

did secure 20,000 merks, due to him by Blackhall, to himself, and the heir of the marriage. The five daughters do now pursue their brother to denude himself in their favour, as bairns of the marriage; because the bond bears *borrowed money*, and of a date during the marriage, which was always sufficient probation of conquest during the marriage. It was *alleged* for the defender, *imo*, That this clause of conquest must be understood, not of all the bairns of the marriage, but the heirs of the marriage, at least it bearing bairns or heirs, it must be interpreted as an alternative obligation, either to provide to the heirs or bairns of the marriage; and the father being debtor, and having made his election, by securing the heir of the marriage in this sum, the bairns are excluded *nam in alternativis electio est debitoris*. *2do*, Clauses of conquest were never extended to rights, in which the contractors do succeed, and are not acquired by their own industry; for such clauses are to encourage wives to be diligent in acquiring, which cannot relate to accidental succession. And it is offered to be proven, that albeit this bond bears, *borrowed money during the marriage*, yet the true cause thereof was this, that David Stuart, the defunct's younger brother, by a second marriage, having died without issue, in a land estate, the same befel to the defunct as heir of conquest; and, by transaction, this bond was granted to the defunct for his right, whereupon he did denude himself in favours of Blackhall his eldest brother; so that this bond being either the price or composition for his succession to his brother, falls not under the clause of conquest, and therefore was warrantably taken in favours of himself and the heirs of the marriage, and not of the bairns.

THE LORDS found, that, by the clause of the contract, all the bairns of the marriage were heirs of provision in the conquest, and that heirs or bairns was not alternative, but exegetic; and that the father, being debtor in the clause, could not effectually alter the clause of conquest in favours of one of the bairns; but found, that clauses of conquest did not extend to rights falling by succession, even though the defunct was heir of conquest; for conquest, as to heirs, is in opposition to heritage. But in these clauses of conquest, albeit the right was conquest to the first defunct David, yet was not so to Walter, succeeding as heir to David, but he did succeed to his brother therein; and therefore the allegance was found relevant to be proven by the oaths of the witnesses, and comuners in the agreement betwixt Walter and his brother and Blackhall, that this sum was either the price or composition for the defunct's succession to his brother David.

*Fol. Dic. v. 1. p. 197. Stair, v. 2. p. 604.*

1682. February.

AITKIN against ———.

No 6.

FOUND, that an obligation, in a contract of marriage, to provide the wife to a liferent of what lands, teinds, annualrents, &c. not mentioning sums of money,

No 6. should be conquest during the marriage, was found not to extend to the annual-rent of moveable sums.

*Fol. Dic. v. 1. p. 197. Harcarse, (CONTRACT of MARRIAGE) No 342. p. 83.*

No 7. 1682. *March.* YOUNG PRESTONGRANGE *against* THE LADY CRAIGLEITH.

FOUND, that an obligation to provide a wife to a third, in liferent, of lands and heritages to be conquest during the marriage, did comprehend a sum belonging to the heir, by a clause secluding executors, as falling under the word heritage. Upon a representation, that clauses of conquest are to be strictly interpreted; and, therefore, by heritages in this case, heritages by infestment are to be understood; the interlocutor was stopped: but it was thereafter adhered to.

*Fol. Dic. v. 1. p. 197. Harcarse, (CONTRACT of MARRIAGE) No 343. p. 83.*

No 8. 1696. *February 5.* YOUNG and CHALMERS *against* YOUNG and MACKY.

Two daughters of a second marriage served themselves heirs in some tenements in Edinburgh, by hasp and stapple, on a clause in their mother's contract of marriage, bearing a provision of all goods and gear to be conquest during the marriage, to the children to be procreate thereof; and a reduction being raised by the bairns of the first marriage, the LORDS found these words of the clause of conquest could not extend to houses, unless it had born lands and heritages, and this notwithstanding the children of the first marriage were provided in a special sum, which they had received and discharged; yet the LORDS found they might reduce this service and infestment, and succeed to the houses as general heirs of line.

*Fol. Dic. v. 1. p. 197. Fountainball, v. 1. p. 708.*

No 9. 1730. *July.* MERCER *against* MERCER.

IN a contract of marriage, there is a provision of conquest in favours of the bairns of the marriage, in the common stile, of all that the husband should conquest or acquire during the marriage. During the standing of the marriage, the husband got left him, as a pure donation, by way of legacy, the sum of 12,000 merks; and the question thereupon occurred, whether this was comprehended under the above clause of conquest? THE LORDS found it was not. *See APPENDIX.*

*Fol. Dic. v. 1. p. 197.*