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was provided to a jointure of 750 merks, should stand good for 600 merks yearly, was found a rational deed, and effectual against the heirs of the first marriage, who, in their mother's contract, were provided to the conquest during the marriage.

Fol. Dic. v. 2. p. 284. Stair. Dirleton.

*** This case is No 11. p. 3190, *voce* DEATH-BED.

No 80.

1677. February 13,

FRASER *against* FRASER.

A PROVISION of conquest in a contract of marriage to the heirs, or to the bairns of the marriage, is not so strictly to be interpreted as if the father were under a specific obligation to make every subject effectual to them that he should happen to acquire during the marriage. It has no other effect than to be a limitation upon the father, that he cannot alter the destination established in their favour by substituting strangers. But as conquest is *nomen universitatis*, to no particular of which can the children lay claim, but to the *universitas* in general, the father, who may forbear to purchase, is at liberty to exercise every act of property after he does purchase; which, though it may alter or lessen the particular subjects that fall under the *universitas*, is not disposing of the *universitas* itself, or altering the destination established in the contract. Any mere gratuitous deed, however, without rational cause or consideration, will be understood to be an indirect method of altering the succession, *et fraus facta contractui*, and therefore ineffectual.

Fol. Dic. v. 2. p. 284. Stair.

*** This case is No 23. p. 12859.

No 81.

1677. June 19.

MURRAYS *against* MURRAYS.

Found in conformity with Robson *against* Robson, No 78. p. 12943. Here the question was with children of the second marriage, as heirs of conquest.

UMQUHILE Thomas Murray, Bailie of Edinburgh, by his first contract of marriage, provided a sum to the bairns of the marriage, with a clause of conquest of lands and tacks acquired during the marriage. And, by his contract of marriage with his second wife, he provides the heirs of that marriage to a sum, and to the conquest during that marriage, of lands, annualrents, and sums of money, and there is expressed goods and gear, but these words are crossed, yet legible. The defunct had a son and two daughters of the first marriage. The two daughters were married, and forisfamiated in his own time. The son of the first marriage hath some heritage in land, which is said to be 700 merks yearly. He has a son and two daughters of the second marriage; and he grants a bond

of provision in his *liege poustie* of 7000 merks to his son of the first marriage, and 6000 merks to each of the three bairns of the second marriage. After all he makes a testament, and burdens his executors with the said bonds of provision, and leaves all his six children of both marriages his universal legatars. Whereupon the rearises a competition, wherein it was *alleged* for the children of the second marriage, That they were creditors by the clause of conquest, being provided to all goods and gear conquest during the marriage with their mother, which clause could not be evacuated by any voluntary or gratuitous deed in favour of the bairns of the first marriage; and therefore the bond of provision, in so far as concerns the eldest son, could not affect the means conquest during the second marriage, much less could the universal legacy bring in all the children of the first marriage equally. It was *answered*, That a clause of conquest in favour of children is not a debt, but a provision of succession, whereby the children represent their father, and so cannot quarrel any provision granted by him, who remained *dominus bonorum* during his life, and so could dispose thereof what way he pleased, not only for onerous causes, but he might gift to strangers, and exercise charity. So that such clauses can only be understood as clauses of conquest of lands, which do reach no lands but such as were conquest, and remained undisposed of at the defunct's death; for it cannot be thought, that by such clauses any persons would interdict themselves, or restrain their freedom; and it is not controverted but the father might borrow sums, or dispohe his goods, or assign his bonds for sums of money, though he should waste or give away these sums at his pleasure; much more may he provide children of a former marriage with competent provisions; for which there is a natural obligation, or do any other rational act, as the providing of a subsequent wife, as was found in the Competition betwixt the Wife and Children of Thomas Littlejohn, No. 79. p. 12943. It was *answered*, That such clauses of conquest are not simply provisions of succession, but as tailzies or provisional succession constitute the successors creditors, as to the terms of the provision against the heirs of line or executors, so must this provision, which is most ordinary among merchants and inferior people, and cannot be interpreted so as to be elusory; and therefore all acts importing fraud, or any disappointment in such clauses, are null, as this universal legacy, which brings in all the bairns of the first marriage, who had no clause of conquest, and who were provided, the son having a land inheritance, and the daughters having been tochered and forisfamiated, equally with the children of the second marriage, who have an express clause of conquest in their favour.

THE LORDS found, That the special provision in favour of both marriages should be first satisfied out of the father's executry, in order, as the provisions were in the several contracts. And as to the superplus of the executry, they found, That the universal legacy did not prejudice the children of the second marriage of the clause of conquest, and therefore preferred them as to what sums were conquest in their mother's time; and as to the provision for the el-

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dest son, the Lords ordained inquiry to be made, whether that part of the executry conquest in the first wife's time, would be sufficient to pay that son his part, which would make it effectual, and what heritage the son would succeed to, that the Lords might consider whether it was a rational provision for the father to add 7000 merks to his son, who had a land inheritance, which they would accordingly sustain, as they did in the case of Littlejohn; and as to the remainder of the executry conquest in the first or second wife's time, the Lords found the universal legacy effectual to bring in all the six children equally.

Fol. Dic. v. 2. p. 284. Stair, v. 2. p. 523.

1679. January 3.

GIBSON against THOMSON.

No 82.

A provision of lands within three chalders of victual to a second wife and children was sustained, though acquired during the first marriage, the heir of the first marriage, who was creditor for the conquest, being otherwise competently provided.

UMQUHILE Sir James Gibson, by his first contract of marriage, was obliged to take the conquest during the marriage, in favour of himself, and the heirs of the marriage, during which marriage he conquered the lands of Keirhill, and yet he disposes the same to Dame Elizabeth Thomson his third wife in liferent, and to the eldest son of the marriage in fee. Mr Alexander Gibson, his heir of the first marriage, pursues reduction of this right, as in prejudice of the clause of conquest. It was *answered*, That the said clause being but a destination, Sir John, though it had been fulfilled, and the rights taken to him and his heirs of that marriage, would have been fiar, and so might have disposed; and this pursuer being his general heir, could not quarrel it, for though heirs of tailzie or provision, by subsequent marriages, may quarrel posterior deeds in their prejudice, because they are not *provisione legis*, and so *eadem personæ cum defuncto*, but *provisione hominis*; and therefore, though they represent the defunct as to strangers, the heir of line being first discussed, yet *quoad* the heir of line, they are creditors, and may reduce any gratuitous deed, hurtful to their provision; but here the pursuer is heir of line, and must represent the defunct *simpliciter*, and cannot renounce to be heir of line, and claim to be heir of the marriage. *2do*, Conquest is always considered with respect to the defunct's death, and with the burden of his debt; for if at any time of his life he should dispose of what he had conquered, it was never found, that the heir was obliged to make it up, much less when he provides it upon a rational account to a wife and children of a posterior marriage; and it was found in Littlejohn's case, No 79. p. 12943, that such clauses of conquest could not prejudice provisions to a wife or children by a posterior marriage. It was *replied* for the pursuer, That he might renounce to be heir of line, and yet be heir of the marriage, and needs no entry for a general clause of conquest. *2do*, Albeit clauses of conquest exclude not posterior deeds for onerous causes, and a just and rational consideration, yet here there is no consideration; for there is a plentiful fortune belonging to the defunct, out of which he might