

1676. June 7.

RAMSAY against YEAMAN.

DR YEAMAN, by contract of marriage, betwixt him and Margaret Ramsay, was obliged to employ L. 10,000 to himself, and her in liferent, and the heirs of the marriage; and was also obliged to employ L. 20,000 to himself, and to the heirs of the marriage; with a provision, that he should have power to burden the said heirs of the marriage with an additional jointure to his wife, and the provisions of his other children, at any time *etiam in articulo mortis*; which jointure and provision is accepted by the said Margaret, in satisfaction of what else she could claim of terce or moveables. And thereafter the Doctor, in his testament, having named his son and apparent heir to be his executor and universal legatar; and having left in legacy to his wife the annualrent of 3000 merks, by and attour her jointure, and diverse provisions to his other children, and legacies to other persons; his relict and her present husband pursued her own son, as executor to his father, for payment of the said legacy left to her. And it being *alleged*, That the inventory of the testament would not extend to satisfy all the legacies, and that there ought to be a defalcation proportionably; it was *answered*, That she was not to be considered as an ordinary legatar, but in effect was a creditor; in respect of the said provision and power reserved to the Doctor, as said is; and that he had used the said power and faculty.

THE LORDS found, that the said addition being left to her in legacy, she was in no better case than the other legatars, and had no preference before them out of the executry.

Yet it is thought, that if there be not so much of the executry as to satisfy the relict her legacy, the heir will be liable for what she wants; seeing, by the said provision, the heirs of the marriage are burdened with what he should add to her jointure *etiam in articulo mortis*; and albeit *nemo potest facere ne leges habeant locum in suo testamento*, and no person at any time can reserve a power to burden his heirs, at such a time as in law he is not *in legitima potestate*; yet when any person gives any thing, or makes a provision in favours of any other person, or of his heirs of provision, he may give and qualify the same *sub modo*, and with what burden he pleases; and therefore the defender, being not only executor, but the only heir of the marriage, will be liable by the said provision to the said addition and provision in favours of his wife and children, albeit left *in lecto*; and he cannot frustrate the same upon pretence that he will not serve himself heir of provision, but heir of line, seeing he is the same person, and is both heir of line and heir of provision; and if need be, the relict and children, as creditors by the said provision contained in the contract of marriage, and in the testament, may get decreets against him as charged to enter heir of provision; and if he renounce, may adjudge the L. 30,000 provided to the heirs of the marriage. *In presentia*.

Act. Sinclair.

Alt. M^r Kenzie and Yeaman.

Clerk, Gibson.

Fol. Dic. v. 1. p. 535. Dirleton, No 353. p. 168.

No 11.

A wife was, in her contract of marriage, provided to a jointure, with power to her husband to add to it. He gave her an additional jointure in legacy, which was found to have no preference to other legacies.