

the heirs of the marriage. That under this destination, the father and mother had a power indeed of dividing the lands according to what proportions they thought proper; but they had not a power to give all the lands to one, and none of them to another.

2do, By the marriage-articles, a power of division was reserved to the father and mother jointly; but they did not exercise it jointly; for Marion Aitchison did not consent till after her husband's death.

Answered to the first; James Lindsay's 9000 merks, his conquest, and the estate of Mauchlenhole, are all to be considered as one subject. It was not required of the parents, that they should divide each of the three subjects; it was enough that a division was made upon the whole thrown together; which accordingly was done; for Isabel got L. 200 Sterling in her contract of marriage.

Answered to the second; Marion Aitchison's consent, after her husband was dead, marks her *animus* more firmly than if she had interponed her consent to her husband's deed during his life.

“ THE LORDS repelled the reasons of reduction.”

Act. C. Hamilton-Gordon, Jo. Dalrymple. Alt. Lockhart, Miller, Montgomery. Clerk, Gibson.
J. M. Fol Dic v. 4. p. 192. Fac. Col. No 4. p. 7.

1768. November 25.

HEIRS OF LINE OF SOUTHDUN *against* KATHARINE SINCLAIR and the CHILDREN OF
MARJORY SINCLAIR.

SOUTHDUN was thrice married, and had issue of each marriage. In his second contract of marriage he became bound to secure 10,000 merks to the issue of the marriage, and also the conquest during the marriage, reserving a power of division. He had two children of this marriage, both daughters, and both of whom survived him. In the contract of marriage of the eldest, Marjory, he provided her in the sum 10,000 merks “in name of tocher, and as her share of the conquest.” The other daughter, Katharine, remained in family with him at the time of his death. And as the provision that Marjory received at her marriage did not amount to half of the conquest, the question occurred between these children of the second marriage, and the children of the first marriage being heirs of line, in what manner the residue of the conquest should be divided.

The parties to Marjory's contract of marriage were Southdun on the one side, and she and her husband on the other. Her acceptance of the sum provided to her in lieu of her share of the conquest, implied a renunciation of that share to her father. The very nature of the transaction proves it to be in his favour, not in favour of Katharine, who was not a party to the contract. It was accordingly found, that as Katharine could not be hurt by a contract to which she was not a party, neither could she take benefit from a contract in

No 129.

No 130.

Extent of the father's power of distribution of the conquest provided to the children of the marriage.

No 130.

which there was no stipulation in her favour; and therefore that she must confine herself to the half of the conquest.

The only difficult question respected Marjory alone. It was *urged* in behalf of her children, for she was now dead, that a man who stands bound to make his conquest effectual to the children of a marriage, cannot in justice pocket a part of the same by eliciting discharges from any of his children; *2do*, Children subjected to the father's power of division are not in such a state of independence as to make a bargain with him effectual in law. They dare not disoblige their father, who, by his power of division, may put any of them off with a trifle.

This is a strong argument on the one side; but on the other it was urged, that at this rate a clause of conquest with a power of division, would bar all covenants betwixt a man and his children with respect to that conquest, which would be extremely inconvenient. Southdun acted *optima fide* in the marriage-contract of his daughter Marjory. As the conquest must have remained uncertain during his life, he, in lieu of it, gave her a portion suitable to her rank, It happened indeed to be less than the half of the conquest, but might have been above the half. If he was barred by law from making such a contract, his daughters must have remained virgins for his life, or have married disadvantageously without a tocher.

It seems to follow from these premises, that such a contract, which is good at common law, must also stand good in equity, unless fraud can be proved. If a man in Southdun's situation should transact with all his children, one excepted, from whom he keeps these transactions secret, and whom he concusses to accept of a sum less than her proportion, threatening her with his power of division; that would be a fraudulent deed and reducible. But as there is no fraud in the present case, there is no good ground of reduction in equity, more than there is at common law.

“THE COURT sustained the settlement made by Southdun in his daughter Marjory's contract of marriage; and preferred the heirs of line to that share of the conquest which would have fallen to Marjory had she not been excluded by the settlement.”

Sel. Dec. No 264. p. 338.

1792. December 4.

JANE DOLLAR and her HUSBAND *against* JOHN DOLLAR.

No 131.

A destination of lands in a marriage-contract, “to heirs or chil-

THE father of John Dollar, in his son's contract of marriage, disposed certain lands “to him and his wife in life, and to the heirs or children, one or more, lawfully to be procreated of the marriage, in fee, (as shall be disposed of by the father to them.)” The procuratory of resignation was simply in favour of the “heirs” of the marriage; and the conquest was by another