

1663. February 17. Mr JAMES FORSYTH *against* ARCHIBALD PATOUN.

MR JAMES FORSYTH, as executor confirmed to his sister, pursues the said Archibald Patoun her husband, for payment of her third of his free goods, at the time of her death. The defender *alleged, First*, By the deceased wife's contract of marriage with the defender, she accepted L. 1000 for all she could crave by his decease, in case there were no bairns of the marriage, and albeit there was a bairn surviving her, yet the bairn shortly thereafter died.

THE LORDS repelled this defence, and found that the bairn surviving the mother never so short was enough.

It was further *alleged* absolvitor, because the deceased wife having a child surviving her, her share belonged to that child, as nearest of kin, and the child being dead, belongs to the defender, the child's father, as nearest of kin to the child, and cannot go back to the mother's nearest of kin; because there is no succession of cognates in Scotland. The pursuer *answered*, That if the child had been executor confirmed to the mother *ad eund. hæreditat.* would transmit the same to the father; but, there being no confirmation, *hæreditas mobilium jacebat*, and the goods remain yet still in *bonis defuncti maritis*; and albeit it was found in the case of Bells *contra* Wilkies,* that it was not necessary to transmit moveables, that the testament were execute; yet, in that case it was a confirmation, which was esteemed an addition. The defender *answered*, That he had done diligence to have it confirmed, but during the child's life, all judicatories were stopped, and he had taken instruments of his desire to be confirmed; and *alleged*, That as bairns surviving would transmit their legitim though they had done no diligence, so this bairn surviving alone was sufficient.

THE LORDS found, That seeing there was no confirmation, the right was not established in the child's person, and that the right could not fall to the father, but fell to the nearest of kin of the mother, and found it was not like a legitim, which is only of the father's means, and not of the mother's, and hath a special privilege in law, to be transmitted by mere superviving. See LEGITIM.

Fol. Dic. v. I. p. 188. Stair, v. I. p. 180.

1676. June 27. EARL of DUMFERMLING *against* The EARL of CALLENDAR.

IN April 1633, there is a minute subscribed by the Earl of Callendar, bearing, 'That he being to solemnize the marriage with Margaret Countess of Dumfermling, the minute or contract is to be amplified thereafter, containing these heads, viz. I bind and oblige me, my heirs and assignees, to infest and seise in conjunct fee and liferent, the said dame Margaret in the barony of Livingston, &c. and likewise by these presents, obliges myself, my heirs and as-

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Found as above; and seems to be the same case under different names.

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A provision of conquest to a wife 'in case there be no children of the marriage,' was found not executed by

* See SERVICE and CONFIRMATION.

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the existence
of a child,
who died the
same day that
he was born.

signees, that of all and whatsoever lands, or sums of money, which shall be purchased during our lifetimes together, (our debts being first paid) there shall be sufficient security thereof made in liferent as of the former lands to the said dame Margaret, in case of no issue of children, the one half thereof to be disposed upon, as the said dame Margaret shall think fit; and thereafter in September 1633, the Earl renounceth his right to the Lady's jointure, and obligeth himself not to meddle with it, but by her warrant in writ.' This Earl of Dumfermling, as assignee by his father, who is heir to the Countess, did pursue both the late Earl of Callendar, and this Earl of Callendar, as he who hath accepted a disposition of the late Earl's estate, without any cause onerous in prejudice of these obligations, to fulfil the same: And, after the late Earl's death, insists against this Earl, who *alleged* absolvitor, because the conclusion now insisted on, being to denude of the half of the conquest, and to pay the bygone rent thereof since the Countess's death, which was in anno 1659, by virtue of the clause of conquest in the said minute, the said clause is conditional 'in case of no issue of children;' *ita est*, There was a child born, which excludes the condition, and evacuates the provision. The pursuer *answered*, That the existency of the child born of this marriage, and who died that same day that it was born, doth not exclude the condition, whether respect be had precisely to the words, or to the meaning of the parties arising from their condition, interest, and acting; for the terms of the condition are, 'in case of no issue of children,' which cannot be understood as if the clause had been conceived thus, 'in case there be children of the marriage, the Lady should have no interest in the conquest,' for then the condition being positive, it might be pretended to have taken effect by the existence of a child; but this clause is negative, 'in case there being no issue of children;' and therefore, if at any time of the marriage there were no children, the condition took place, whether by the childrens simple non-existency or deficiency; for if the Lady had been then pursuing her husband to fulfil this provision, and to infeft her in conjunct fee in the conquest, she would have been well founded on the clause, subsuming 'that there are no children;' and it would not be a good answer, that there had been children of the marriage; and seeing this minute bears, 'not only the not being of children,' but 'in case of no issue of children,' it makes the matter much more clear, for the word *issue* were superfluous, if the simple existency of children did exclude the provision, but *issue* being a word customary in the English law and writs, but not with us, it doth there import succession, posterity, and so relateth to the dissolution of the marriage, and must be understood as that *formula* debated by the Doctors, *si sine liberis decesserit*, or *deficientibus liberis*, which still respects the dissolution of the marriage, and imports a permanency, and cannot be purified by a momentary existence; and accordingly, the LORDS have been always accustomed to interpret the ordinary clauses in contracts of marriage, 'in case there be no children,' or 'failzieing of children,' that the tocher should return or the jointure be increased by the survivency,

and not by the simple existency of children, as hath been frequently decided. *2do*, If the meaning of parties be considered, which is the best way to interpret a dubious expression, the case must be considered, as if the husband and wife were disputing the extention of the minute, before either children or conquest, and then it is to be considered, if this case had been proposed to the parties at the time of the minute, what if a child be born, and die in some few days, would the Lady have acquiesced to quit the conquest? Or would the husband quit the marriage before he extended it further, which cannot with any reason be thought, especially seeing he had only then the barony of Livingstoun, not exceeding 7000 merks of rent, and the Lady had a liferent of 22,000 merks by year, with money and moveables, and was a young and strong woman, and the husband had no visible way of making conquest but by her means; for what he had acquired, was abroad in the war, which he had quit, and settled at home by this marriage; so that being illiterate, and a most profound peace in the country in anno 1663, there was no ground of expecting conquest but by the jointure; and therefore, whether the words or meaning be considered, the simple existence of a child is not relevant. The defender *replied*, That 'issue of children' imports no more than the existence of children, and amongst illiterate parties, words are oftentimes superfluous; neither can the clause be understood as equivalent to that *formula*, *si sine liberis decesserit*, which clearly implies that the want of children is at the time of death; but this clause is equivalent to this *formula*, *si liberos non habuerit, si liberos non susceperit*; and it is clear, that in the condition introduced by law, that if the marriage dissolve within year and day without children, all things betwixt man and wife return *hinc inde*, the simple existence of children is sufficient; and if that be not sufficient in this case, then, though there had been twenty children come to maturity, and married, if they and their *issue* had died before the parents, the Lady would have recurred to her share of the conquest, which had been very unreasonable. It was *duplied*, That all the conditions alleged by the defender express a peculiar time, viz. the 'procreation or birth of the children;' so that if here the clause had said, 'in case there were no children procreate,' or 'in case there were no children born,' their birth evacuates the condition; and, in the same manner, the law determines the time of existence, or non-existence of children to dissolve the marriage, viz. 'if either party die within year and day, without children procreate, heard cry,' and so their birth and maturity by crying and weeping, determines the time, which doth noways quadrate to this clause, 'if there be no issue of children,' which at least must import the ordinary clause 'of failing of children.'

THE LORDS found that the existency of a child, who died that day, did not evacuate the condition in this minute, and therefore repelled the defences founded thereon.

In this process there was a second defence proponed, and debated the 28th day of June.—It was *alleged* for the Earl of Callendar defender, absolutor, be-

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cause the clause in the minute founded upon, could only import a liferent to the deceased Lady, with a power to dispone on the one half of the conquest as she thought fit, which is but a personal faculty, incommunicable to heirs and assignees, such as is ordinary in dispositions by fathers to their children, reserving to themselves power to burden or affect, which is never extended to heirs; and it cannot be subsumed that the Lady did dispone. And seeing the clause is imperfect and dubious, *in dubiis quod minus est et quod benignius est sequendum*; and certainly the personal faculty is less than the property, and more suitable to the interest of both parties; for thereby the wife, if she had pleased, might have disposed of the half, and yet the husband had hopes that he might prevail with her, not to dispose, as he did; but if the meaning were to give her the fee of the half, which being the most important right, it would have been exprest *in verbis translatis dominii*; and if stretched further, would be an extravagant unreasonable provision, which was never in a contract betwixt noble persons, whereby a wife should not only have the liferent of all the husband had, but of all that he should acquire; and likewise the fee of the half of his conquest, in case there was no issue. *2do*, In conjunct fees betwixt man and wife, where the heirs are not exprest, which may clear who is fiar, the law presumes *quod potior est conditio masculi*, that the husband is fiar, and the wife only liferenter; and therefore it must be so in this case. *3tio*, The clause of conquest bears, that the conquest should be secured to the wife in liferent, as the barony of Livingston; but it is undeniable that the security of the barony of Livingston was to be in conjunct fee and liferent, whereby the husband was fiar, and the wife liferenter; and therefore the security of the conquest being expressly regulated thereby, behoved to state the husband fiar, and the wife liferenter; and so her power to dispose is no act of property, but a personal faculty.—It was answered for the pursuer, That the clause of conquest, as to the import thereof, must either be considered precisely according to the words in the minute, and the terms in which the Lords could have extended a contract of marriage thereupon, or according to the meaning of the parties, to be elicite from the circumstances; and if the Lords were extending the minute, without any speciality of circumstance, they could only extend it thus, That seeing both the barony of Livingston, and the conquest, were to be by way of conjunct fee, and that heirs are exprest in neither, that the husband and his heirs would be obliged to infeft himself and his spouse, the longest liver of them two in conjunct fee and liferent, and their heirs, or the heirs of the marriage, without expressing, which failing, &c. So that it would be left to the interpretation and construction of law, whether the husband were sole fiar, or whether the husband was fiar in the one half, and the wife in the other half; in which case the common presumption of law would construct the husband to be sole fiar, and the wife to be only liferenter, unless there were a stronger presumption or evidence in the contrary; and so the husband would be sole fiar of the barony of Livingston, because there is no presumption or evidence in the

contrary; but the conjunct investment of the conquest behaved to run in these terms, That the husband should take his conquest to himself and his wife, the longest liver of them two in conjunct fee or liferent, and to their heirs; and in case there were no issue of children of the marriage, that the one half should be disposed of as the wife should think fit; by which conjunct fee, the presumption of law that the husband is sole fiar, is taken off by that adjection, that the wife being conjunct fiar, hath power to dispose on the one half, which is a sufficient evidence to take off the presumption, and to make the wife fiar of the half; for it is beyond question, that a conjunct fee granted to two men, the longest liver of them two, and their heirs, would have this effect, that both are fiars equally in the half, and that the survivor hath the liferent of the whole, and therefore they are said to be invest in conjunct fee and liferent, because they are both fiars of the half, and they are both liferenters of the other half, as they happen to survive; but the only reason wherefore a conjunct fee to man and wife constitutes the man sole fiar, and the wife liferenter, is the presumption, that that is the meaning and intention of parties, which presumption, as all other presumptions are, is elided by a stronger presumption in the contrary; as if an heretrix resign her lands in favour of herself and her husband, the longest liver of them two in conjunct fee, and their heirs; if this be not done by contract of marriage, or as a tocher, as it frequently occurs, that after contract of marriage, and marriage following, the wife succeeds to an estate, which, if she resign in manner foresaid, and she and her husband be invest thereupon in conjunct fee, and their heirs, without expressing further, the wife will be sole fiar, and the husband only liferenter; because the presumption is stronger for the wife, that her meaning was, not to denude herself of the fee; but the case is much stronger here, where it is not left to presumption whether the wife be only liferenter, or fiar in the half, but it is expressly agreed to by both parties, that the wife should have power to dispose of the one half, if there were no issue or children; so that the precise question comes to be, whether a wife, being invest in conjunct fee, with power to dispose of the one half as she pleases, be fiar of that half, or if she hath only power to dispose of that which is not her own but her husband's; and it is very clear that that clause adjected takes off the presumption, and leaves the wife according to the nature of conjunct fee, to be fiar of the one half; and as to the meaning of the parties to be elicite from special circumstances, it makes strongly for the wife to be fiar of the half; *1mo*, Because the clause bears expressly, that her conjunct fee of the conquest is to be with the burden of their debt; and therefore must be meant of the property; for a liferenter was never burdened with debt; *2do*, It is acknowledged that the husband had only an estate of 7000 merks a-year, and that the wife had a liferent of 22,000 merks a-year, and was a young and healthful woman about 30 years of age; so that she had a better estate than he, which is very extraordinary; and therefore, though this clause of conquest were extraordinary, yet it was very reasonable; and if it had been directly proposed,

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the husband would not have relinquished the marriage, but rather have yielded to it; nor would the Lady have gone on without it, seeing there was no visible way of making conquest but by the Lady's great liferent; for the husband was an illiterate man, and could make no improvement of his fortune but by his sword, by which he acquired abroad the money that bought the barony of Livingston; but he had deserted that service, and settled at home by this marriage; and though he gained in the civil war that ensued at home, yet there was no thoughts of that war in April 1633, the time of the minute; *3tio*, The meaning of parties is yet further cleared by a bond granted by the husband, bearing date in September 1633, and which the defender hath pleaded to be of a later date, as after the marriage complete, whereby the husband renounces his *jus mariti*, and gives his Lady the sole disposal of her opulent jointure, which is much more extraordinary than the half of the jointure, in case of no issue; and if this posterior bond had been granted the time of the minute, it might have been a cause to have limited the ground of the conjunct fee; which being so long after, it can be no ground at all.

THE LORDS found, That by the terms of the clause of conquest, and by the meaning of parties elicite from the circumstances foresaid, it did not import a naked liferent, with a personal faculty to the Lady to dispoise the half; but that she being conjunct fiar with that power, was fiar of the one half of the conquest; for albeit the conquest, in the manner of security, was regulate by the infestment of Livingston, both being conjunct fiars; yet the power of disposal not being in the conjunct fee of Livingston, but of the conquest, it made the security, as differing in that point, to have different effects as to the fee; but seeing this clause was but a general clause of conquest, the LORDS found that it could only extend to what the husband acquired during the marriage, more than what he had the time of the minute, and with the burden of all his debts contracted during the marriage; so that though the whole estate he now hath, was acquired during the marriage, yet as much of it as was equivalent to the barony of Livingston, was not to be reached by the clause of conquest, but only the superplus that were free, over and above the debt contracted during the marriage, of which free superplus the pursuer, as succeeding to the Lady, was to have the half, but no part of the bygone rents from the Lady's death till her husband's death, because they belonged to the husband, as the surviving conjunct fiar. See This case by Dirleton, *voce* FACULTY.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 430.

1677. January II. BAILLIE against SOMMERVILE.

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The clause,
si sine liberis
found not to
take place,

LITTLEGILL having charged Mr William Sommerville to make payment of the sum of 10,000 merks, contained in his contract of marriage with Mr William's daughter, and upon a bond of corroboration, and a decret of consent; there