

ferred, because he had arrested prior to the filling up of Forth's name in these blank bonds, at least prior to any intimation of his being creditor therein; and so *esto* he had been assignee, a creditor of the cedent's arresting before intimation affects it *nexu reali*.—*Answered, imo*, They denied it was Melfort's money. *2do*, *Esto* it were, Cefnock was not then creditor to Melfort, not having then constitute his debt of the bygone intromissions with his estate.—*Replied* to the *first*, They opposed Blair Drummond's oath, bearing he filled up Forth's name by Melfort's order, which proves the money was Melfort's. To the *second*, Though Cefnock had not then obtained a decret against Melfort, yet he was creditor by the general act rescissory in 1690, and by his special act; and had raised his summons and arrested thereon.—THE LORDS preferred Cefnock on his arrestment, and decerned Blackbarony, the debtor, to pay him. See BLANK WRIT.

Fol. Dic. v. 1. p. 72. Fountainball, v. 1. p. 766.

No 86.

1700. February 9.

LIBERTON and EDMINSTON, against The Countess of ROTHES, &c.

IN the competition betwixt James Liberton of Leiden, and Janet Edminston his spouse, against the Countess of Rothes, and other creditors of Edminston of Carden, the Lords found that old Carden having disposed his estate to his eldest son, with the burden of fundry provisions to his other children, and particularly to the said Janet Edminston, the son's creditors could not quarrel the same, nor seek preference thereto, but that the father's creditors might be heard against these provisions, either as latent or undelivered, or that parents cannot burden their estates with sums of money payable to their children till their lawful creditors be satisfied; at least, that they had a considerable visible estate, sufficient to pay all, at the time of their settling these provisions, as was found betwixt the Duke of Queensberry and the Children of Mousewell, (p. 961.) ; and that the father's condition might be inquired into, whether insolvent at that time, yea or not; tho' it is very hard to put creditors upon these indagations; and wherever the debtor's estate is dubious, it is juster that the children should be losers, than that the creditors should want. See the 30th June 1675, Clerk *contra* Stuart, marked both by Stair and Dirleton, with observations on the decision, No 46. p. 917. The creditors urged the late decision, Napier of Tayock *contra* Falside. Fountainhall, v. 1. p. 729. *voce* PROVISION TO HEIRS and CHILDREN.

Fol. Dic. v. 1. p. 72. Fountainball, v. 2. p. 87.

No 87.

Competent to creditors to explicate the solvency of a father granting provisions to his children.

1703. July 1. DAVID REID against GRIZEL WHITSOM, and RUTHERFORDS.

By contract of marriage betwixt the said Grizel and John Rutherford, she is provided to a life rent annuity of 300 merks out of his lands, but with this quality, that in case there were children of the marriage, she, *per verba de presenti*, re-

No 88.

A wife brought a tocher of 2000 merks. She was provided to the

No 88.
 liferent of
 300 merks a-
 year, 100 of
 which, in case
 of children,
 to be renoun-
 ced in their
 favour. The
 entire liferent
 being no more
 than reason-
 able; the pro-
 vision out of
 it to the chil-
 dren sustain-
 ed against an-
 terior credi-
 tors.

nounced 100 merks of the said annuity in their favour allenary, fecluding all others from the benefit thereof. Rutherford dying, Reid his creditor adjudges his lands; and, in a competition for the mails and duties betwixt him and the said Grizel, the relict, and her children, it came to be debated, whether her renunciation of the 100 merks accresced to the adjudger, or to her bairns. It was contended for Reid, he was preferable, because the 100 merks was provided to children then not born, but *liberis nascituris*, and so only belongs to them by way of destination; and as substitutes in a bond, who are reputed as heirs, and liable *in valorem* to their father's creditors, as was decided 23d December 1679, Erskine *contra* Carnegies, (No 82. p. 968.) *zdly*, It was a fraudulent contrivance to prefer the children to their father's anterior creditors. *Answered* for the children, That the clause was plainly conceived in their favour, with an exprefs feclusion of all others from the benefit thereof. *zdly*, It is not a renunciation in favour of the heirs of the marriage, (for that would have accresced to the creditors, and been affectable by them), but of the bairns; and if it had stood still in her person, her husband's creditors could have had no claim to it, and no more can they in this case: And the decision cited has many distinguishing circumstances; for there her jointure was exorbitant, far above what her husband could give; whereas Grizel's annuity is very moderate, being but 300 merks, and she brought 2000 merks of tocher with her; and in such a case the LORDS found the benefit of a renunciation only accresced to the children, 16th November 1665, Wat *contra* Ruffel, Stair, v. 1. p. 308. *voce* PERSONAL AND TRANSMISSIBLE; neither is there any fraud, but a just, equal, and open bargain, and nowise flowing from their father, and so not subject to his debt. THE LORDS found this provision so expressly exclusive, that they preferred the children to the creditors. The like was found lately between the Laird of Kinfauns and his father's creditors, p. 489. & 970.

Fol. Dic. v. 1. p. 72. Fountainball, v. 2. p. 185.

1715. February 10.

The LAIRD and LADY BLACKBARONY *against* The LORD and LADY PITMEDDEN,
 and MONTGOMERY of MAGBIEHILL.

No 89.
 A person, af-
 ter contract-
 ing a debt,
 and after dili-
 gence had
 been done up-
 on it, grants
 a bond of pro-
 vision to his
 daughter.
 Found rele-
 vant to *pre-
 sume* that the

HUNTERS of Hagburn, elder and younger, were debtors to John Peter of Whitlaid in upwards of 3500 merks, and horning and caption raised thereon; and John Peter assigned these sums to Elizabeth his daughter, Magbiehill's grandmother. And after this debt was contracted, and diligence so done, Hagburn elder made a bond of provision, (afterwards corroborate by his son) in favours of Catharine Hunter one of his daughters for 3000 merks; young Hagburn having fallen into difficulties, conveys his estate to Mr William Wallace his brother-in-law; but the price not having been applied for payment of creditors, Elizabeth