

1678. *January 29.*

No 4.

LADY PARDOVAN and Her DAUGHTERS *against* STEWART of Pardovan.

IN a contract matrimonial, conquest being provided to the heirs or bairns, and these being a son and four daughters, the daughters raise a declarator that the conquest belongs to them. THE LORDS found the claim of conquest, as it was conceived, did provide the conquest to all the bairns of the marriage, one or more, so that the son might come in with the rest, and that the father intended an equal division among them all.

It was found in the case of Mr Thomas Baird's wife and children of the first marriage, that a provision in favour of bairns makes an equal succession; and in this case the LORDS found it was not conquest what was paid as a composition for the succession, and allowed it to be proved by the comuners and witnesses.

Fol. Dic. v. 2. p. 275. Fountainhall, MS.

*** Stairs report of this case No 5. p. 3052, *voce* CONQUEST.

No 5.

1680. *July 21.*BROWN *against* His MOTHER.

By contract of marriage, the lands being provided to the heir by the first clause, and the conquest to the children in a subsequent clause; the LORDS found the heir had a share of the conquest (though it was most part executry) without collation, because he was also a child.

Fol. Dic. v. 2. p. 275.

*** This case is No 11. p. 2375, *voce* COLLATION.

1684. *February.*SCOT and ARTHURS *against* CHARLES SCOT of Bonnington.

No 6.

Found, that children representing their father must receive a sum divided *per capita*, and the eldest have one share.

ONE being obliged, in his contract of marriage, to provide L. 20,000 upon land to himself and his wife in liferent, and to the heirs of the marriage in fee, with a quality, That the same should be proportioned among the children at his sight; and that the wife surviving should restrict herself, and pass from that part of the annualrent effecting to the proportion of the child or children, so soon as they came to be married; by the infetment upon the said contract, the fee is provided to the heirs of bairns. The eldest son pretended to be heir of the whole sum, as the heir of provision.

Answered for the younger children ; That heirs in a second contract of marriage are understood bairns in a competition among themselves ; *2do*, The clauses in the contract reserving power to the father to divide the sum, and the provision to heirs was rational, that the children might represent the father, and be liable to pay his debt ; *3tio*, The eldest brother being now general heir, upon the decease of the children of the first marriage, he ought to have no share of the L. 20,000.

THE LORDS found, That the children must represent their father, and that the sum divided among them *per capita*, the father having made no division in life, and that the eldest son had one share thereof, and no more.

Fol. Dic. v. 2. p. 275. Harcarse, (CONTRACTS OF MARRIAGE.) No 345. p. 93.

No 6.

1684. December.

IRVINE against M'KITTRICK.

A WOMAN in her contract of marriage being obliged to convey to her husband what lands should happen to fall to her during the marriage ; and he being obliged to take the rights and securities thereof to himself and her in conjunct fee, and to the heirs and bairns in fee ; the bairns pursued the mother to denude in the terms of the provision.

It was *alleged* for the defender ; That the clause being copulative in favour of heirs and bairns, the pursuers must serve heir to their father, though the provision would divide amongst them *pro rata*, which the LORDS sustained ; though it was *replied*, That oftentimes conjunctive particles are to be interpreted disjunctive.

Fol. Dic. v. 2. p. 275. Harcarse, (CONTRACTS OF MARRIAGE.) No 369. p. 95.

* * * Fountainhall reports this case :

1684. November 28.—ISOBEL IRVINE and Thomas Hay her husband against Bessie Makittrick in Dumfries, is reported by Redford. The case was, Where a clause in a contract matrimonial did provide what conquest should come by the mother to the heirs and bairns of the marriage, in copulative terms, if they might pursue for it *qua* bairns, without being heirs, seeing the clause might be expounded disjunctively, and that the Lords had in such cases found they needed not be formally served heirs. Yet it was *alleged*, Verba in contractibus non debent esse otiosa, sed aliquid operari, and so here the word heirs

No 7.
Where one was obliged to take rights and securities to himself and spouse in conjunct liferent, and to the heirs and children in fee, the clause found copulative in favour of the children.