and lying among his papers; for it contained no clause dispensing with the not delivery. Fordell was so confident, that he hoped the Lords would find the disposition false, upon Cumming denying his subscription; (but the Lords were persuaded that Cumming did prevaricate;) and the least he promised himself was that it should be found a writ null of the law, as only standing upon the testimony of a single witness. This made him bestow very liberally; which he was the better enabled to do, that the Secret Council had given him the possession *medio tempore;* and the Lords had not ordained any restitution of the bygone fruits, reputing them as *bona fide percepti et consumpti*, on the Council's warrant. This interlocutor surprised many as unexpected. See the full case in the Informations. *Vol. I. Page* 6.

1676 and 1678. CATHARINE MITCHELL *against* THOMAS LITLEJOHNE'S HEIRS.

1676. *June* 17.—CATHARINE Mitchell, relict of John Reid, merchant in Edinburgh, being remarried to Thomas Litlejohne, tailor; who, within half a year, taking sickness, he grants her a bond and declaration for 600 merks, during her lifetime, in case the marriage dissolve within year and day. He dying shortly after, the said Thomas his heir, and other children, with concourse of Andrew Litlejohne, their tutor, pursue a reduction, before the Lords, of this her yearly liferent provision: 1*mo*, Because as he died within the year, and so no jointure was of the law due, so the said declaration and bond, dispensing with the said law and consuetude, was granted *in lecto ægritudinis;* and though he came to kirk and market, yet he was supported; and was sick of a lethargy, and was not *compos mentis*, neither as to memory, nor judgment, nor bodily health, when he did it. 2*do*, It was *a non habente potestatem:* he could not do it in defraud of his children of the first marriage, who were anterior creditors, by virtue of their mother's contract of marriage, and a clause of conquest therein contained, providing the haill means and estate he should happen to acquire *stante matrimonio* to the bairns to be procreated of that marriage; after which he could make no donation to a conjunct person, destitute of all onerous cause, in prejudice of these children their *jus quæsitum.*

ANSWERED to the *first*,—Offers to prove he was *in liege poustie*, when he subscribed it, and sound in his intellectual faculties, and that he came to kirk and market unsupported. As to the *second*, A naked clause of conquest does not hinder nor restrain a father from disposing on a moderate jointure to a wife who brought somewhat with her; he being of an opulent fortune, and not incapacitated by inhibition, or other diligence done upon that clause of conquest.

The Lords, before answer, ordained both parties, *hinc inde*, to prove, both as to the defunct's going to kirk and market supported or unsupported, and as to his capacity and understanding what he was then doing. For this, *vide supra*, *20th February* 1670, the *Lord Balmerinoch* against the *Earl of Airly* and *Lady Coupar*, and the many citations there. *Item*, 11*th July* 1669, *Shaw* against *Calderwood.*

When the probation came to be advised, in regard the supportation was mentioned by some of the witnesses, and the acts of sanity were not so fully proven,

therefore we alleged for the said Catharine, defender,—That her interest was well founded to affect, if not the heir, (to whose prejudice nothing can be validly done upon deathbed,) at least the executors and the moveable estate of the granter, which was here of a value far more considerable than her annuity amounted to; as was found, *supra*, in a case, at number 260, in November 1671; and in the places marked *in margine* there, and ofttimes *alibi*. And that her bond of provision behoved, at least, to sustain, as being of the nature of a legacy, to affect the moveables; as was decided, 13*th January* 1631, *Houston* against *Houston*.

To this it was ANSWERED for the pursuer,—If the husband, granter of this bond and annuity, had not been denuded by that obligement to provide the conquest to the children of the first marriage, they would not deny but this provision would be good and effectual against the dead's part of the testament and executry; but, since his estate was so destinate, he could not wrong that *jus quæsitum*, especially by profuse squanderings and unnecessary donations.

To which it was REPLIED,—That the fee of the conquest (notwithstanding of a clause of simple destination in favours of the children of a first marriage,) must undoubtedly reside in the father, and so carry about with it its congenial effect, viz. *jus de re sua libere disponendi*, for the personal obligement cannot give *jus in re*. *L.* 20 *C. de Pactis,—Traditionibus, non nudis pactis, &c.* 2*do*, These clauses of conquest cannot divest the father of the dominion of his acquired goods, else he could not alienate them to strangers, which he may do; *ergo*, he may moderately provide a wife furth of these goods, being a most favourable and onerous case in law. 3*tio*, If they enstated the property of the conquest in the children, what needed inhibitions be requisite to secure and consummate such clauses? 4*to*, Though they were creditors thereby, yet that hinders not the father, their debtor, to dispose on his goods till he be incapacitated by diligence; whereof there was none there. (See the three several ways of conceiving clauses and destinations of conquest in contracts matrimonial to children of the marriage, and their sundry effects in law, in a MS. beside me.) 5*to*, If such clauses impeded the father's power of disposal of the conquest in a rational way, then, among many other inconveniences, it should hinder him from a second marriage: it opens a door of encouragement to profligate debauched children to be disobedient and contemn their parents, if they know their parents are restrained from doing any thing in their prejudice. See this and all the other grounds, *ad saturam*, enlarged in the information of the cause beside me: to which I refer, touching here the heads of the arguments only. 6*to*, The Roman law is clear in *L.* 15 *C. de Pactis;* and see anent it, Sandes, *Decisiones*, p. 71, 72, and 75; *L.* 6 *C. de secundis Nuptiis:* by which, in an equable sort of temperament, a man is permitted to give as much for a provision to a second wife as the smallest portion of any of the children of the first bed comes to. 7*mo*, The law of England is clear also; see Bracton and Swinebourne, cited in the afore-mentioned information. 8*vo*, Our Scots law goes along; so Craig, p. 238, *et seq.* in the case of the three Aikman Sisters; see M'Keinzies's Observes on the Act of Bankrupts, p. 73 *et seq.* *Novellam Leonis*, 19 *; vide supra, num.* 262, [18*th November* 1671.] See the places in Durie, Stairs, and many other enforcements, argued in the foresaid information; and also a short one drawn by Sir Jo. Cunyghame. *Vide supra*, Calander and Dumferling's case, [No. 445, *February* 1674;] and 1*st of December* 1680, *A. Bruce*.

The Lords, on the 26th of June 1676, having advised this debate, found very rationally that an obligement in a first contract of marriage, providing all the conquest during the standing of that marriage to the children procreated thereof, does not so denude the father of the propriety, or instate the children in the fee and dominion of the conquest, but, 1*mo*, notwithstanding thereof, the father may freely dispone upon it to his creditors or others, for onerous causes. See 15th June 1678, *Birnies and Morray*; 1st Dec. 1680, *Anderson* and *Bruce*. 2*do*, He may, *non-obstante* such a clause, give away money he has beside him in specie to any he pleases, so that the same can never be condicted or repeated by the children. See Dury, 6th July 1630, *Monro and Scot*, where the giving of a legacy out of one's own hand makes it so privileged that it does not suffer the *detractio falcidia*. *Vide supra, num.* 422, [Pallat and others, November 1673.] 3*tio*, That destination of the conquest does not hinder but a man may, in a rational way and for a just cause, (though it be not onerous nor adequate to the worth,) leave in legacy, or otherwise dispose upon a part of the said conquest to any person they please, though it were even *titulo donationis*; *si modo rationalis subsit causa* why he should gift to that person, *obligatione morali vel naturali, ad antidcora*, or the like; and that it is not a profuse squandering away of his means or a fradulent conveyance. 4*to*, They found a clause of conquest did not impede a man, in a rational way, to provide his wife to a competent liferent; providing it be *moderata* and not *inofficiosa donatio*; not exceeding the half of his free moveable gear, if he want children, or a third part of his moveable and personal estate, falling under testament confirmation and executry, if he have children; upon which third, or dead's part, he hath power allenarly to legate in prejudice of his children: unless inhibition or other legal diligence were done or served against him, upon that clause of conquest by the friends at whose instance execution was ordained to pass by the contract matrimonial; or that the said clause of conquest be conceived, not by way of simple and naked destination, but thus,—Likeas, I bind and oblige me to take and provide the haill conquest to be made by me during the marriage, to the heirs and bairns procreated therein; or if, besides thir *verba de presenti*, it bear farther a clause and obligement *de non alienando*. Some complained of this decision, as too like a trysting and gratifying interlocutor, as not so close to the buckle and the principles and analogy of law. See Dury, 15th March 1634, *Brown*. And it does exceedingly evacuate, enervate, and insignificate clauses of conquest in contracts matrimonial. But what made it tolerable here, was, that the wife was no otherwise provided but by this 600 merks; for, if she had reaped any other benefit from her husband *aliunde*, it is like they had not used her so favourably. *Infra*, December 1676, *numero* 524, thir same parties. See all thir formulas *loco supra citato*. Concerning the import of obligations natural, civil, or mixed; and of pactions, *sive sint nuda pacta sive vestita, sive sint legitima, et contractibus incontinenti adjecta sive ex intervallo*; see *Vinnius ad Titulum Institut. in princ. et parag.* 2, *De Obligationibus*.

It may be alleged if the third part of the free moveables be less than the stock of 10,000 merks, which corresponds to 600 merks by year, the principal, so long as it lasts, should be liable to her for making up the deficiency of her liferent; yet the interlocutor provides her only to the liferent of the third part.

At the pronouncing of this interlocutor, the pursuers' procurators contended, That, since it appeared the motive of it was the great moveable estate the de-

funct had left behind him; for taking off whereof, they offered to prove that it would not amount to 40,000 merks of free gear; whereas it has been represented to be 80,000 merks. The President declared, the quantity of the patrimony was no inducement to them; but, though he had only left 30,000 merks, she behoved to have her annuity out of the third part of that 30,000 merks; and therefore ordained and assigned a day for both parties to condescend upon his estate,—the defender on the value of it at the time of her husband's decease, and the pursuers on the defalcations by debts, desperate counts, bonds, or otherwise. Which being done on either hand, and the pursuer, for himself, and in name and behalf of his pupils, offering to assign her to as much of the count-book (for there is 22,000 merks owing by accounts,) as would make up a stock of 10,000 merks, to pay her her annuity of 600 merks, she finding caution to do exact diligence against the debtors in these counts, should be assigned to her, and refund the stock at her death.—*Vide infra, February* 1677, No. 549, *Sarah Roome.*

Against which, it was ALLEGED,—1*mo*, That her provision behoved to affect not the third part only of her husband's free executry, but the half; because, the marriage dissolving within year and day, this legacy was not given to her, nor adjudged to be payable out of the moveables, as wife, (for the marriage is *fictione juris*, as if it never had existed,) but as if she were a stranger, and nowise in place of the third of the moveables due to her as wife; for, if there had been no marriage, then the testament had admitted a bipartite and not a tripartite division: now the case, by the dissolution within the year, is, *constructione et præsumptione juris*, just as if he had not had a wife; *ergo* the testament must divide in two. As to the tutor's offer, *nullo modo relevat*, and she is not obliged to accept of it, because there is clear liquid responsal debt for satisfying her obligation; and the tutor has had two years time for doing diligence, (and six month is but the *laxamentum* allowed in the Roman law, *L.* 15 *D. de Administratione Tutorum,*) and for recovery of the debts; and her case is alimentary and privileged, &c. See the information about thir two points beside me.

Craigie, having reported this, affirmed, That the Lords repelled the first, and adhered to their former interlocutor, and permitted it only (being *moderata et gratuita donatio,*) to be taken off the third of the moveables; and, as to the second, they ordained the haill moveable estate of the defunct to be casten, proportioned, and divided into three equal parts, as near as could, and gave the defender her option and election, to betake herself to any one of them she expected would be readiest penny to her. But, first, we of consent defaulked, and allowed the tenements of land, wadsets, and heritable bonds granted to heirs and assignees, secluding executors, (conform to the Act of Parliament in 1641, renewed by the 32d Act in 1661; see anent this, other papers *alibi*;) many of which they had foolishly and ignorantly confirmed, though they fell nowise under executry. As for the legacies, we contended her right was preferable, at least that she ought to come in *pari passu* with them.

And, in regard the action could not be brought to a period in the summer Session 1676, and that she wanted two years of her annuity, through their contentious prolonging of the plea, Craigie, on the 28th July, ordained her to have 600 merks paid by the tutor within a month, *nomine alimenti, ad sumptus litis sustinendos, provisionaliter; per legem* 27, *par.* 30, *D. de Inofficioso Testa-*

mento; *ibique Bartolum*; *L.* 14 *D. Ut in possessionem Legatorum*; *L. ult. C. de Ordine Cognitionum. Vide Alvarum Valascum, Consultatione* 1*ma*, where he treats *de Alimentis quæ unus ex litigantibus, ob paupertatem, petit in judicio sibi ministrari ab altero ex litigantibus, qui res de quarum dominio contenditur possidet*; and shows that, in Spain, *extra casum dictæ legis* 27, *Nunquam pauperi litiganti ministrantur sumptus.* See *Matthæus de Afflictis, Decisione* 10 *et* 11; *Curtius, in tractatu de Sequestris, in fine.* See, where I find the Lords of Session did the like, *ex officio nobili*, in the Sederunt books, (see my summary of them,) 13*th* of *February* 1560. In an action between the *Lady Allardize* and *Wm. Stewart*, they ordain Wm. to pay her the sum of in the mean time, till the plea betwixt them shall come to a close; *ibique citatur lex* 7 *D. de agnoscendis et alendis Liberis.*

When this 600 merks fell due, Andrew Litlejohne, the tutor, presented a bill of suspension thereof, to my Lord Newbyth, who was Ordinary that week for the Bills, upon this reason, That the eldest son and apparent heir being past fourteen, and so out of tutory, had deserted him, and was intending to elect Mr Wm. Clerk, his uncle by the mother, for his curator, and who thereupon was arresting all the sums of money with which he resolved to pay this 600 merks decerned; so that the debtors would not own him, but retained in their own hands, and were offering to suspend upon double poinding. Though this pretence was no way relevant; for, 1*mo*, The heir had nothing to do with the executry, unless he would offer *collationem bonorum.* 2*do*, The tutor had already uplifted, intromitted, and meddled with ten times the sum decerned. Yet Newbyth superseded execution till the 8th of November, at which time they might discuss the reasons of suspension upon the bill before the Ordinary, the tutor always within a month paying her 300 merks of the 600 merks decerned for.

In this my Lord did not punctually observe the injunctions of the Act of Sederunt dated the 9th of February 1675, commanding irrelevant bills to be instantly rejected; but I mind not to rip up his irregularities.

Advocates' MS. No. 478, *folio* 246.

1676. *December* 14.—In the action mentioned *supra, num.* 478, by Catharine Mitchell, relict of Thomas Litlejohne, against his children and tutors, conform to the interlocutor of the 17th of June last, she having given in her charge, containing an inventory of her husband's personal and moveable estate, out of which she was found to have right to a third, in so far as extended to 10,000 merks or 600 merks per annum; they craved defalcation of heritable bonds: which was granted. 2*do*, Of debts owing by the defunct. Against this we ALLEGED,—No respect can be had thereto, because not instructed. ANSWERED,—They are not masters of the instructions; and therefore crave an incident against the creditors, to cause them exhibit their bonds. REPLIED,—That delays the pursuer, and therefore the relict offers to find caution (somewhat like the *cautio Mutiana* in the Roman law, but not the same case with it;) that what debts shall be afterwards lawfully instructed, and she called thereto, shall proportionally deduct off her third part, with the other two parts; providing always, in case her stock diminish, so as it cannot afford her annuity of 600 merks per annum, then the fee of the third part shall be liable for the inlaik. My Lord Craigie granted them an Act for calling the creditors to produce their bonds.

Then ALLEGED,—The younger children having got bonds of provision from their father, to the value of 30,000 merks and more, and being creditors *ab ante*, both by their mother's contract-matrimonial and clause of conquest therein contained, as by their legitim and portion natural, and confirmed executors *qua* creditors to their father; they are preferable to his relict; whose provision is without any cause onerous, *in lecto, et intra annum.* ANSWERED,—This is determined already, and the relict preferred, by the interlocutor of the 17th of June last.

This going to the Lords' answer, and being reported by the Justice Clerk, and they having considered the debate, the bonds of provision made to the relict and children, and legacy left to Andrew Litlejohne, together with the defunct's testament,—they found the provision made to the relict preferable both to the provision made in favours of the children, and to the legacy left to Andrew Litlejohne the tutor; and that in so far as concerns the third part of the defunct's moveable goods and debts: as also, that the bond of provision, granted to the children, is preferable to the legacy left to Andrew Litlejohne; but prejudice always to the said Andrew, to found upon any declaration in his favours, contained in the codicil, and to pursue thereupon. And find the foresaid provision, granted to the relict, preferable in so far as it may be satisfied out of the third part, whether the same was granted on death-bed or not. Which is no more but a farther confirmation of what they had found formerly on the 17th of June last. See the information, which has sundry other points in it.

Thereafter the tutor, Andrew Litlejohne, having, in name of the children, obtained a decreet against sundry persons, debtors, the relict, on the 4th of January 1677, gave in a petition to the Lords, founding on her interest in a third part by their reiterated interlocutor; and therefore craved either the decreet might be stopped, or the third part of the sums therein contained declared to belong to her *pro tanto*, or that sufficient caution were found her for making forthcoming to her a proportional third part thereof. But the Lords having allowed him to extract his decreet, in regard he offered immediately, without a process or other formality and delay, to count and reckon, either to Mr Wm. Clerk, as now curator, chosen by the eldest son and apparent heir, or to the relict: whereupon I advised her to arrest such of these sums as were in persons' hands who lived within Edinburgh, by virtue of the letters of horning, poinding, and arrestment, raised on her decreet obtained before the Commissaries of Edinburgh, whereof there was no past suspension, but only reduction depending.

Upon the tutor's offer to count, Mr Wm. Clerk, joining with the relict, offered some proposals that he might have right to intromit, finding caution to pay the children's portions; since the eldest son, by the father's testament, was nominated sole executor, and all was disponed to him, with the burden of his brethren and sisters' provisions; especially since he offered to secure the relict out of the first and readiest, and that he had already intented a process for removing the tutor, as suspect, and grossly malversing: and therefore craved that all the bonds, tickets, counts, and other papers, might be consigned in the clerk's hands. This the Lords would not grant; but ordained them to count and reckon before Reidfurd. See the proposals *apud* me. *Vide infra, 7th July* 1677, *num.* 596.

After the tutor had run both the terms of his incident against the creditors, for production of their bonds, to instruct what was their respective true debts, and that the term was circumduced and certification granted, then they dropped in bonds to the value of 6 or 7,000 merks, but sundry of them such against which there may be very just exceptions; but, even allowing that entire article, the relict from the remanent may easily find a stock of 10,000 merks, to pay her annuity. She also gave her oath of calumny anent her knowledge of the debts. *Advocates' MS. No. 524, folio 270.*

1677. *July* 7.—In the action pursued by Catharine Mitchell against the children of Thomas Litlejohne, and their tutors and curators, largely deduced *supra, num.* 478 *and* 524; (*vide infra, num.* 599;) the said relict having given in a bill to the Lords, craving now she might have the extract of her decreet for her annuity of 600 merks, bygone and in time coming; since the tutors and curators, who were appointed in February last to close their count and reckoning betwixt and the 1st of June, had not done it, but colluded of purpose; and she could not attend their uncertain motions:

The Lords ordained the other party to see and answer; who, returning none, the Lords' deliverance, this day, was,—That they having considered her bill, and that no answer is made thereto, they do ordain the children of the deceased T. Litlejohne, and their tutors and curators, to make payment to the petitioner of the sum of 600 merks yearly, for all the years resting to her, conform to their former interlocutors, and, in time coming, during her lifetime; and to find sufficient caution for securing her therein, and making payment to her thereof in all time coming.

The tutors and curators, being startled at this, and particularly their finding caution, gave in a bill to the Lords, pretending their count was near ended, and they could not know what her share would be till it were finally closed, &c.

The Lords, on this bill, on the 12th of July, by their deliverance, adhered to their former interlocutor in favour of Catharine Mitchell, superseding extract of any Act or decreet upon that interlocutor till the 26th of July next; to the effect, *medio tempore*, the count might be closed betwixt the tutor and curator, and the Lords may then consider if any thing then ought to be deduced off the sum of 600 merks, ordained to be paid to the said Catharine. The 26th of July elapsing, and they intending nothing but delays, she extracted her decreet; and, having charged them with horning, they presented a bill of suspension in August, made up of false or frivolous reasons. However, she did stop execution upon her decreet of consent till the 20th of November; and they paid her 900 merks of bygones, the one half on the 1st of September, and the other on the 1st of October. See my answers to their last bill of suspension.

Advocates' MS. No. 596, folio 292.

1678. *February* 17.—In the action mentioned *supra*, [No. 596,] pursued by Catharine Mitchell against Litlejohnes, we insisting to get the bill of suspension discussed, and my Lord Reidfurd having reported to the Lords the state of the count betwixt the tutors and curators, and her objections against the same, *viz.* that [she,] as relict and creditrix, by her contract of marriage and bond relative thereto, could never be made liable to bear any proportional part of the expense of the confirmation of the testament, especially since the Lords had found she had right to a free third for satisfying her liferent; and that they had not confirmed the testament testamentar, which ratified her right, but a

dative, with design to defraud her; *item* that she could bear no part of the aliment or entertainment of the children, or of the expense of the lawsuits, much of it being most exorbitantly depursed in pleaing against herself: so that nothing could affect her third as a burden, but only debts. And, in case it would not pay her, when it is stocked, 600 merks yearly, we craved access to the stock, for making up our deficiency and inlaik, upon the *cautio Mutiana*.

The Lords having heard the Lord Reidfurd report the debate in this cause, they found that the expenses of confirmation, and the children's aliment till the next term after the father's decease, and the necessary expenses dispursed in law pursuits against the defunct's debtors, ought to be deduced off the total of the inventary; and that all the other accounts behoved to come off the bairns' two parts, and nowise diminish any part of the relict's third; but found, in case there should be any inlaik of the said Catharine Mitchell, the relict, her annualrent of 600 merks yearly provided to her, they reserve to her action for the same as accords of law. This the Lords thought safer than to decide *in jure*, upon a supposition of the deficiency of the third part to pay her, which, *ex eventu*, might not exist.

See more of this cause, on the 10th of July 1678.

Advocates' MS. No. 727, folio 320.

1678. *July* 10. In the action betwixt Katharine Mitchell, and the heirs of Thomas Littlejohn, and their tutors and curators, the Lords (17th Feb. last,) found the entertainment of the family till the next term came off the total of the inventary; whereon a question arose, whether this was Lambmas or Martinmas. The relict ALLEGED, Lambmas, since [her husband] died some days before it. ANSWERED,—Whitsunday and Martinmas were the only legal terms.

The Lords found that it reached to Martinmas, and that the defunct's family ought to have aliment till the term of Martinmas after his decease.

Then it was controverted, what should be allowed for the aliment of each child. The Lords modified £100 Scots yearly, for the aliment of every one of the younger children; and 200 merks Scots for the aliment of the eldest son, because it was within the annualrent of their portions, and within Edinburgh, where all things are dear.

Then Andrew, the tutor, offering to account for the ware as it was appretiated; ALLEGED,—That was only an advice and opinion; and he ought to make no benefit to himself of the pupil's goods, else he acts unfaithfully in his tutorial trust, &c.

This being also reported to the Lords, they found that the tutor ought to depone anent his intromissions with the defunct's goods, as well for the goods that were in his shop, as any other goods; and that he ought to account for the true prices he got for any of the goods that were in the shop, and also for the prices of such other of the said goods as were trusted by him, for which he hath not done exact diligence for recovery of the prices thereof.

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