

1697. December 7.

MATHEW CUMMING *against* JANET KENNEDY and ALEXANDER MUIR.

THE LORDS advised the action between John Kennedy and Helen Howat, and Mathew Cumming her husband. The question was, on a clause of conquest in the contract of marriage between Helen's father and mother, providing the conquest to the bairns of the marriage; and the said Helen being the only child of that marriage, she and Mathew Cumming her second husband raised a declarator, that the conquest belonged to her, and consequently to Mathew, her husband, *jure mariti*, the same being moveable; then she dies. Mathew, the husband, insists in the declarator, and Janet Kennedy, the said Helen Howat's daughter of the first marriage, compares, who *alleged*, That James Howat her grandfather's means can only be declared to pertain to her, in regard Helen, her mother, was neither confirmed executrix to her father, nor served heir of conquest to him; and so the dominion not being legally transmitted to Helen, the goods must necessarily fall to Janet Kennedy, her daughter.—*Alleged*, That the obligation providing the conquest to the bairns of the marriage needed no confirmation, being an illiquid subject, and of the nature of an *universitas bonorum*, but was transmissible *ipso jure qua* bairn, without any other cognition. And, *2do*, She was served heir of line, which comprehended the subaltern branch of being heir of conquest and provision. *3tio*, She had raised a declarator in her lifetime, which supplied the want and defect of a confirmation, and was equivalent thereto.—*Answered*, By the principles of our law, moveables require a legal title by confirmation to their conveyance, as well as heritage does a service, without which Drumelzier's title against the Earl of Tweeddale his brother, was refused as insufficient, 21st July 1676, *voce* PROVISION TO HEIRS and CHILDREN; and there is no transmission *ipso jure* amongst us, without service or confirmation, except only in the case of legitim and nearest of kin. See the famous case of Peter Bell's Children, 12th Feb. 1662, *voce* NEAREST OF KIN. And for her being served heir of line, she, thereby representing as heir general and universal, can never recur again to be a qualified heir as to a part of the succession only; and the declarator taking no effect in her lifetime, signifies nothing, even as the serving an edict or brief would vanish as an imperfect inchoate title, if the party died before the service or confirmation were expedite.—*Replied*, The legitim is not the only case of transmitting *ipso jure* by our law; for a bond taken to a father, and failing him by decease, to a child substituted *nominatim*, the fee and property transmit there *ipso jure* to the substitute, without a service or confirmation. And, in the case of Shorts against Saline, 19th February 1695, *voce* PROVISION TO HEIRS and CHILDREN, the being heir *designative* was found sufficient; and in Drumelzier's case, a service was required, because it was heritage; but moveables are much more easily transmitted; so that the bare existence of a child is enough to carry the clause of conquest, being a moveable subject.—THE LORDS, on this debate, found of before, and this day,

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A daughter, in her contract of marriage, accepted a clause, making her 'a bairn in the house.' Found, that she thereby renounced the conquest provided to her in her father's contract of marriage.

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upon bills and answers adhered thereto, that Helen Howat had right to the clause and obligation of conquest contained in her father's contract of marriage, as a bairn of that marriage, and that *ipso jure*, and on her declarator, notwithstanding she was not confirmed nor served heir of conquest in special, but had served heir of line, and consequently that Cumming, her husband, had right *jure mariti* to what was simply moveable of that conquest; which was a nice point, and makes confirmations less necessary in such cases.

1698. July 7.—THE LORDS advised the rest of the points debated in the declarator, mentioned 7th December 1697, pursued by Mathew Cumming, merchant in Glasgow, against Jannet Kennedy and Alexander Muir, her husband. James Howat, in his contract of marriage, had provided the conquest to the bairns of the marriage. Helen Howat being the only daughter of that bed, and being first married to Thomas Kennedy, by whom she had the said Janet, and then married to Mathew Cumming; and James Howat in his testament having named Janet Kennedy, his grandchild, executrix and universal legatrix, Helen Howat and Mathew Cumming, the second husband, raise a declarator that James's whole means ought to belong to her, by virtue of the clause of conquest contained in her mother's contract of marriage, and that he could do no deed prejudicial thereto, and consequently, that the universal legacy left by him to Janet Kennedy ought to be declared void and null, the clause of conquest constituting her creditor; and though a father is not, by a destination of conquest, so bound up from disposing his goods in a rational way, providing it be done in *liege poustie, et inter vivos*, yet he can never by a gratuitous deed evacuate that obligation, nor dispose of his goods either by a testamentary conveyance or on death-bed.—*Answered* for Jannet Kennedy, That the clause of conquest is in favour of the bairns of the marriage; but *ita est* the word *children*, by the construction of law, includes not only those of the first and nearest degree, but all the subsequent and remoter branches, *liberorum nomine non solum filii sed et nepotes neptesque comprehenduntur, l. 220. D. De. verb. sign.; et sermonis proprietati standum est ubi salva verborum sententia id fieri potest*; so the clause of conquest is abundantly fulfilled by her grandfather's universal legacy to her, she being a bairn *quoad* him as well as her mother; and the design of these clauses is to tie up the parents from giving away that conquest to children of another marriage, but never as to those who are *ex eadem stirpe*, though *in ulteriori gradu*.—*Replied*, Grandchildren are comprehended under the name of *liberi*, in opposition to uncles or aunts, or other collaterals, but not where it comes to be in competition with a nearer degree, where *nepotes* are not reputed bairns; as to which the decisions ought to be considered, 9th Feb. 1669, Cowan *contra* Young, *voce* PROVISION TO HEIRS AND CHILDREN; 3d Jan. 1679, Gibson *contra* Thomson, *IBIDEM*; 19th June 1677, Murrays *contra* Murray, *IBIDEM*; and lately, in 1692, the Children of Bailie Thomas Wyllie against him*; where the Lords found he might distribute his estate in what proportions he pleased among his bairns, notwith-

* Examine General List of Names.

ing of a clause of conquest.—THE LORDS sustained the universal legacy, and found the clause of conquest did not restrain him but he might even by testament legate his goods to his grandchild, and that the deed was not wholly gratuitous but rational. They likewise found, that Helen Howat, in her second contract with Mathew Cumming, having accepted of a clause making her a bairn of the house, was a renouncing of the clause of conquest, seeing the legitim and it were inconsistent, and that she could not repudiate the said provision now.

Fol. Dic. v. 1. p. 434. Fountainball, v. 1. p. 800. & v. 2. p. 9.

* * Dalrymple reports the same case :

1699. *January 20.*—BY contract of marriage betwixt James Howat and Janet Cunningham, the conquest during the marriage is provided to the longest liver in liferent and conjunct-fee, and, after their decease, to the heirs or bairns of the marriage.

Helen Howat, the only daughter of the marriage, having married Thomas Kennedy, she got a portion of 6000 merks, and an obligation to be a bairn of the house by her contract, and Janet Kennedy is the only daughter of that marriage.

The said Helen Howat did afterwards marry Mathew Cumming, with whom James Howat did contract 10,000 merks, and again obliged himself that she should be a bairn of the house.

Thereafter the said James Howat made his testament, wherein he did nominate Janet Cunningham his relict, his executrix, and Janet Kennedy, his grandchild by his daughter's first marriage, universal legatrix.

Janet Cunningham having survived, she did also nominate Janet Kennedy her grandchild, her executrix and universal legatrix ; and she left bonds to the value of 12 or 13,000 merks.

Mathew Cumming, the son-in-law, having confirmed himself executor-dative to Janet Cunningham, and intromitted with the bonds, Janet Kennedy, the executrix and universal legatrix to her grandmother, pursues Mathew Cumming for declaring her right to her grandmother's executry.

It was *alleged* for Mathew Cumming ; That the executry of Janet Cunningham was nothing else but the result of the means of James Howat, her husband, to which the defender had right from Helen Howat, James Howat's only child, who, by his contract of marriage, was provided to the whole conquest ; and his whole estate being conquest, it did belong to the defender's wife by the clause of conquest.

It was *answered* ; That parents are fiars of their own estate, notwithstanding of clauses of conquest, or destinations in favour of heirs or bairns of a marriage, which doth not hinder the father to dispose of his estate or conquest, by any rational deed without fraud. And in this case, the universal legacy to Janet Kennedy was a most rational deed, because he had already provided the daugh-

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ter of the marriage to two portions in her first and second contracts ; and therefore might reasonably and freely dispose of the superplus by an universal legacy. *2do*, Obligements in contracts are not designed to restrain the father's free disposal to the issue of the marriage in whatever degree. *3tio, et separatim*, The daughter did, both in the first and second contracts, accept of an obligation to be a bairn of the house, which doth import a passing from the claim of succeeding in the whole by the clause of conquest ; for the bairn's part being contradistinct to the dead's part, it doth imply that the father should have the free disposal of his own dead's part.

It was *replied, imo*, It is true, parents may dispose of their means by rational deeds, but then the father's disposal must be by deeds *inter vivos*, and not by an universal legacy ; because heirs of provision are creditors, and all creditors are preferable to legatars ; and consequently there is no place for any legacy, the whole being exhausted by the clause of conquest. *2do*, Though grandchildren may be comprehended under the name of bairns, yet an obligation in favour of bairns, doth only belong to descendants in the first degree, if any be extant ; and a father might as well legate to a stanger, as to a grandchild, in prejudice of a daughter.

3tio, The accepting of a legitim, was a clause in favour of the daughter, which she might repudiate, as her husband now doth.

It was *duplicated* ; That the defender doth acknowledge, that a father may do any rational deed, notwithstanding of a clause of conquest ; and it cannot be denied, that the universal legacy was most rational ; and the law hath left parents, and all fiars, in as full and free disposal of the moveables by testament, as of heritage by deeds *inter vivos* ; and therefore the moveables might freely be disposed by the universal legacy, the daughter of the marriage being already sufficiently provided. *2do*, It is acknowledged, that a provision to bairns does naturally fall to bairns in the first degree ; but the design of contracts being only to exclude the father's arbitrary and fraudulent disposal of his means, either to children of another marriage, or to strangers, he may provide any descending of the marriage at his pleasure ; and there is nothing more ordinary, than to provide younger children by testaments, though the clause of conquest be in favour of the heir, in which the children have no interest ; and for the same reason a grandchild may be also provided.

3tio, The taking an obligation for a legitim, was not simply in favour of the daughter, but also in favour of her father ; because that obligation relaxes the clause of conquest, as to the overplus ; neither is it lawful to renounce that clause of the contract, unless the tocher thereby contracted were also renounced, and restored.

THE LORDS found the universal legacy could not be quarrelled upon the clause of conquest, the daughter being competently provided ; and likewise found, That the accepting of an obligation to be a bairn of the house, did.

leave the father at his freedom to dispose upon the surplus at his pleasure.
See PROVISION TO HEIRS AND CHILDREN. *Dalrymple, No 10. p. 13.*

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1709. July 13. GODDART *against* SWINTON.

SIR JOHN SWINTON of that ilk, while a merchant at London, enters into a copartnery for a trading voyage to Guinea and the West Indies, with nine other merchants, whereof Mr Goddart was one, and the ship returning with profit, Ursula —, relict of the said Goddart, as administratrix and executrix to him, pursues the said Sir John, as cashier to the company, before the Court of Queen's Bench at Westminster, for L. 390 Sterling as his share in the copartnery, and obtained a decret; and he having found one Benjamin Mould to be his bail and cautioner, the relict gives a release and discharge to the said bail, on Sir John's giving a declaration that her giving the said discharge was nowise meant to preclude her from any advantage she had by the said decree and judgment against Sir John, for recovery of her debt due by him to her. And John Goddart, her son and assignee, pursuing Sir John Swinton before the Lords, he alleged nothing was produced to instruct Goddart as a partner in that society, or that Sir John was cash-keeper.—*Answered*, Though Sir John's double of the contract bears not his subscription, yet they produce another signed by him according to the English custom, whereby every one signs their neighbour's double, but not his own. *2do*, They oppone the decree, where when all things were fresh and recent, these points were not so much as denied, which certainly they would, if there had been any ground for them; and the decree being the sentence of a Supreme Court upon compareance, it must have the strength of a *res judicata*; seeing Sir John had three remedies, either by applying to the Exchequer, or carrying it by an appeal to the Chancery, or the House of Peers, yet he made use of none of them, but to get his cautioner relieved, gave the declaration foresaid, which in their style is equivalent to a ratification, and a renouncing of any power or interest he had to quarrel the said decree.—*Replied* for Sir John, That an English judgment or decree can never have the strength and effect of a *res judicata* in Scotland, whatever force it may have in England; for the Queen's Bench there and the Lords of Session being not subordinate, but co-ordinate courts, *par in parem non habet imperium, et extra territorium jus dicenti impune non paratur*; and though much respect is to be paid to the sentences of foreign sovereign courts, yet that is not *ex necessitate*, but only *ex comitate*, from decency and honour. And there were no reason to sustain their decrees here, till the English pay the same respect to ours, which they do not, but rejected a decret of improbation obtained by Sir Robert Crichton *alias* Murray against Richard Murray of Broughton.* Yea, they do not regard our very extracts under the Clerk Register's hand, but require the principal to be produced, though we have

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A party, who had been pursued in the Court of King's Bench, found bail. The pursuer granted a discharge to the cautioner, upon the defender declaring that the pursuer's granting that discharge, was nowise meant to exclude him from any advantage he had by the decree of the Court of King's Bench for recovery of the debt. It was found, that by this declaration, the defender ratified the said decree, and passed from any defence competent to him against it.