

pecially if that debt was contracted before the bond of provision was granted, and while it remained in the father's custody, and so in his power to be reduced at his pleasure.—Ifobel's *reason* of reduction was, That albeit Sheins' apprising was prior, yet there was no infestment thereon in Sheins' person, bearing to be on an assignation to the apprising by Sheins to Collingtoun; but any infestment produced is in Collingtoun's person, bearing to be on an assignation to the apprising by Sheins to Collingtoun; which assignation is not produced; and so Sheins' infestment, flowing from Collingtoun, is null, because Collingtoun's right, from umquhile Sheins, is wanting, which is the mid-cuppling. *2do*, Sheins' apprising being on two sums; the one whereof was to the behoof of a cautioner who had paid the debt, and taken the assignation in Sheins' name to his own behoof; which cautioner being conjunct cautioner with James Arnold, the common author, and having a clause of relief, neither he, nor Sheins intrusted by him, could justly or validly apprise Arnold the cautioner's lands for the whole sum, but behoved to deduct the other cautioner's part; and so the apprising is upon invalid grounds, and thereby is null, and albeit prior to Ifobel Arnold's apprising, yet she has the only valid apprising.—It was *answered* for Sheins, That the first reason was not competent to the pursuer, for it was *jus tertii* to her what progress Collingtoun had from umquhile Sheins, seeing she derives no right from him. *2do*. This Collingtoun, by his right, granted to this Sheins, acknowledges that *ab origine* the infestment in Collingtoun, his father's person, was to Sheins' behoof, which is a sufficient adminicle in place of the assignation: And to the *second* reason, albeit it were instructed, it could not annul the apprising *in toto*, but restrict it to the sum truly due, especially seeing that Sheins was content to declare his apprising redeemable, by payment of the sums truly resting, within such times as the Lords would appoint; and albeit the Lords are strict in the formalities of apprisings when they are expired, and carry the whole estate, though impropotional, yet during the legal, they allow them in so far as they are due.

THE LORDS found Ifobel Arnold's first reason competent and relevant to her, unless Collingtoun's assignation were produced, or the tenor of it proven; and found the second reason relevant, to restrict the apprising to the sum truly due; in respect that Sheins did of consent declare it yet redeemable for the true sums; But they found Sheins' allegiance, that the ground of Ifobel Arnold's apprising, was a bond of provision, posterior in date or delivery to Sheins' debt, relevant to prefer him as a conjunct creditor for his true debt, though the assignation should not be produced, a new one from Collingtoun being sufficient. See *JUS TERTII*.

Fol. Dic. v. 1. p. 71. Stair, v. 1. p. 557.

1670. June 24.

MARGARET HOME against Mr ANDREW BRYSON.

IN a reduction of a disposition of lands, made by Andrew Bryson to Mr Andrew, his second son of the first marriage, at the instance of Margaret Home, his

No 77.
the bond of provision was posterior to the onerous debt.

No 78.
A son in *famiglia*, obtained a gratuitous disposition from his father. Thereafter he made voluntary pay-

No 78.

ment to several of his father's creditors. The disposition found reducible, in so far as his step-mother might thereby be prejudiced in her rights by contract of marriage; although she had done no diligence, to put the son in *mala fide* to pay debts contracted after her life-rent provision. Being *in familia*, he was presumed to know of her right.

mother-in-law, upon the act of Parliament 1621, as being done in defraud of her life-rent provided by her contract of marriage, it was *alleged* for the defender, That his right was for an onerous cause, and condescended upon several debts that he had paid for his father.—THE LORDS having considered the disposition, which did only bear, for love and favour, as likewise the condescence, that many of the debts were after the disposition, so that his payment was voluntary; they did sustain the reason of reduction founded upon the pursuer's contract of marriage, which was prior thereto, notwithstanding that the defender did further allege, that the pursuer had done no diligence before his payment of other creditors; which the Lords did not respect, specially seeing she being his father's wife, he could not but know she was provided to a life-rent. But, albeit the case had not been singular upon that head, yet the most were of the judgment, that a son being *in familia*, and getting an estate for love and favour, he could not prefer one creditor to another, and make the disposition onerous thereby; which may be much disputed, seeing he was not put in *mala fide* by diligence; and so he might lawfully pay any creditor he knew would prevail in a reduction of his right.

Fol. Dic. v. 1. p. 71. Gosford, MS. No 278. p. 119.

1676. June 16.

ARESKINE against REYNOLDS.

No 79.

Children who had received provisions, found liable upon the act 1621, for their father's debt, while they could condescend on no separate visible estate he had, when the provisions were granted.

ALEXANDER REYNOLDS having granted a bond of 2000 merks to Elizabeth Guthrie, his future spouse, or any person she should appoint, payable after her decease; which bond being now in the person of Areskine, he pursues the children of the debtor for payment; on this ground, that the debtor had provided them to all his means and estate; which provisions being fraudulent in prejudice of creditors, they are liable by the act of Parliament 1621, to make furthcoming to the creditors, whatsoever they uplift by virtue of such fraudulent dispositions.—The defender *alleged* absolutor, because they did no way represent the defunct; and it was unreasonable, and a novelty, to pursue children having received provisions, as representing their parents by a passive title, especially young children that could not be heirs.

THE LORDS repelled the defence, and found that it was not a passive title, as representing the defunct, but a passive title founded upon the act of Parliament, and the defender's own fraudulent deed in accepting it, to exhaust the debtor's estate, but allowed them to condescend upon any other visible estate that the defunct had at the time of their provisions, that might purge the fraud and vitiosity of these provisions.

Stair, v. 2. p. 428.