

OPINIONS.

COALSTOUN. The money might have been paid by the defenders to Young : they did the same thing by giving credit for it.

GARDENSTON. No powers were given to Young.

KAIMES. Young comes in here only in consequence of his gratuitous offer to transmit the power of attorney. Young is no party.

AUCHINLECK. A letter of attorney may be given to one who may delegate.

PRESIDENT. The defender's plea is dangerous ; for, according to it, a London merchant, or any other merchant at a distance, would, in consequence of a simple recommendation, always pay himself first for any debt due by the person recommending.

1766. *March 11.* JOHN PATULLO, Writer in Edinburgh, Trustee for the Creditors of Allan Livingstone, *against* CHARLES and ELIZABETH LIVINGSTONE.

PROVISION TO HEIRS AND CHILDREN.

The Bar-keeper of the Faculty of Advocates, whose office is held during pleasure, having resigned, upon an arrangement that his successor should pay him an annuity during his life, and a sum of money to his children upon his death,—Found, that this last mentioned sum could not be attached by his creditors after his death, but belonged to the children.

ALLAN Livingstone enjoyed the office of bar-keeper to the Faculty of Advocates. His commission was during pleasure. On the 4th February 1764, he resigned his office on account of his infirmities ; but, at the same time, he prayed that he might be allowed to retire in such a manner as not to be left destitute in his old age. This resignation being made, John Hay, late merchant in Edinburgh, was suggested in Faculty as a proper successor to Livingstone. The Dean and his council were named as a committee to settle such terms of agreement between Livingstone and Hay as should appear equal and reasonable. On the 24th February 1764, Hay became bound to pay to Livingstone an annuity for life of L.70 sterling, and to his children the sum of L.200 sterling, at the first term after his death. Next day, the Dean reported to the Faculty that the committee had settled an agreement between Livingstone and Hay in such a manner as appeared equal and reasonable ; and Hay was elected bar-keeper during pleasure. Livingstone enjoyed the annuity of L.70 during his life. Upon his death, his children received the L.200. In an action before the Commissaries of Edinburgh, Patullo, trustee for the creditors of Livingstone, insisted against his children as representing him. The Commissaries "Found, that, as the bond expressly bears to have been granted in consideration of the deceased Allan Livingstone resigning his office of bar-keeper to the Faculty of Advocates ; that the said Allan Livingstone could not take the sum of L.200 sterling, therein contained, payable to the defenders, his children, to the prejudice of his own lawful creditors ; and, therefore, found the defenders liable to the

pursuer in payment of the sums libelled, *in valorem* of the said L.200, and decerned." The cause was brought by advocacy before the Court of Session.

ARGUMENT FOR THE PURSUER.—Patullo, trustee for the creditors, pleaded : That Hay was admitted in consequence of the valuable consideration of L.200, which he became bound to pay. Livingstone himself made the transaction, and it must be understood to have been for his benefit. The L.200, then, must be considered as having been once *in bonis* of Livingstone, and from him *gratuitously* transmitted to his children,—they must therefore be liable for his onerous debts to the extent of that sum.

2do, The obligation was delivered to Livingstone, and remained in his custody until his death : it must therefore be considered as a fund whereof he had the disposal ; and, of consequence, it must go for payment of his onerous debts.

ARGUMENT FOR THE DEFENDERS.—The children of Livingstone answered,—That their father possessed his office during pleasure. The office itself could not have been adjudged by his creditors, nor its emoluments effectually arrested. The sum of L.200, which was stipulated upon his resignation, was destined by the Faculty of Advocates for the use of the children of their old servant : it never belonged to Livingstone,—it could not have been levied or discharged by him, and, consequently, it cannot be attached by the diligence of his creditors.

On the 4th February 1766,—“ The Lord Auchinleck, Ordinary, advocated the process, and found, that, as the office held by the deceased Allan Livingstone, during the pleasure of the Faculty, was not affectable by the creditors of Allan Livingstone ; the L.200, payable to his children on his demitting that office, was not affectable for his debt ; and therefore assoilyied the defenders, and decerned.

On the 15th February, 1766, upon advising a representation for the creditors, the Lord Ordinary,—“ In respect of the reason assigned for the former interlocutor, and in respect that although the creditors of Allan Livingstone could have affected the emoluments of his office had he continued to hold it, and that he ought, out of regard to justice, to have held it, and when he quit it, taken care to make the consideration be secured in such manner as that his onerous creditors might have been paid, yet the creditors had no legal compulsitor against him to hold it, nor legal right to what was given to his children on his resignation ; and therefore adhered to the former interlocutor, and refused the desire of the representation.”

On the 28th February, and 11th March 1766,---The Lords “refused” two several petitions for the petitioner, D. Græme. The general opinion of the Court was, That, by Allan Livingstone’s transaction, *nihil deest* to his creditors, and, consequently, that their action was groundless.