1738. *December* 16. CAMPBELLS *against* CAMPBELLS.

No 2.
A party delegated to third parties the power of making provisions on his children. This found competent.

COLONEL CAMPBELL being bound in his contract of marriage to secure the sum of 40,000 merks, and the conquest during the marriage, to himself and spouse in conjunct-fee and liferent, and to the children to be procreated of the marriage in fee, did, by a death-bed deed, settle all upon his eldest son, burdened with certain provisions to his younger children, to take place in case their mother should give up her claim to the liferent of the conquest, and restrict herself to a lesser jointure, otherwise these provisions to be void; in which event it was left upon the Duke of Argyle and the Earl of Islay to name such provisions to the children as they should see convenient. It being *objected* by the younger children upon the mother's refusal to restrict herself, That their father could not delegate his powers, and that such delegation was ineffectual, there being no compulsitor upon the referees to determine; which brings the matter to the same as if the children were left entirely unprovided; and concluding from this, that the settlement should be voided *in toto*, and that each child should have an equal proportion as if no settlement had been made;——THE LORDS found the power and faculty given to the Duke of Argyle and Earl of Islay is lawful, and does subsist; and in respect these referees have neither exerced their power, nor declared their will not to exerce the same, they superseded further proceeding in the cause till the 5th of June next, that in the mean time either party might make proper application to the Duke of Argyle and Earl of Islay, to determine what sums should be paid to the younger children, or declare their non-acceptance of the power committed to them. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 289.

SECT. II.

Import of Clauses containing Reserved Faculties.

1676. *June* 7. RELICT of DR YEOMAN *against* His HEIR.

No 3.
A power to burden an heir with legacies to pious uses, or with an

DR YEOMAN, by his contract of marriage, provides 'L. 10,000 in conjunct fee 'to his future spouse, and to the heirs of the marriage, and L. 20,000 further 'to the heirs of the marriage, reserving his own liferent, and a power to bur'den his heir with legacies to pious uses, or with an additional jointure to his

'wife.' By his testament he leaves a legacy of the annualrent of 3000 merks during her life, over and above the L. 10,000 provided to her by her contract. She and her second husband pursue her son, both as heir and executor for this annualrent, who *alleged*, That as executor, the dead's part was exhausted with legacies, which therefore behoved to suffer a proportional abatement; and as heir he is not liable, because no deed in testament, or on death-bed, can burden the heir; and albeit it be true that any person who dispones or provides any heritable right, may qualify it with any provision he pleases, and so with a power to burden it *in lecto*, which that party cannot quarrel, as being a condition with which his right is given and accepted; but otherwise no person can, by any clause in *liege poustie*, reserving a power to burden his heir on death-bed, do it effectually; for then that excellent statute should be generally evacuated; and in this case the defunct hath not exercised the faculty, for he hath not burdened his heir, nor constituted a liferent, as *inter vivos*, but only granted a legacy, without mention of the power reserved to him in the contract; and though he had, yet if his son please not to be heir of provision, or to enjoy any right as heir of the marriage by the contract, but as heir of line by the law, no deed on death-bed can burden him, seeing he accepts not any disposition or provision from his father, but only the benefit of law, as any other heir might do, though there had been no bairns of the marriage, who could never be burdened with this reservation.—It was *answered*, That this legacy being accessory to the contract, by which the wife renounced her third and terce for L. 10,000, and what her husband would provide her to on death-bed, she is in effect a creditor, or at least a preferable legatar, not to suffer abatement with the rest; 2*do*, The defender being both heir and executor, though the faculty be not formally exercised, yet materially it is; and there was no reason that the son should be suffered to enter heir of line, to avoid his father's provisions that would reach him as heir of the marriage.

No 3. additional jointure to a wife, found not available against the heir, if executed on death-bed.

THE LORDS found, That this legacy could only affect the defender as executor, and with proportional abatement with the other legatars, but the defender could not condescend upon a terce or third renounced by her contract, which was better than the L. 10,000 contained therein, without this addition.

Stair, v. 2. *p*. 423.

*** Gosford reports the same case:

IN a pursuit for an additional jointure, at the said relict's instance, for the yearly annualrents of 3000 merks, added to her jointure of L. 10,000, founded upon her contract of marriage, and his declaration by a legacy relating to his power to burden *in articulo mortis*, it was *answered*, That the reversion was not obligatory, but voluntary, and so being declared on death-bed, was only a legacy, and ought to bear a defalcation, the inventory not being able to pay all debts and legacies; and the contract gave no right, but was only a faculty reserved, which was not binding, neither could it bind the heir unless he were heir of

No 3.

provision, but not as heir of line.——The Lords found she had only right as a legatar, and so liable to deduction; and that he could not be liable as heir, unless he were heir of provision, but not as heir general; which was hard, seeing the provision made to the heir of the marriage was affected; and if this were granted, all heirs of provision of the marriage would elude provisions made to second sons or daughters by serving heir general, and relicts of creditors might be defrauded, seeing the heir general might be free, and yet enjoy the provision.

Gosford, MS. No 859. *p.* 542.

No 4.
What understood a personal faculty.

1676. *June.* E. Dumfermling *against* Callender.

By minute of contract betwixt the deceased Earl of Callender, and Dame Margaret Hay, Countess of Dumfermline, he was obliged to infeft the said Lady in the lands and barony of Livingston, in liferent and conjunct-fee, and whatsoever other lands and sums of money should be conquest during the marriage; he is obliged likewise to grant surety of the same to her in liferent, in the same manner as of the former lands; and in case of no issue of children, the one half of the said conquest to be disposed upon as the Lady shall think fit. And the Earl of Dumfermline having intented a pursuit as assignee by his father, who was heir to the Lady his mother, for implement of the said minute; for declaring what lands, sums of money and others were conquest by the said Earl, during the foresaid marriage; and for infefting the pursuer in the half of the said conquest, it was *alleged*, That the said obligement and clause of the minute as to the conquest, are conditional, viz. in case of no issue of children; and that the said condition did not exist, viz. there being a child procreated of the said marriage.

The Lords, upon debate *in præsentia*, and among themselves, did find, That the said condition did exist, in so far as, though there were children of the marriage, yet there were no children or issue the time of the dissolution of the marriage, by the decease of the Lady.

Albeit it was *urged*, That these conditions, *si liberi non extiterint*, *vel non sint procreati*; and that condition, *si non sint liberi superstites*, were different in law, and in the conception and import of the same. And in the first case, *si non sint liberi*, *sine adjecto tempore decessus vel dissoluti matrimonii*, *deficit ipso momento* that there is a child; and the condition, being in the terms foresaid, in case of no issue, both in law and in propriety of speech, cannot be otherwise understood and interpreted; and *in claris non est locus conjecturæ aut interpretationi*, which is only where words are homonymous or ambiguous; and where a clause is of itself such as may be understood without addition, to make any, upon pretence of the intention of parties, is not *interpretari sed addere, et intentio in mente retenta nihil operatur*; and that if there had been children of the