

1738. February 17.

SIR RODERICK M'KENZIE of Scatwell *against* CHRISTIAN MONRO.

## No 76.

A wife being disappointed by the diligence of creditors, of her jointure, for which her husband had been only personally bound, is found entitled to the benefit of an infestment, given to her by her husband during the marriage, bearing to be, 'over and above any former provision,' which would have been gratuitous, had the jointure been made effectual.

IN a marriage contract, the husband, by a personal obligation, provided his wife to a jointure of L. 180 Scots yearly, and also to the sum of L. 1000 Scots, failing children of the marriage; during the marriage he infest his wife in a tenement of L. 10 Sterling of yearly rent, bearing to be, 'over and above any former provision made in favours of his spouse.' The husband having died insolvent, his creditors raised a reduction of this infestment, upon the first head of the act 1621, as being gratuitous: The relict acknowledged she could not hold both the personal provision and the infestment; but *observed*, That the case would be hard if the creditors, who had cut her out of her personal provision, by preventing her in diligence, should be allowed to turn these provisions against her, in order also to cut her out of her life rent infestment; and therefore *answered*, That as a reasonable provision granted *stante matrimonio*, to a wife not otherwise provided, would be effectual though the husband were insolvent at the time; so the present infestment, though designed as a gratuity, turning out to be no other than a reasonable provision, is not reducible; gratuitous it cannot be said to be, with regard to the relict, who throws up every other claim against the husband and his creditors.—THE LORDS found the wife's infestment is not reducible upon the act 1621.

*Fol. Dic. v. 1. p. 70.*

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 S E C T. XI.

## The Onerosity of Provisions in Favour of Children.

1668. July 22.

JOHNSTOUN of Sheins *against* ARNOLD.

## No 77.

In a competition betwixt two appraisings, one of them upon a bond of provision, it was found relevant, so as to prefer the other led on an onerous debt, that the delivery of

JAMES ARNOLD having granted a bond of provision to his daughter Hobel, became afterwards debtor to Johnstoun of Sheins, who apprised Arnold's estate, in anno 1638, upon a debt of his own, and as assignee to another debt. Thereafter Hobel Arnold, on her bond of provision, apprises the same lands; Sheins comes in possession of the most part, and Hobel in a small part, till they both acquire the benefit of a possessory judgment, whereupon there are mutual reductions. Sheins' *reason* was, That his father's apprising was long prior to the defender's, and that the ground of the defender's apprising, was only a bond of provision by a father to his daughter, which could never exclude the father's creditors, ef-

pecially if that debt was contracted before the bond of provision was granted, and while it remained in the father's custody, and so in his power to be reduced at his pleasure.—Ifobel's *reason* of reduction was, That albeit Sheins' apprising was prior, yet there was no infestment thereon in Sheins' person, bearing to be on an assignation to the apprising by Sheins to Collingtoun; but any infestment produced is in Collingtoun's person, bearing to be on an assignation to the apprising by Sheins to Collingtoun; which assignation is not produced; and so Sheins' infestment, flowing from Collingtoun, is null, because Collingtoun's right, from umquhile Sheins, is wanting, which is the mid-cuppling. *2do*, Sheins' apprising being on two sums; the one whereof was to the behoof of a cautioner who had paid the debt, and taken the assignation in Sheins' name to his own behoof; which cautioner being conjunct cautioner with James Arnold, the common author, and having a clause of relief, neither he, nor Sheins intrusted by him, could justly or validly apprise Arnold the cautioner's lands for the whole sum, but behoved to deduct the other cautioner's part; and so the apprising is upon invalid grounds, and thereby is null, and albeit prior to Ifobel Arnold's apprising, yet she has the only valid apprising.—It was *answered* for Sheins, That the first reason was not competent to the pursuer, for it was *jus tertii* to her what progress Collingtoun had from umquhile Sheins, seeing she derives no right from him. *2do*. This Collingtoun, by his right, granted to this Sheins, acknowledges that *ab origine* the infestment in Collingtoun, his father's person, was to Sheins' behoof, which is a sufficient adminicle in place of the assignation: And to the *second* reason, albeit it were instructed, it could not annul the apprising *in toto*, but restrict it to the sum truly due, especially seeing that Sheins was content to declare his apprising redeemable, by payment of the sums truly resting, within such times as the Lords would appoint; and albeit the Lords are strict in the formalities of apprisings when they are expired, and carry the whole estate, though impropotional, yet during the legal, they allow them in so far as they are due.

THE LORDS found Ifobel Arnold's first reason competent and relevant to her, unless Collingtoun's assignation were produced, or the tenor of it proven; and found the second reason relevant, to restrict the apprising to the sum truly due; in respect that Sheins did of consent declare it yet redeemable for the true sums; But they found Sheins' allegiance, that the ground of Ifobel Arnold's apprising, was a bond of provision, posterior in date or delivery to Sheins' debt, relevant to prefer him as a conjunct creditor for his true debt, though the assignation should not be produced, a new one from Collingtoun being sufficient. See *JUS TERTII*.

*Fol. Dic. v. 1. p. 71. Stair, v. 1. p. 557.*

1670. June 24.

MARGARET HOME against Mr ANDREW BRYSON.

IN a reduction of a disposition of lands, made by Andrew Bryson to Mr Andrew, his second son of the first marriage, at the instance of Margaret Home, his

No 77.  
the bond of provision was posterior to the onerous debt.

No 78.  
A son in *famiglia*, obtained a gratuitous disposition from his father. Thereafter he made voluntary pay-