

children. In a reduction of this settlement, at the instance of the younger children, it was *pleaded* for them, That they were creditors *per capita*, each entitled to an equal share; and, supposing the father to have a power of division, it was irrational to leave the whole to one, burdened with small provisions in favour of the rest. It was *pleaded* in behalf of the defender, That an obligation granted *familiæ*, makes the family, as a body politic, creditor, so as to restrain alienations *extra familiam*, but does not make each a creditor *per capita*, to restrain the father from giving the whole to any one he pleases. The LORDS found, That each of the children was entitled to a share in the special sum and conquest, but that the father had a power of division of the sum and conquest among his children in such manner as might be found rational, and therefore that he might lawfully acquire a land estate, and take the rights thereof to his eldest son, and might also dispoise his moveable estate to him, with the burden of rational provisions to his younger children. See APPENDIX.

No 127.

*Fol. Dic. v. 2. p. 289.*

1743. February 4.

SANDILANDS *against* SANDILANDS.

No 128.

JOHN SANDILANDS, by contract of marriage, bound himself, *imo*, To take security for 18,000 merks to himself and wife in conjunct-fee and liferent, and to the children of the marriage in fee; whom failing, to his heirs, &c.; *2do*, To secure the estate of Counteswells, a male-fee, holding of the town of Aberdeen, to the heir-male of the marriage; *3tio*, That if there should be no sons of the marriage, and in life, the father should pay to one daughter of the marriage, for her provision and patrimony, 8000 merks at her marriage, or age of sixteen, and if two daughters, 10,000 merks, &c. The contract is dated in December 1721. In November 1722, Sandilands executed a bond in favour of a daughter, then procreated of the marriage, for 12,000 merks, one half payable at his own, and the other at his wife's death; providing, *imo*, That if they had other issue of the marriage, the sum be restricted to 6000 merks; *2do*, That what sums she should take as heir of line, or executor to her father, should impute in payment of said provision, and she should only claim the surplus from the heir-male. Sandilands died in 1724, leaving a son, who was served heir to him, and infeft in the lands of Counteswells, upon a precept of *clare constat*, as nearest heir-male, and who died in 1737. The daughter pursued John Sandilands's heir-male, who was served heir-male to her brother for the above provisions. THE LORDS found, That, by the contract of marriage, she was entitled to a share of 18,000 merks provided by that contract to the issue of the marriage; and found, That the condition on which the sum of 8000 merks is provided to the only daughter of the marriage, viz. in case there are no sons procreated and in life, has not existed, in regard that, at the dissolution of the

No 128.

marriage by the decease of the pursuer's father, there was a son existing; therefore found, That the pursuer had no right to the 8000 merks; but found, That by the bond of provision in November 1722, the pursuer's share of the said sum of 18,000 merks was habilely restricted to 6000 merks. See APPENDIX.

*Fol. Dic. v. 4. p. 191.*

1761. *January 14.*MARGARET WILSON *against* JOHN MILLER.

No 129.

In a provision to bairns of a marriage, where the parents have the power of division, they are not obliged to make a division of every separate subject.

The consent of one parent may be interposed to the deed of the other, though deceased.

By marriage-articles, of date January 3. 1690, betwixt James Lindsay and Marion Aitchison, James Lindsay bound himself to have in readiness the sum of 9000 merks Scots, "which he obliges himself to secure to the use and behoof of himself and the said Marion Aitchison, and longest liver of them two, in conjunct-fee and liferent; and to the bairns lawfully to be procreated betwixt them, to be divided amongst them, as their father and mother shall think fit."

Moreover, James Lindsay bound himself, "That whatever lands, heritages, debts, goods, or gear, he shall happen to conquest or acquire during the marriage, that he shall provide the just half thereof to himself and the said Marion Aitchison, and longest liver of them, in conjunct-fee and liferent, and the bairns to be procreate betwixt them, as their father and mother shall think fit."

*Lastly*, Marion Aitchison obliges herself "to convey the lands of Mauchlenhole, of about L. 600 Scots yearly rent, in favour of the said James Lindsay and Marion Aitchison, and longest liver of them two, in conjunct-fee and liferent, and to the bairns lawfully to be procreated betwixt them, in fee, to be divided amongst them as their father and mother shall think fit."

Of this marriage there were several children. They all died young except two daughters, Anne and Isabel.

On the 16th of October 1724, James Lindsay gave 2000 merks to his daughter Anne in her contract of marriage; and in the year 1729, he gave to his youngest daughter Isabel L. 200 Sterling in her contract of marriage.

Some months after, he disposed the lands of Mauchlenhole to James Semple, the eldest son of his daughter Anne.

The disposition bears to have been made with the special advice and consent of his spouse Marion Aitchison; however, she did not sign her consent till four years after, to wit, in the year 1732, and after her husband's decease.

Margaret Wilson, in right of Isabel Lindsay her mother, brought a reduction of this disposition against John Miller the purchaser from James Semple, *insisting*, That her mother had a right to one-half of the lands of Mauchlenhole.

She *pleaded, imo*, By the marriage-articles betwixt James Lindsay and Marion Aitchison, the lands were provided to the bairns of the marriage, not to