinquatur: Ne quidem alimenta necessaria, quæ tamen ipsi ex bonis postea quæsitis conceduntur.; Synt. jur. civ. ex. 44. § 30.

The ancient Scots law agrees with the civil in both respects. "He who should be made hairman, (*i. e.* liberated upon insolvency) shall swear in court that he has na gudes nor gear attour 5 shillings and an plack. He shall not retene to himself of all his winning and profit, frae that day in anie time coming, but twa pennies for his meat and claith, and he shall give ilk third penny for payment of his debt;" Stat. Will. cap. 17.

It does not appear that the ancient law has been altered; nor is any exception allowed by the writers on our law, from the general disposition by the bankrupt.

It is true, this sum is not arrestable; but it does not from thence follow, that it may not be assigned by the debtor. Sums due by bills of exchange, the future profits of land or money, are not arrestable; yet there is no question, that the creditors are entitled to a conveyance of these.

At any rate, the pursuer ought to assign his half-pay, so far as it may exceed what is necessary for aliment. It was found, that, though an officer's subsistence money was not arrestable, yet the arrears were; 26th January 1715, Captain Brodie, No 45. p. 709. And, as a debtor must convey even certain

sums which are not arrestable, *a-fortiori*, he ought to convey all that may be affected by that diligence.

No 102.

Answered for the pursuer; No argument can well be drawn from the Roman, or ancient Scots law, to the present case, the subject in question having been unknown in the time of these laws. Besides, it is certain, that notwithstanding the general terms in which the rule is laid down as to this matter, yet there were many exceptions. Thus a sum might be given to a debtor with a *proviso*, that it should not be assignable by him, nor attachable by his creditors; and it would be no bar to his obtaining the *cessio*, that this could not be conveyed by him. The pursuer's half pay falls to be considered much in the same light with such a sum. It is given by government for decent living to him, and that he may be ready for public service when required. If it should not be applied in this way, he would be in danger of losing it. It is for this reason that it is not arrestable. For the same reason, he ought not to be obliged to assign it; and indeed it was so found *in terminis* by the House of Lords, in the case Alexander Blackwood *contra* John Cathcart. See APPENDIX. Nay, it is universally understood, that the pay, of sea-officers especially, whether full or half-pay, is not assignable, in so much that no agent will pay upon an assignation.

This argument applies to the whole of the half-pay; and, as there is here no question as to arrears, the case of Captain Brodie is no precedent.

"THE LORDS found the pursuer was not obliged to assign any part of his half-pay."

Aet. *Buchan Hepburn.*Alt. *Geo. Ferguson.*

A. R.

Fol. Dic. v. 4. p. 138. Fac. Col. No 75. p. 130.

1775. February 4.

JOHN SHARP *against* DAVID TURNER, RACHEL FORBES, late Spouse of the said John Sharp, and Others, His Creditors.

THE pursuer is eldest son of the late John Sharp stabler in the Pleasance, who made a disposition of several heritable subjects, to a considerable value, in favour of his said son, and others therein mentioned. After reciting the several subjects disposed, is the following clause: "Declaring always, That these presents are granted by me, with the burden of the payment of my just and lawful debts, contracted prior hereto, and unpaid at my decease; and particularly, with the payment of the provisions to Janet Sharp my daughter, and Elisabeth Elliot my intended spouse: And, further, that it shall not be in the power of any of my said sons, to sell, dispo,ne, burden, or affect the foresaid subjects with any debts of their contracting, until the youngest of their children shall attain the years of majority complete: Which provision I hereby appoint to

No 103.

Cessio bonorum denied to a pursuer, as not being bankrupt so far as to entitle him thereto, although rendered bankrupt in terms of the act 1696.