1783. *August* 5. CREDITORS of CULT *against* The YOUNGER CHILDREN.

No 90.
In cases regarding bonds of provision to children, the solvency of the granter when these became effectual against him, must be proved by the children, unless the other creditors have been *in mora*.

In 1775, Mr Wardrobe died possessed of the estate of Cult, and some moveable funds. In 1777, his creditors, and among these his younger children, upon their bonds of provision, adjudged; and in the end of the year 1782, the lands were sold judicially.

In the ranking, the LORD ORDINARY found, 'That as the creditors of the father 'were guilty of no culpable neglect, and as there is now a confessed bankruptcy, 'the children are not entitled to compete on their bonds with the creditors of 'the father.'

Against this interlocutor the younger children reclaimed, and *pleaded*, The object of the statute 1621 was not to render every gratuitous right dependent on the future circumstances of the donor, but to restrain fraudulent alienations, by persons in a state of insolvency, in favour of their confidents and relations. The validity therefore of rights with regard to this statute must be regulated by the situation of the granter when these became effectual against him. In the case of provisions to children, which are subject to revocation, the father's death is the period to be attended to; and no subsequent alteration, whether proceeding from the conduct of the other creditors, or any other contingency, ought to impair settlements, which, though not viewed as onerous in a question with the granter's creditors, are in every other respect of the most favourable and rational nature, Erskine, book 4. tit. 1. § 34.; January 6. 1677, Children of Mousewell *contra* his Creditors, No 80. p. 961.; December 11. 1679, *inter eosdem*, No 60. p. 934.; February 7. 1679, Hamilton *contra* Hay, No 81. p. 968.; January 12. 1697, Kinfawns *contra* Carnegie, No 85. p. 970.

Answered, The LORD ORDINARY's interlocutor, when duly compared with the circumstances occurring in this case, does not in the least impinge on the principle, that provisions to children in a question of this sort depend on the solvency of the granter at the period when these became the foundation of a proper action against him. Here the younger children are unable to point out any diminution of their father's funds, from misconduct on the part of the heir, or any other extraneous accident. Their competitors have used every dispatch in discussing the estate of their debtor which the nature of their diligence could admit. No reason therefore can be offered for supposing that the funds would have been more productive at the common debtor's death than at the moment of this ranking.

Observed on the Bench, In the circumstances of this case the justice of the LORD ORDINARY's decision cannot be disputed. Yet as the words are capable of the interpretation given to them by the petitioners, it may be proper, for preventing any misapprehension from the precedent, to vary the terms in which it is conceived.

The interlocutor pronounced by the Court was in these words: 'Find, That 'the creditors were guilty of no culpable neglect, in not doing diligence sooner

No 90.

'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.'

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.

SECT. XII.

The onerosity of Proviſions made in contracts of marriage.

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

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-

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