

1739. December 22. CAMPBELL against CAMPBELLS.

No 22.

COLONEL CAMPBELL being bound in his contract of marriage to provide the sum of 40,000 merks, and the conquest to the children of the marriage, did, by a death-bed settlement, appoint his eldest son to be his heir and executor, and left it to the Duke of Argyle and Earl of Islay to name rational provisions to his younger children. The referees having declined to execute the trust reposed in them, the younger children insisted in a total reduction of the settlement, claiming each of them an equal share in the special sum and conquest. It was *pleaded* for the heir, that the father had a power of division and of giving more to one child, less to another; and *esto* he had given the whole to the heir, which at the same time was not his intention, the deed is only reducible so far as he transgressed his powers *et quoad excessum*, and therefore the children's *querela inofficiosi* can be carried no further than *ad supplimentum legitima*, to make them up rational provisions, such as the father ought to have left them. THE LORDS notwithstanding found, that the Colonel having settled his whole estate upon his eldest son, without making any effectual provision for his younger children, his settlement is reducible; and that the younger children are, each of them, entitled to an equal share of his estate with the eldest son, in terms of the Colonel's contract of marriage.

Fol. Dic. v. i. p. 464.

. Kilkerran reports the same case :

1738. December 15.—A FATHER who was bound in his contract of marriage to provide and secure a sum of money, and also the conquest during the marriage, to himself and wife in conjunct fee and liferent, and the children of the marriage in fee, having purchased an estate in land during the marriage, and taken the rights thereof to himself, his heirs and assignees, thereafter, by deed, settled his whole estate, heritable and moveable, upon his eldest son, with the burden of such provisions to his younger children as two Noble Lords therein named should appoint.

In a reduction of this settlement at the instance of the younger children, it was *pleaded*, that they were creditors *per capita*, and each entitled to an equal share; and *answered* for the defenders, that obligations in contracts of marriage in favour of the children of the marriage, are in law understood to be granted *familia*, so as to restrain alienations *extra familiam*; but not to rank each a creditor *in capita*, or to restrain the father from giving the whole to any one he pleases.

THE LORDS found, " That each of the children were entitled to a share in the said special sum and conquest, and that the father's taking his whole land estate acquired by him, and disposing his whole moveables to his eldest son,

No 22. one of the children of the marriage, was not legal implement of the above provisions; but found that the father had a power of division of the said special sum and conquest amongst his children, in such manner as might be found rational; and therefore found that he might lawfully acquire a land estate, and take the rights thereof to his eldest son, and might also dispone his moveable estate to him, with the burden of rational provisions to his other children; and found, that as the father had himself power to settle and determine the extent and proportion of the provisions to be paid to the younger children, he might also delegate that power to any other person in whom he confided; and superseded further procedure till a day certain, betwixt and which notice was to be given to the said Noble Lords to declare their will in the matter."

And they having declined to interpose, the Lords "found the foresaid deed of settlement void, and the whole children entitled to an equal share of both heritage and moveables, and found that they had no powers to interpose in the modification of rational provisions to the younger children."

N. B. Heirs or children in provisions in contracts of marriage receive their construction from the nature of the subject provided. If it be a land estate, then whether the provision be to heirs or to children, it is the heir of the marriage who is creditor in the provision; if it be a sum of money that is to be laid out and secured, or a tenement in burgh that is provided, where there is no view of the continuation of a family, then whether the expression be heirs or children, the whole children are creditors.

Kilkerran, (PROVISION TO HEIRS AND CHILDREN.) No 4. p. 456.

See APPENDIX.