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that time he had the expectation of nearer heirs, and questionless had it in his view that those subjects might be inherited by his own children, while his nephew's L. 300 was to be a burden upon his executry. THE LORDS repelled the defence against the pursuer's title, and found, That, notwithstanding of his being heir, he was not excluded from pursuing for the debt libelled. See APPENDIX.

Fol. Dic. v. 2. p. 145.

No 153.

1739. December 14. PRINGLE of Symington *against* ALISON PRINGLE.

IN a contract of marriage, the husband obliged himself to provide 12,000 merks to the children of the marriage, payable at marriage, or at the male children's age of 21, and the females age of 16, which event should first happen : And it is declared, " That the foresaid sum should be in full satisfaction to the children of all that they could claim from their father, except what he should give or provide to them of his own free will ; as also, excepting what should accresce or belong to them as his heirs or nearest of kin." THE LORDS were of opinion, That an obligation of this sort is not to be strictly interpreted like a bond of borrowed money ; that it implies no more, than that in all events the children shall enjoy or succeed to their father's effects, to the extent of the sum stipulated ; and therefore the heir, who in the present case succeeded to the land-estate *præceptione hæreditatis*, by a disposition, bearing love and favour, claiming over and above, from the younger children who succeeded to the moveables, his proportion of the said 12,000 merks, they found, That the claim was satisfied and extinguished by his succeeding to the land-estate. See APPENDIX.

Fol. Dic. v. 2. p. 145.

No 154.

Two persons being found conjunctly liable *ex delicto*, and one of them having furnished the other with a sum of money which he used in paying a composition, it was presumed not to be advanced by way of loan, but as the advancer's share of what they had been found liable in.

1745. January 29.

JOHN DUNCAN *against* JOHN YOUNG.

DAVID GIBB and James Keith having been prosecuted before the Justices of Peace of the shire of Kincardine, at the instance of John Williamson, brought afterwards an action of wrongous imprisonment, oppression, and damages, for the procedure had in that process, against the Justices, Clerk, Procurator-fiscal, and private party.

John Young of Stank, the Clerk, was entrusted by the rest of the defenders, as John Duncan this pursuer alleged, with the management of the cause, and obtained an interlocutor assoilzieing them all except Williamson, who was found liable.

A reclaiming bill was presented for Williamson, on which Mr Young impe- trated from him a disclamation of the process, and the LORDS having, on a suspicion which they entertained, examined into the manner of obtaining this, it

was set aside, and they found, " That the process had been carried on by the instigation of John Young, and assoilzied Williamson from Gibb and Keith's damages and expenses ; and found Young and John Duncan, the Procurator-fiscal, conjunctly and severally liable therein, and in damages and expenses also to Williamson."

Young transacted the matter with Gibb and Keith, and having paid them L. 60 Sterling, took a discharge bearing the receipt of the money from him.

As Duncan had advanced him L. 20 of the money, he brought an action against him for repetition, on these grounds, That it was found the action was carried on by his instigation ; that he the pursuer was really his servant, and only nominal Procurator-fiscal, his master managing all the business, and having pleaded this very cause while he wrote the interlocutor ; that Young alone had made the composition, and had fallen on several contrivances to indemnify himself of this loss, and had prevailed with the pursuer to advance him this L. 20, though he denies he promised to repay him, but owns he told him he expected the shire would indemnify them both.

Pleaded for Young, They were both found jointly liable, and that part of the interlocutor, finding the process to have been carried on by his instigation, without mentioning the other, has not been adverted to, as they were then on one side, and had no thought of this debate ; there was no appearance of Duncan's being ignorant of the transaction ; and he had therefore paid the L. 20 as his share ; a presumptive loan was a thing unknown, and the circumstances from which this was sought to be inferred not true ; he had indeed been his servant, and lived still in his family, but had business of his own, and was Procurator-fiscal and a messenger, and used to be absent a considerable time without asking leave ; it might be owned he conducted himself pretty much by Mr Young's advice, and though he might have got it in this cause, the adviser is not singly guilty, and he had been accessory in obtaining the disclamation from Williamson ; it did not appear he was a nominal Procurator-fiscal, but there was evidence of fines being paid to himself ; he had been present at Edinburgh at consultations, so that his condemnation was not owing to Young's having the sole management of the cause ; and as the Lords had acquitted the Justices, so doubtless would they have him, if he had been innocent ; he had then paid his own fine and could not repeat it.

It was pretty plain from the proof, that the pursuer was the defender's servant ; and, on the other hand, the agent in the former process being examined, declared the money to make the payment was sent to him with a letter signed by both.

Some of the LORDS thought, That as Young being ordained to confess or deny the receiving the money, had owned the receiving it to pay the agreed sum, no more appeared from this declaration, than that it was advanced to enable him to make payment, but not as the pursuer's own proportion ; and as they thought Young obliged to relieve him, repetition was competent ; but the rest were of

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opinion the advance was made as his share of the fine ; and, supposing Young to have had no claim against him in case he had paid it all, or even that he could have demanded relief of Young for the whole, if he had been forced to pay it, and testified he did so with an intention to seek his relief, yet having paid it as his share, he could not repeat.

THE LORDS, 13th December 1744, found there lay no action for repetition of the sum libelled ; and, on a bill and answers, they adhered, unless the pursuer would offer to prove by the defender's oath, that the money was advanced by way of loan.

Act. *Lockhart.*Alt. *R. Dundas & Burnet.*Clerk, *Justice.**Fol. Dic. v. 4. p. 124. D. Falconer, v. 1. p. 58.*

SECT. VI.

Tocher granted in a Contract of Marriage how far presumed in Satisfaction of former Provisions.

No 155.

A tocher granted to a daughter in her contract of marriage interpreted to be in satisfaction *pro tanto* of all former special provisions, tho' not so expressed.

1569. December 15. COCKBURN *against* LAIRD of CAMBUSNETHAN.

ANENT the action by John Cockburn, brother to the Laird of Stirling, against the Laird of Cambusnethan, who married the said Laird's daughter ; it was *alleged* by the said pursuer, That Catharine Charteris, relict of umquhile John Carmichael of M. gave 200 merks to the said defender's daughter to her marriage, and put it in the defender's hands, who gave his obligation to the said Catharine and her son, that he should deliver the said money to his daughter at her perfect age ; and, therefore, the said pursuer, who married the said daughter, to whom the said money was given, desired the defender to deliver the said sum to the said daughter, his wife, and to him for his interest, conform to the said obligation. It was *alleged* by the defender, That he gave the said sum to the King's Treasurer, together with 1000 merks of his own proper money, for the marriage of the Laird of Lamington to his said daughter ; for the which marriage she obtained 1700 merks, with which sum she was married, and disposed thereupon at her pleasure ; and therefore he should be assoilzied from payment of the said 200 merks, notwithstanding his obligation ; which allegiance was found relevant by the LORDS, who assoilzied from the said sum.

Fol. Dic. v. 2. p. 146. Maitland, MS. p. 191.