

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.

 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-