

1734. *February.*SUTHERLAND *against* MURRAY.

No. 38.

Robert Murray disposed his estate of Pulrossie, failing heirs of his body, "to and in favours of John and George Murrays, his brother's sons, and the heirs-male to be procreated of their bodies; which failing, to Sutherland of Clyne," &c.; thereafter he goes on to appoint a division of the estate betwixt the two brothers, into unequal parts. George having died without heirs of his body, the question occurred betwixt his brother John and Sutherland of Clyne, which of them was substitute to him in his proportion of the lands. For Sutherland it was pleaded, That he was substituted to both the brothers in their separate rights, which was clear from the clause, "which failing," in his favours; whereas there was no substitution in the tailzie of the one brother to the other. It was answered, The intention of this tailzie was to preserve an ancient family—"That Sutherland is substituted after the two brothers, and the heirs-male of their bodies," and no otherwise; so that he can have no claim while an heir-male of either of their bodies is alive. The plain intention of the tailzier was to prefer both his nephews, and the heirs-male of their bodies, to Sutherland; which must imply a mutual substitution of the one brother and his heirs to the other brother and his heirs. The Lords found, That Sutherland could not be served heir to George during the life of the brother John, and the heirs-male of his body; and found, That John Murray may proceed in his service to his brother George. See APPENDIX.

*Fol. Dic. v. 2. p. 400.*1736. *February 17.*PATRICK RANKIN *against* JOHN and PATRICK RANKINS.

Patrick Rankin, in his contract of marriage with Margaret Marshall, *anno* 1703, "provided 1000 merks, and whatever should be conquest during the standing of the marriage, to the heirs or bairns lawfully to be procreated betwixt them; and, in case of predeceasing his wife, he thereby assigns to her the life-rent of the equal half of the free moveables."

Of this marriage there were eight children; the eldest of whom, Walter, with consent of his father, entered into a contract of marriage with Margaret Auld, *anno* 1731, wherein he becomes bound, "to provide to himself and spouse, in conjunct fee and life-rent, which failing, to his heirs and assignees, whatever means and estate, both heritable and moveable, that he presently hath, his father shall make over to him, or what he shall happen to get with his wife."

From this contract it did not appear what provision Patrick had given to his son; but it was instructed by a writing holograph of Walter, dated in September, 1732, that his father, at the time of the contract, had bound himself to pay him 1000

No. 39.

Can an heir discharge his right of succession, before it opens?

Import of a clause in a marriage-contract to the heirs or bairns of a marriage.

No. 39. merks at Whitsunday, 1732; and, further, that he had assigned to him a bond for 600 merks, which he had taken to himself in life-rent, and Walter in fee; for which causes, he “discharges his father of the said bond and assignation granted at the date of the contract, and of all portion-natural, bairns’ part of gear, and of all that his spouse or he could claim, might fall or succeed to, either heritable or moveable, through the decease of his said father or mother.

After this discharge, Walter died, leaving Patrick, his only son, behind him; whereupon Patrick, the grandfather, a little before his death, made a settlement of his effects in favours of his own wife and children; in which, amongst several other things, he disposed to them two heritable bonds, on which infestment had followed.

Of this deed, Patrick, the grandchild, as heir to his grandfather, brought a reduction, upon the head of death-bed, for setting aside the conveyance, in so far as concerned the two heritable bonds.

To which it was answered: *1mo*, That the settlement is not liable to reduction upon that head; because it was made in consequence of the prior obligation in the contract 1703, wherein Patrick had provided whatever he then had or should thereafter “conquest, to the heirs or bairns of that marriage,” with the burden of certain provisions to his wife; by which the defenders had a just claim to all the defunct’s succession, heritable or moveable, as he had done nothing but what, by law, he was bound to do. *2do*, The pursuer’s claim is excluded by his father Walter’s receiving near double as much from Patrick, the grandfather, as any of the rest of his children, as is instructed by the holograph discharge above-mentioned.

Replied for the pursuer: That the provision in the contract being to the heirs or bairns, whatever subjects were heritable behoved to fall to the eldest son of the marriage, as heir, and did not divide amongst all the children equally; but, whatever is the legal construction of such a clause, it has never hitherto been questioned, but that a father, notwithstanding thereof, had a power of division, providing this was settled in a reasonable manner, so as not to cut out one or more of the children; which was done in the present case, by Patrick’s taking these two bonds to himself and his heirs, while he had sufficient effects to provide his other children; though, perhaps, each of them would not have an equal share with his heir.

In the *next* place, with respect to the discharge said to be granted by the pursuer’s father, as it is holograph, so it does not prove its date; and, of consequence, must be presumed to have been granted on death-bed. But, supposing it was never so formal as to legitim or bairns’ part, yet it could not operate to defeat his right of succession in the heritable bonds; for, as to these, Walter had no right till after his father’s decease; and, as he died before him, the succession, of course, opens to the pursuer.

Duplied for the defenders: That, in provisions of conquest in contracts of marriage to the heirs or bairns of the marriage, it is an established rule, that all

the children, male and female, succeed equally in heritable subjects, lands only excepted; as to which, the eldest son has the right; at least such is the opinion of Sir James Stewart, p. 148. and Stair, p. 482, (503.); but with respect to heritable bonds, upon which infestment followed, and burgage tenements, the Lords have determined that these were to be divided equally amongst the children, in virtue of such provisions; as was found 14th January, 1663, Thomas Beg, No. 44. p. 4251. *voce* FIAR, July 10, 1677, Carnagy, No. 2. p. 12840. *voce* PROVISION TO HEIRS AND CHILDREN.

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Neither can it make any difference, that old Patrick took the bonds to him and his heirs; seeing, as they were conquest, they belonged to the defenders, as falling under the above clause. And, with regard to the observation, that the discharge, being holograph, does not prove its date, it is answered, The pursuer represents his father in a considerable moveable estate, therefore he cannot object thereto; and, although he could, the defenders offer to prove that the discharge was seen in old Patrick's hands a considerable time before the granter died. Nor can it vary the question, that Walter died before his father; since it has been determined, that such provisions may be discharged in the father's life-time. See the case of Elizabeth Moodie *contra* Stewart of Burgh. (Examine General List of Names.)

The Lords found, That, by the provision in old Patrick's contract of marriage, in favours of heirs and bairns, all the children come in *per capita*; *2do*, That the deeds executed of the date of Walter's contract of marriage, are to be understood as a part thereof, and as if they had been contained therein; *3tio*, That Walter could not grant on death-bed the discharge founded on by the defenders; and, *4to*, found, That the 1600 merks made over by old Patrick to Walter, of the date of the contract of marriage, must impute in any claim he might have in in virtue of his father's contract of marriage with Margaret Marshall, his mother.

Against the fourth or last branch of the above interlocutor the pursuer reclaimed, upon this ground, That it tended not only to introduce a necessary collation amongst heirs of provision, which was a novelty in our law, but likewise to deprive the father of the power of the disposal of any part of his means, in his own time, and to restrain him from dividing amongst his children the subject of his conquest, by such proportions as he shall think fit, contrary to the design of such clauses; which means no more than to tie up his hands from doing any fraudulent deed to disappoint the children of that marriage, by providing the same subject to those of a subsequent one, or substituting others to succeed to him by voluntary conveyances: That hitherto no practick had occurred tending to restrain the father's power of distributing the conquest amongst the children of the same marriage to take effect at his death; far less from giving away any part of it while he is in *liege foustie*; especially if a competency is left to his heirs of provision.

No. 39. And that collation does not take place amongst heirs of provision, is a point settled by the decision 19th November, 1720, Rickart, No. 15. p. 2378. *voce* COLLATION.

It is true, that this rule does not hold with respect to legitim or bairns-part, which is a portion of the father's moveables that arises to the children *ex lege*, in which they have an equal interest, even during the marriage; but that is widely different from a provision of conquest to the heirs or bairns of a marriage.

It has been found indeed, That provisions by a father in a child's contract of marriage are presumed to be in satisfaction of a special provision in a bond granted by the father, upon this principle, That *debitor non præsumitur donare*, 29th June, 1680, Young, No. 157. p. 11476. *voce* PRESUMPTION; but that cannot apply to a provision of conquest, as the father hath a discretionary power over that subject, by providing a larger or smaller proportion of it to any of his children he thinks fit.

The defenders answered: That the point determined is founded upon the maxim, *Debitor non præsumitur donare*; which, though it may sometimes fail in circumstantiate cases, yet there is nothing here from which it can be presumed the father intended a gift in favours of his son: It was given as a provision in a contract of marriage, which is not of the nature of a pure donation; seeing such provisions are constructed to be in implement of the settlement that was made in favours of the children; Stair, B. 1. T. 8.

As to a father's power of making an unequal division of the subjects conquest, it is believed he may; and, in fact, it was so done here; for the pursuer's father got more from Patrick than the rest of the children will get; but that is nothing to the present question, which is, How far the father intended to give this provision towards satisfaction of his eldest son's interest in the provisions in the first contract? The presumption surely is, that he did not intend to gift it, but that it should be imputed just as much as if it had been expressly in the writ; seeing, as the father was the administrator of the common subjects, it is to be presumed that every thing he did was in conformity to the first contract; therefore his giving off a proportion to the eldest son, more than he would have drawn by course of succession, must be supposed to have been given in satisfaction of his share, and the superplus as a *præcipuum*.

The decision, Rickart *contra* Rickart, does not apply; as the presumption of the father's will to keep an equality in such a matter as this is more easily to be presumed than with respect to land.

As to the observation drawn from the decision in Young's case, That the father there was liable to pay a sum by special obligation, whereas here he was under no such tie, but might have disposed of the conquest in what manner he thought fit, it is answered, The distinction makes no difference; for, though old Patrick had a power to have given unequal provisions amongst his children, yet as, by the contract, they were equally called, the presumption must be, that, in all his

administration, he had that equality in view, as well as to answer his own obligation. No. 39.

The Lords adhered.

*C. Home, No. 17. p. 39.*

1736. December 17. GREENOCK *against* GREENOCK.

No. 40.

A proprietor, who had his estate by inheritance, made a purchase of the teinds of his lands, and was infeft in the teinds by charter and sasine. After his death, the question occurred, Whether this subject should go to the heir of line, or of conquest? The Lords preferred the heir of line, who, in this case also, succeeded to the land-estate.

*Fol. Dic. v. 2. p. 401. C. Home.*

\* \* This case is No. 8. p. 5612. *voce* HERITAGE AND CONQUEST.

1740. January 8. DUKE of HAMILTON *against* EARL of SELKIRK.

No. 41.

The late Earl of Selkirk, superior of the lands of Balgray, having made a purchase of the property, but without completing the same by a resignation *ad remanentiam*, the Duke of Hamilton, his heir of conquest, claimed the same, as being a separate subject, not consolidated with the superiority. The Lords found, That they belonged to the Earl of Rutherglen, who was heir of investiture of the superiority; and the same was found with regard to the teinds of Crawford, purchased in by the defunct, the lands being entailed upon the Earl of Rutherglen.

*Fol. Dic. v. 2. p. 401. Kilkerran.*

\* \* This case is No. 10. p. 5615. *voce* HERITAGE AND CONQUEST.

1742. February 5.

MR. GEORGE AYTON *against* The CREDITORS of ALISON of Birkhill.

No. 42.

February 25, 1675, Sir John Leslie, proprietor of the lands of Newton, &c. resigned the same to himself, in life-rent, and to John Leslie his son, &c. which failing, to Clara Leslie his daughter, and the heirs of her body; which failing, to Helen Leslie his youngest daughter, and the heirs of her body; and failing all, to his nearest and lawful heirs and assignees whatsoever, &c. At this time Sir John had two other daughters, than the two called by the above substitution, viz.

An heir expressly excluded cannot succeed even on the failure of all the substitutes nominated.