

of the accounts, and finding he could not quarrel them, but he might give a discharge, especially on so advantageous terms as Sir Patrick gave him.

THE LORDS having advised this point of the trust by the tack, in the beginning of January 1709, found Sir Robert, though heir general, not bound to warrant his father's disposition and discharge, because he had accepted the trust by the tack. It carried only by the President's vote.

Fountainhall, v. 2. p. 428. 454. & 472.

No 55.

1709. December 23.

The CREDITORS of the deceast GEORGE MARSHALL, Merchant in Edinburgh,
against His CHILDREN of the First and Second Marriage.

IN a competition betwixt the Creditors of George Marshall and his Children, those of the first marriage having adjudged upon bonds of provision granted to them by their father, and the Child of the second marriage having adjudged for the provision in her mother's contract of marriage; both craved to be ranked *pari passu* with the creditors.

Alleged for the Creditors; The Children cannot be brought in equally with them; because, contracts of marriage and bonds of provision are but the father's destinations in favours of their Children, whereupon no diligence could be used against the father in his lifetime, as was decided, February 10th 1688, in the case of the Creditors and Children of William Robertson, No 36. p. 4929. And seeing children can have only a share of their parents' means, they can pretend to nothing till his debts be satisfied; that only being ours *quod deductis debitis est nostrum*.

Answered for the Children; *imo*, Those of the first marriage contended, that they were not only Creditors to their father *jure naturæ*, whereby parents are obliged to provide for their children; but also were onerous creditors to him, in respect of a great tocher he got with their mother, and their bonds were prior to the contracting of the Creditors' debts, and therefore they ought to be preferred, December 11th 1679, Creditors *contra* Children of Mouswell, No 60. p. 934. *2do*, The Child of the second marriage *pleaded*, That her provision was conceived in her mother's contract of marriage before the date of the Creditors' bonds, which was an onerous, and no latent deed; and the Lord Preston's children of the second marriage were brought in with his creditors according to their diligence.

Replied for the Creditors; The provisions must be considered only with respect to the father's condition at his death, at which time being insolvent and bankrupt, he could do no deed in prejudice of his just and lawful creditors; as is clear from the practick betwixt the Creditors and Children of Robertson, No 36. p. 4929., and that of Inglis *contra* Boswell, November 14. 1676, No 236.

No 56.

Creditors preferred to children who had adjudged on their bonds of provision, dated before the debts were contracted.

No 56.

p. 11567. Nor is the Child of the second marriage in any better case than the other Children; because, a contract of marriage doth not take the fee from the father, or hinder him to contract debt, November 21st 1682, The Creditors and Children of Mr Andrew Marjoribanks, No 48. p. 12891.; but is only designed to regulate the succession of the Children of the marriage, with relation to themselves or to children of other marriages.

THE LORDS preferred onerous Creditors to the Children, in respect the father was fiar, notwithstanding the bonds of provision and contract of marriage.

Fol. Dic. v. 2. p. 281. Forbes, p. 372.

* * * See a subsequent branch of this case, as reported by Forbes, and Fountainhall's report, No 9. p. 47., *voce* ADJUDICATION.

1711. July 12.

MR ROBERT BLAW, Schoolmaster in Edinburgh, *against* His FATHER.

No 57.

A father found to be *vergens ad inopiam*, so as to induce an adjudication in security gainst him; because he had granted bonds of provision to his children, which would exhaust his funds.

MR ROBERT BLAW having pursued an adjudication against his Father, upon a bond granted to him by his Father, for borrowed money payable at the Father's decease, upon this ground, that the Father was *vergens ad inopiam* by granting a bond of provision to his younger children, that would exhaust all his effects;

Alleged for the defender; There can be no adjudication in this case, for the sum in the bond, whereof the term is not come. Because adjudications since the 1672 are come in place of apprisings, and such a debt for which a previous pointing could not be used, cannot be apprised for. *2do*, Property cannot be transferred without statute or custom, and there is neither statute nor custom for an adjudication of this kind. *3tio*, It would be inconvenient, in so far as, it would let all the Father's creditors loose upon him. And upon the same ground adjudication might be sought upon warrandice before eviction, upon relief without distress, and at the instance of wives and children upon contracts of marriage during the standing thereof.

Replied for the pursuer; Adjudication here is not craved upon the act 1672, but only an adjudication in security, whereof the legal doth not expire, introduced by custom from the analogy of the statute. So adjudications are allowed in favours of wives against their husbands, in implement of their contracts of marriage, albeit the term of payment was not come, or uncertain by the husband's surviving the wife. And my Lord Stair holds, B. 4. T. 51. § 9. That adjudication is competent for illiquid debts. In the Roman law *creditor in diem* might have had the benefit of *missio in possessionem*, especially where, as here, there was evidence of the debtor's growing poor. And for the same reason a pursuit for relief in such a case is competent with us to a cautioner before dis-