

1676. *June 20:* MITCHELL *against* CHILDREN of LITTLEJOHN.

No 87.

A RATIONAL provision, granted to a second wife, was found effectual against the children of the first marriage, who, in their mother's contract, were provided to the conquest during the marriage.

*Fol. Dic. v. 2. p. 287. Stair. Dirleton.*

\* \* \* This case is No 11. p. 3091. *voce* DEATHBED.

1684. *November 7.*

BEATRIX ANDERSON, and JOHN SIMPSON, her Husband, *against* ALEXANDER ANDERSON.

No 88.

ALEXANDER ANDERSON being obliged, by contract of marriage, with Beatrix Dyet, to secure all the conquest he should purchase during the time of the marriage, to himself and to his wife, the longest liver of them two, and to the bairns to be procreated betwixt them; which failing, to the said Alexander's heirs and assignees; the said Beatrix Dyet, Alexander's wife, being deceast, his daughter and child of the marriage is married to one Simpson, and in her contract of marriage the father contracts 3000 merks of tocher, but the said contract bears not that it was in satisfaction of all she could crave. The said daughter and Simpson her husband, having intented process against the said Alexander Anderson the father, to make payment to her of the conquest in her mother's time, extending to 20,000 merks, at least to employ the same to be made forthcoming after his death; it was *alleged* for the defender, That by conception of the contract, the father remained still fiar, and consequently might dispone upon the conquest as he thought fit, and that the foresaid clause was a destination allenary, and so could take no effect. THE LORDS found, That there could be no process for the implement of the clause, until the father's death, and that notwithstanding thereof, the father might dispose upon the conquest for any rational or necessary use, and that it might be affected with his debts contracted, or to be contracted at any time during his life, and might be employed for any other rational or necessary use.

*Fol. Dic. v. 2. p. 287. P. Falconer, v. 2. No 94. p. 64.*

\* \* \* Fountainhall reports this case:

1684. *November 27.*

BEATRIX ANDERSON, and John Simpson gunsmith, her husband, pursue Alexander Anderson, coppersmith in Edinburgh, her father, on this ground, that by his contract of marriage with her mother, he obliged himself to take all

the conquest during that marriage, to the bairns of the marriage in fee; and subsumed that there were 40,000 merks conquest by him *stante illo matrimonio*, and therefore craved the half of it, (there being also a brother of that marriage,) to belong to her, reserving her father's liferent. *Alleged*, Such clauses of conquest were only naked destinations, containing merely a tailzie and right of succession, if he did not otherwise dispose on his goods, and it did not deprive the father of the dominion and faculty to bestow even what was conquest in that marriage to a second wife and her children, or to do any other rational deeds with his own goods, whereof he was still absolute fiar and proprietor; and that this was agreeable to what the LORDS had found, the 9th February 1669, Cowan *contra* Young, No 77. p. 12942.; and on the 17th of June 1676, Littlejohn *contra* Mitchel, No 87. p. 12960.; and 1st December 1680, Anderson *contra* Bruce, No 46. p. 12890. *Answered*, Clauses ought to operate somewhat, and it is unjust to allow a parent to evacuate his prior contract of marriage, by giving all to a posterior wife and bairns; and contrary to Moses's law discharging exheredations in that case; for by it he not only defrauds the children of the first marriage, but also the first wife's friends and relations, who in contemplation of the provision of the conquest gave the larger tocher, and so the clause was onerous. THE LORDS, on Redford's report, refused to sustain any process at the daughter's instance, either for payment of the conquest, or so much as for liquidation of it, during the father's lifetime; which seemed to run on these two grounds, *1mo*, That it was judged unfit to encourage children to be disobedient or ungrateful to their parents, or to rise up in rebellion, or in processes against them; *2do*, That such provisions of conquest being only but mere destinations, the conquest was not to be considered as it stood at the time of the dissolution of the marriage, but as it shall be at the time of the father's death; so that, if there was no conquest then, or if he had disposed on it at all, then they had nothing to crave. Yet this interlocutor *a contrario sensu* would seem to infer, that the Lords reserved their action after her father's death to liquidate the conquest, and pursue his other heirs or relict for the same, though in discourse they seemed not to mean that. Whereupon, Alexander gave in a bill, craving the Lords would explain their interlocutor, and declare that he had the power of disposal of his conquest at his pleasure. THE LORDS, on the 2d December, in their reasoning on the said bill, were very clear that he might spend it all in his own time, and piss at the wall, (as we say,) but they would not be straitened nor put upon that lock, so as to encourage him to do it; therefore they waved the bill, and adhered to their former interlocutor; for what if a man by accidents of fire or shipwreck, or other losses, whether public or private, calamities of plague or war, come to poverty, were it just to restrain him in the consumption or disposal of his conquest and industry, for relief or payment of debts, or other rational deeds; but this supposition seems to deny an absolute power of disposal *ad libitum extra illos casus*.

\*.\* Harcarse also reports this case :

No 88.

ALEXANDER ANDERSON coppersmith, having in his first contract of marriage, when he had no estate, obliged himself to provide the whole conquest to himself and his wife, or the longest liver, and to the bairns of the marriage; and having afterwards made large provisions to the children of a second marriage, the daughter of the first marriage pursued her father for liquidating the conquest, and employing the same conform to the destination in the contract.

*Alleged* for the defender, That clauses of conquest being mere destinations, need not be implemented, and here the father, who was in the fee, had power of disposing for rational causes, as was found in the case of Andrew Bruce and Others, No 46. p. 12890.; and the contravention of the obligation was only to be considered after the father's decease in particular cases, if rational or not, and the obligation in the second contract could not be considered as a contravention at this time, seeing the conquest of the second marriage might answer the provisions thereof.

*Answered*, That obligations in contracts must operate in the terms thereof, and, as an obligation to employ a special sum by way of destination, must be implemented, so, in this case, the obligation of conquest to bairns and not to heirs, in place of all provision, must be particularly fulfilled.

THE LORDS found the defence relevant, and assoilzied from the process, and would not so much as declare that provisions of conquest could not be disappointed by irrational deeds, in respect that might incumber the defender's estate in his own life, and such deeds might be cognosced upon, when they happened to emerge; and found, that *medio tempore* inhibition could not be served upon the obligation of conquest. In this process it was also *pleaded*, That the father had the power of distribution of the conquest among his children according to their deserving, and the pursuer having got 2500 merks of portion, her brother deserved all the rest. It was *answered*, That the provision to bairns, without reserving a power to portion it, divides *in capita*; but this received no interlocutor.

*Harcarse*, (CONTRACTS OF MARRIAGE.) No 368. p. 94.

\*.\* This case is also reported by Sir P. Home.

By contract of marriage betwixt Alexander Anderson coppersmith, and Beatrix Dyet his spouse, the said Alexander being obliged to provide all that should be conquest during the marriage, to himself and his wife in liferent, and to the bairns of the marriage in fee; which failing, to the said Alexander's heirs and assignees whatsoever, and Beatrix Dyet the wife, being deceast, leaving behind her two children of the marriage; and Beatrix Anderson, one of the children, and John Simpson her husband, having pursued a declarator against the said Alexander Anderson the father, for making furthcoming the half of the conquest to her as one of the two children of the marriage,

conform to the clause of conquest contained in the said contract. *Alleged* for the defender, That the clause of conquest being only a substitution and destination of succession, the father did remain still fiar, and may dispose of the conquest during his own lifetime, so that, so long as he lives, no such action can be sustained against him; as was decided in the case of Young against Cowan, 9th February 1669, No 77, p. 12942.; where the Lords found, That a clause of conquest can only be understood of the goods, as they were the time of the acquirer's death, and that he may dispose of the same at any time during his lifetime at his pleasure; and likewise decided in the case of Bailie Anderson against Andrew Bruce, No 46. p. 12890.; where albeit a sum of money was provided to the bairns of the marriage, whom failing, the one half to return to the wife's mother, yet the husband was found to be fiar and might dispose of the sum; much more may the husband actually dispose of the conquest, as in this case, seeing the termination by the conception of the clause in the writ, failing of children of the marriage, was in favour of the father's heirs, and the father had already given the defender a competent portion when she was married to the said John Simpson. *Answered*, That the bairns of the marriage, by virtue of the foresaid clause, being creditors to the father, they would have their benefit of the conquest, without necessity of being served heirs to the father, or any way to represent him. However the conquest might be affected with any debts contracted by him during the marriage, yet he can do no voluntary deed in prejudice of the said clause, but his estate must be considered as it was *tempore soluti matrimonii*, and of his wife's decease, to give the children the benefit of the foresaid conquest; which being the only provision in favour of the children of the marriage, it cannot be evacuated and made ineffectual by the father at his pleasure; and whatever may be pretended, that when such clauses are only declaratory, whatever lands, sums of money, and others, shall happen to be conquest during the marriage, the right thereof should be taken in the terms foresaid, that notwithstanding of such a provision, the father may dispose of the conquest; but when the clause is conceived in obligatory terms, and is the only provision in favour of the bairns of the marriage, it cannot be in the father's power to make the same ineffectual; and the decision Cowan against Young doth not meet this case; that being only in case of a bond granted by the payer for a sum of money, as an additional provision in favour of the children of the first marriage, which was found to effect his conquest that was provided to the children of the second marriage; as also the case of Andrew Bruce and Anderson does not meet, for in that case the parties craving the benefit of the clause of conquest were not the children of the marriage, but the wife's nearest kin, who by the last termination, failing of bairns of the marriage, were substituted in the equal half of the conquest, which the Lords found to import no more but a substitution and destination of succession, there being a bairn of the marriage who survived the mother several years; and any provision granted to the defender when he was

No 88.

married, cannot prejudge her of the clause of conquest contained in the mother's contract of marriage, seeing she did not accept the same in satisfaction of the said provision. THE LORDS refused to sustain process for the half of the conquest during the father's lifetime, and found that the father, notwithstanding of the foresaid clause, may dispose upon the conquest for any rational or necessary use, and that it may be affected with the father's debts, contracted or to be contracted at any time during his lifetime, and any other rational or necessary deeds done by him.

*Sir P. Home, MS. v. 2. No 620.*

1685. February 24.

No 89.

ELSPETH CRUIKSHANKS, and Mr JOHN JOHNSTON, Merchant in Aberdeen, Her Husband, *against* ROBERT CRUIKSHANKS of Banchry, Her Father.

THE LORDS, on Carse's report, found, That the obligation in the said Robert's contract of marriage with the pursuer's mother, providing the conquest to the bairns of the marriage, resolves only into a destination; and that, notwithstanding of that clause, the father is fiar; and therefore refused to sustain process during the father's lifetime, either for liquidation or payment, or declaring that the father may do no deed that is gratuitous or voluntary, to the prejudice of the said clause of conquest. See the parallel case decided 27th November 1684, Simpson *against* Anderson, No 88: p. 12960.; only, here the clause of conquest runs, that he provides the conquest to the bairns *in integrum*, which conception was not so strong in Anderson's case.

*Fol. Dic. v. 2. p. 287. Fountainhall, v. 1. p. 343.*

1687. February —.

No 90.

Mr ROBERT IRVINE *against* ELIZABETH and JEAN IRVINES.

A MAN having obliged himself to provide 4000 merks to himself and his wife in conjunct fee and liferent, and to the bairns of the marriage in fee, and to pay the money to the bairns, the next term after their mother's decease, she predeceasing, the children pursued their father for payment.

*Alleged* for the defender, That the provision to pay the 4000 merks to the pursuers, the first term subsequent to their mother's decease, supposed her to be the survivor, and was not intended as a renunciation of the father's conjunct fee.

THE LORDS found the father had the liferent of the sum during his life.

*Fol. Dic. v. 2. p. 285. Harcarse, (CONTRACTS OF MARRIAGE.) No 383. p. 99.*