

for their debts: Also find, That there is now confessedly an insufficiency of funds belonging to the late William Wardrobe, for payment of his debts; and that the younger children of the said William Wardrobe have not produced sufficient evidence to show that their father's estate in Scotland, at the time of his death, was sufficient to answer the debts he then owed, and their provisions; and therefore find, that the said younger children are not entitled to compete with these creditors of their father.'

No 90.

Lord Ordinary, *Braxfield.* For the Creditors, *Honyman.* For the Younger Children,
Henry Erskine, Dickson. Clerk, *Colquhoun.*
Craigie.

* * * The younger children insisted, that among the funds a debt due by one of their number should be computed; which, with the price of the estate of Cult, would have satisfied the whole debts as they stood at the father's death. The Court were of opinion, as the debtor was confessedly unable to pay, and had been in that state since the father's decease, that this demand could not be complied with. One of the Judges, however, suggested, that in the event of a future recovery of this debt, the younger children would be entitled to a preference on it to the effect of receiving what they would have drawn out of the estate of Cult had their father been solvent at his death. No precise judgment was pronounced on this point.

Fol. Dic. v. 3. p. 49. Fac. Col. No 117. p. 182.

S E C T. XII.

The onerosity of Provisions made in contracts of marriage.

1671. February 8. MR JOHN WATT *against* CAMPBELL of KILPONT.

SIR ARCHIBALD CAMPBELL being debtor to Adam Watt in a sum of money, he did thereafter contract his son Mr Archibald in marriage with Thomas Moodie's daughter, and by the contract Thomas Moodie acknowledges the receipt of forty thousand pounds from Sir Archibald, and is obliged for twenty thousand merks of tocher, all to be employed for Mr Archibald in fee; but Thomas Moodie's daughter dying, and leaving no children behind her, Thomas Moodie did restore the sums, and there is a discharge granted by Sir Archibald and his spouse, and Mr Archibald, bearing them to have received the sums, and to have discharged the same; whereupon Mr John Watt, as heir to Adam, pursues Mr Archibald to

No 91.

A father, at the time solvent, gave his son on his marriage L. 40,000 Scots. On the father's eventual bankruptcy, action sustained at the instance of a creditor a-

No 91.
gainst the
son; the gra-
tuity, al-
though it did
not render
the father
bankrupt, be-
ing consider-
ed to be exor-
bitant.

pay him the sum due to his father, upon this ground, that he having received forty thousand pounds of his father's means, after contracting of the debt, ought to make so much of it forthcoming as will pay the pursuer; which action was founded upon the act of Parliament 1621, whereby all deeds done by debtors in prejudice of their creditors, without a cause onerous, are declared null; and all parties that by virtue thereof intronit, are declared liable to restore to the creditors. It was *answered* for the defender, *1st*, That the libel was not relevant, there being no part of the act of Parliament 1621 that incapacitates debtors to gift or dispone sums of money, or moveables, especially if the disponent at that time be not insolvent, but have a sufficient estate for satisfying his debt; and it is offered to be proven, that Sir Archibald had, at the time of this contract, a sufficient estate for all his debt, in the hands of the Earl of Argyle and Glenorchie; and albeit, by the supervening forefaulture, Argyle's debt be insufficient, it was a good debt the time of the contract, so that there can be no ground to make a child liable to restore a portion given by a father who was solvent. *2^{dly}*, Albeit the defender could be liable, if it were clear that he had the sum foresaid by his father yet remaining to the fore, yet if it had been lost or spent before the intending of this cause, he or any subsequent estate acquired *aliunde* is not liable, *ita est* any thing he has is a wadset of forty thousand merks on Kilpont, and the two tochers he had, viz. twenty thousand merks from Thomas Moodie, and ten thousand merks of legacy, and twelve thousand merks of tocher with Sir William Gray's daughter, was sufficient to acquire the right of Kilpont, without any thing from his father. *3^{dly}*, The discharge produced cannot instruct that Mr Archibald received the money, because it bears indefinitely that payment was made to Sir Archibald and his spouse, and to Mr Archibald, and all of them do discharge. The pursuer *answered*, That the libel was very relevant, for whatsoever might be alleged of bairns portions by a solvent father, yet this being so considerable a fortune provided to the only son, and apparent heir, if it did not make him liable to satisfy the father's debt *pro tanto*, it were a patent way to defraud all creditors and elude the act of Parliament, for the father might sell his estate, and provide the moneys in this manner; and as to the discharge, albeit it be indefinite, yet it must be presumed that Mr Archibald received the sums, because they belong to him in fee by the contract of marriage.

THE LORDS found the libel relevant, and that the discharge produced did presume that Mr Archibald the heir did receive the money, but seeing the probation was not express, but presumptive, they allowed Mr Archibald to condescend upon what evidences he could give, that the money or surety thereof was delivered to his father.