No 122. still creditor to her father in the other 3000 merks; and that the free estate of Alexander Young must in the first place be applied to the payment of the said respective sums of 3000 merks and 1000 merks; and that the remainder falls to the said Jean Young and Christian Stenhouse equally betwixt them.

C. Home, No 56. p. 96.

1740. *February* 8. Alison Pringle *against* Thomas Pringle of Symington.

No 123. Import of a clause in a marriage contract providing a certain sum to the children of the marriage, in satisfaction of all they could claim except what farther the father should provide to them of his own free will.

By contract of marriage betwixt Robert Pringle and Ann Rutherford, in the 1687, 'he obliged himself, his heirs, executors and successors, to pay to the 'children of the marriage, in case of his wife's predecease, the following pro-'visions, viz. If there were two or more children, the sum of 12,000 merks, to 'be divided as he should think fit, and that at the male childrens age of 21, 'and the females age of 16, or either of their marriages, whichever should first 'happen, which should be in full satisfaction to the children of all that they 'could claim from their father, excepting what further he should provide to 'them of his free will.' Of this marriage there were issue three sons and one daughter. *Anno* 1698, he granted a disposition of his lands of Symington, in favours of Thomas Pringle his eldest son, then an infant, on the narrative of love and favour, and certain other onerous causes, &c. Robert, in his own lifetime, provided his two younger sons, and took from them discharges of any claim they might have upon the contract. Ann Rutherford predeceased her husband, who died in the 1738, leaving besides his land estate disponed to his son Thomas, an executry to the extent of 17,000 merks and upwards. Upon which Alison Pringle the daughter confirmed herself executrix to her father, and brought an action against her eldest brother Thomas for certain sums, part of the executry intromitted with by him.

The defence *pleaded* for him was founded on the contract, viz. that thereby the sum of 12,000 merks was provided to the children of the marriage, payable at there respective ages as therein set furth, by the defunct's executors, and that he was creditor in a proportion of that sum, exceeding the sums claimed from him by his sister, his father's executor, whereby her claim was excluded by compensation.

In support of this, it was observed in general, that it was a rule in our law, that though the heir and executor, with respect to creditors, be considered as *eadem persona*, yet in questions betwixt themselves they came under a different consideration; and the heritable and moveable successions make the defunct to be considered as two different persons, and having two different heirs: Hence it is, that if the executor be creditor to the defunct in an heritable debt, his succession as executor will not extinguish the debt *confusione*, but the debt will be good against the heir, and will receive execution in the same manner as it would do in the defunct's lifetime; and so of the heir, if he was

creditor to the defunct in a moveable debt. 2*do*, By the terms of the contract, the children were proper creditors to their father in the special provision of 12,000 merks, of which the term of payment did actually exist in their father's life, so that they might have brought an action against him for payment in his own life. 3*tio*, It was equally plain that this was a moveable debt; the father bound his executors to pay the provisions to the children; consequently, though the defender had succeeded as heir to his father, his claim to a share of the provision, which was founded on his mother's contract, would not thereby have been extinguished *confusione*; the succession, as heir, is understood to be *causa lucrativa*, or by the will of the defunct; the heir in all questions with the executor is considered to take the succession, not in payment of the moveable debts due to him by the defunct, but as a donative from his predecessor, and consequently not in satisfaction of his anterior moveable debts; all which must hold in the strongest manner in the present case, where the defender does not take his father's estate as heir, but by disposition for love favour, reserving the granter's liferent, and alterable at pleasure; so that there is no place here for the question, Whether *debitor præsumitur donare*. See December 1728, Archibald Robertson, (*see* APPENDIX). And if this is a general rule of law, That a moveable debt due by a defunct to his heir, is not extinguished by the creditor's succession as heir, if the defunct also leave an executor, it must apply in the strongest manner to the present case, where, by the particular conception of the contract, it appears to have been in the view of parties that the children of the marriage might succeed as heirs to the father; and their provision should be over and above their succession as heir, or as nearest of kin to their father. No 123.

Answered, The import of the provision was, that the father thereby provided 12,000 merks to the children of the marriage, in full of all they could claim; only if he should please, of his own free will, to give them more, or if the heir should succeed to him in heritable subjects of a greater extent than his share, or if the younger children should take more, as nearest of kin to him, than their shares of the provision, then they should respectively enjoy the whole they should get or succeed to, notwithstanding that, by the preceding terms of the provision, they seemed to be restricted to the sum of 12,000 merks; and the gloss put on it by the defender is absurd, *scil.* That it was to be over and above what the children should receive from their father, and over and above what they should succeed to as heirs or nearest of kin to him; for, at this rate, as the heir would take the heritable estate, and notwithstanding have a claim for his share of the provision; so the younger children, by the same rule, behoved to take the whole moveable estate, as nearest of kin, and still be entitled to their shares of the provision. Now, where could there be a fund for payment of the provision, or a debtor that would be liable to the one or the others claim? for the heir, who is suppposed to take the heritable estate, could no more affect the moveables for his share of the provision, than they could him

No 123. as heir for their shares; for, in this sense, it is supposed, that both take their respective successions over and above their provisions. Further, if the father should have given bonds of provision to the respective children, to a much greater extent than the provision in the contract to the children *nascituri*, he should still remain debtor to his children in that provision, unless he expressly declared in the bonds, that the same should be in satisfaction thereof, than which nothing were more absurd. The word further, mentioned with respect to what the father should freely give, must be understood repeated in the subsequent clause as to what they should succeed to as heirs or nearest of kin to him, and explains the meaning of the whole to be as above, That the provisions that might be given to them by their father, after their existence, or what they should succeed to, should be first imputed in satisfaction of the provision in the contract, and that they should retain the overplus. It is true, the children are here proper creditors in their provisions, as in the case of Easter Ogle, (*see* PROVISION to HEIRS and CHILDREN,) and might have pursued their father for the same, after the term of payment, or upon their diligence competed with extraneous creditors; but as he, who had power of division, might have made any of them repent of such procedure, so it cannot affect the present case. The defender has suffered his claim to lie over till his succession, as in common prudence he had reason to do, the value of the estate succeeded to being vastly more than his share of the provision; and therefore he must rest satisfied with it, as he may well do, and not pretend to rear up a claim against the executry. The disposition to the defender contains indeed ample powers to revoke the burden, and consequently could not at its date be understood in satisfaction of any debt; but then, it having remained unrevoked, it must extinguish the defender's provision, and must be understood in the same manner as if he had succeeded as heir, which is the most favourable light it can be taken in for him, he being truly heir *præceptione*. The case so standing, the principle laid down for the defender, That an heir being creditor to a defunct in a moveable bond, has action against the executor for the same, notwithstanding of his succeeding to the land estate, though well founded in law, does not apply to this case; because, though the defender was creditor in a share of the provision to the children *nascituri*, yet it was in such a manner that what he might succeed to as heir should satisfy his claim on the provision in the first place, and that he should retain what further might accresce to him as such.

THE LORDS found, That the son having succeeded to his father, by disposition to his land estate, his share of the 12,000 merks is satisfied and extinguished.

Fol. Dic. v. 4. p 123. C. Home, No 145. p. 248.

No 123.

*** Kilkerran reports this case:

BY contract of marriage, in 1687, between Robert Pringle of Symington, and Anna Rutherford, father and mother to the parties, the said Robert became obliged, in case of his wife's predecease, to pay to the children of the marriage the following provisions at the terms after specified, viz. 'If there 'should be only one son or daughter, the sum of 8000 merks; if two or more 'children, to pay among them all the sum of 12,000 merks, according as he 'should think fit, and that at the male children's age of 21, and the females of '16, or their marriage, which ever should first happen, with annualrent after 'the respective terms of payment;' and it is by the contract declared, 'That 'the foresaid sums should be in full satisfaction to the children of all that 'they could claim from their father, except what he should give or provide to 'them of his free will; as also excepting what should accresce and belong to 'them as heirs or nearest of kin.'

Of this marriage there were three sons and one daughter, Alison; and, in the year 1698, Robert granted a disposition to Thomas his eldest son of his lands of Symington, his paternal estate, of about L. 100 Sterling a-year, whereof he was possessed at the date of the contract of marriage, though he had not settled it in the contract; and the disposition proceeded on the narrative of the love and favour he had and bore to him, and certain other onerous causes and weighty considerations, and reserved the father's liferent and power to alter and burden. Robert thereafter provided his two younger sons, and took from them discharges of all claim they had upon their mother's contract of marriage.

After Robert's death, who survived his spouse, and who had made no settlement other than the foresaid disposition, though he left a considerable executry, Alison his daughter confirmed herself executrix; and having brought a process against Thomas her eldest brother for a sum of money, which was in his father's repositories at his death, and which of course had fallen into the hands of his heir, it was *pleaded* for him, That the 12,000 merks provided by his father and mother's contract of marriage was a moveable debt, which affected the executry, and that he, as one of the children of the marriage, was entitled to a proportion thereof, which exceeded the sum pursued for, and that therefore Alison's claim was excluded by compensation.

THE LORDS found "That the defender having succeeded to his father by disposition to his land estate, his share of the 12,000 merks was thereby satisfied and extinguished."

The Court was of opinion, That where a man, who is bound by his contract of marriage to provide the children of the marriage in a certain sum, leaves his estate, be it heritable or moveable, to descend in the legal channel, it is implement to the child or children succeeding as heir or executor, of their part:

No 123. of the said provision, and that the disposition to the defender in this case was just the same as a succession. It was admitted, that where an heir is, before his succession, the proper creditor of his predecessor in a moveable debt, his service as heir will not extinguish his claim against the executry, and that *vice versa* the case was the same, where an executor is creditor to his predecessor in an heritable debt. For although *quoad* creditors of the defunct, both are considered as but *eadem persona cum defuncto*; yet, in questions between themselves, the heritable and moveable succession makes the defunct to be considered as two different persons, and as having two different heirs; but it was also thought, that the case was very different where the debt due to the heir, as in this case, was only a provision of succession, wherein he is partly heir as well as creditor.

N. B. This judgment was, upon an appeal, reversed.

Kilkerran, No 5. p. 457.

1747. *January* 6.

Margaret Crawfurd, and John Cochran her Husband, *against* William Hogg.

No 124.
A clause in a contract of marriage, whereby the wife accepted the provisions in full of all she could claim through her husband's decease, was found, in consideration of the circumstances of the case, to exclude the claim of her next of kin on her decease.

By contract of marriage entered into between William Hogg, merchant in Edinburgh, and Anna, daughter to Patrick Crawfurd merchant there, it was agreed that William Hogg should provide 24,000 merks Scots of his own money, together with 7000 merks received by him in tocher, upon land, or other securities, to be taken to himself and spouse, in conjunct fee, and to the children of the marriage, declaring, that if there should be no children, she should have a liferent of 1200 merks Scots, and the half of the conquest, with one half of his household furniture, restricted, in case of children to 900 merks, and half of the household plenishing, which she 'accepted of in full satisfaction of all further 'liferent, terce, moveables, or any other manner of way, through her said pro-'mised husband's decease.'

The marriage dissolved by the death of Anna Crawfurd; and Margaret her sister, with concourse of John Cochran of Ravelridge her husband, brought a process against William Hogg, junior, merchant in Edinburgh, as representing William Hogg then also deceased, to account for the wife's share of moveables in communion, in which the Commissaries of Edinburgh, 21st November 1746, 'Having considered the contract of marriage betwixt William Hogg and Anna 'Crawfurd, and the ample provisions therein contained, in favours of the said 'Anna Crawfurd, and the whole circumstances of the case, found that by the 'said contract she had accepted of the conventional provisions therein specified, in place of the legal provisions.'