

No 21. by deeds on death-bed ; yet secondarily, it is competent to the creditors of the defunct, or heir, who are also prejudged by such deeds ; because, if the right stood in the heir's person, they could affect the same ; and it was so found in the reduction, at the instance of the creditors of Balmerino and Couper ; at whose instance, Couper's disposition on death-bed was reduced, albeit Balmerino was neither heir nor pursuer ; and there is no reason, that if an heir should forbear to enter, creditors should be prejudged. See TITLE TO PURSUE.

THE LORDS found, That the defender, as creditor in the sums whereupon the disposition proceeded, had interest to reduce the disposition ; and found the wife's second infeftment reduceable, as being *in lecto*, in so far as it deborded from the contract of marriage ; and found, that thereby that infeftment behaved to be interpreted in the first place, for satisfying the special obligation of employing the 3000 merks ; and that the superplus benefit of the tenement, if any was, was comprehended in the clause of conquest only ; and found no necessity to decide the first defence, concerning the acceptance of the first infeftment, whether the wife's taking and keeping of it in her custody, did import the same.

*Fol. Dic. v. 1. p. 199. Stair, v. 2. p. 34.*

1688. July.

COLLINGTON against HEIR of COLLINGTON.

No 22.

A wife, by a contract of marriage, being provided to the liferent of what the husband should conquest, or, of what sums he should receive payment of during the marriage, was found not entitled to the liferent of sums conquest during the marriage, which had been applied by the husband for purging incumbrances upon his estate.

By contract of marriage betwixt my Lord Collington and his second Lady, my Lord having obliged himself to employ what he should conquer, or any sums of money he should receive payment of as due to him, and to take the rights and securities thereof to himself and his Lady, and longest liver, in conjunct fee ; and having renounced his *jus mariti* of thirty-six chalders of victual that stood in the Lady's person, which obligation she accepted in satisfaction of all she could ask or claim of jointure, terce or third, except the house or park of Collington ; the Lady after her husband's decease, pursued his son and heir, this Lord Collington, for a liferent of a great sum alleged conquest by the father, the pursuer's husband, arising from fees and pensions from the King, with which he had purged old wadsets and incumbrances upon his lands, upon these grounds, 1. That the money conquest must be reputed extant, in so far as the wadsets of the lands now redeemed, are surrogate in place thereof ; especially the Lady having quit her terce of the lands which are now freed, and which she would have fallen to, in case he, in contemplation of the said obligation of conquest, had renounced. 2. The case where a wife is competently provided by her contract, obligations of conquest do usually admit of some extension, for provisions to children of a former marriage, which is *debitum naturale*, and for rational deeds where no fraud appears ; yet that cannot be pleaded here, where the conquest is the wife's principal provision ; and it could not be esteemed a rational act, to take the conquest of the second marriage from the bairns thereof, and give it to the eldest son of the first mar-

riage. 3. The other alternative clause, ' or any sum of money he should receive payment of, &c.' clears the design, and is exegetic of the conquest; and all the pensions, salaries, &c. were received, and were due. 4. 'Tis the general rule, That all acquired during a marriage, and remaining at the dissolution thereof, or employed to satisfy debts of former marriages, should be reckoned conquest; and any special exceptions are not applicable to this case, and never allowed but when the wife is *aliunde* competently provided by her husband, and the disposal rational; neither of which can be here subsumed on Niddery's case, No 16. p. 3062., was among heirs of line and provision, and contained other specialities; what is here advanced may be confirmed from several decisions; March 14. 1623, Skene *contra* Forbes, No 1. p. 3045.; July 3. 1627, Lady Dunfermling *contra* her Son, No 10. p. 3054.; January 11. 1632, Lady Binning *contra* Hadden\*; and June 27. 1676, Earl of Dunfermling *contra* Lord Callendar, No 7. p. 2941.

*Answered* for the defender: By the law and custom of this kingdom, nothing was conquest but what remained free at the dissolution of the marriage, and the husband being fiar of the conquest, he might spend and debauch the same, and much more might he pay his debts contracted before the marriage, which is a rational and prudent deed; nor is conquest (which is but fortuitous, and often adjected as a compliment) to be considered so strictly as positive obligations. Again, nothing of the conquest was remaining; and *esto* the Lord Collington had cleared his old estate of debt, that was rational, and was not repute conquest in Niddery's case, nor yet liable as *surrogatum*. 2. The Lady having the house and yards, and the liferent of the sums due the time of the contract, (which is considerable) and thirty-six chalders of victual by the first marriage, she is plentifully provided; whereas the defender hath a great family of children, and but a small fortune. 3. If the other clause, ' or to receive payment,' &c. had been exegetic, it had been a tautology; but it is a distinct positive obligation as to a conjunct fee of all sums then due to my Lord that he should receive, which are still in my Lord Huntly's hands never received. 4. My Lord Collington, the pursuer's husband, sold lands to the value of 10,000 merks, for the payments, and her portion was likewise employed for that end, though renunciations were always taken, and not assignations, the hazard of conquest not being apprehended: so that it cannot be presumed that the debt was purged with conquest-money; and to confirm what is advanced, decisions were also adduced; February 9. 1669, Cowan *contra* Young and Reid †, 1676, Littlejohn's case †; July 19. 1679, Morice *contra* Morice †; February 10. 1629, Oliphant *contra* Finnie, No 19. p. 3066.; July 15. 1673, Robson *contra* Robson †, No 4. p. 3050.; December 8. 1687, Frazer *contra* Frazer †; where the conquest of a second marriage employed for paying the debt of the first was sustained, though a considerable estate fell to the first marriage, which the husband had before the second marriage.

\* Examine General List of Names.

† See PROVISION TO HEIRS AND CHILDREN.

No 22. 'THE LORDS assolizied the defender;' upon which the pursuer appealed to the Parliament, where the decreet was turned into a libel, and reviewed.' See APPENDIX.

*Fol. Dic. v. 1. p. 198. Harcarse, (CONTRACT OF MARRIAGE.) No 398. p. 105.*

No 23.

A father had taken a disposition in favour of himself and his wife, in conjunct fee and liferent, for the wife's liferent, and to their son in fee, with a reserved faculty, to burden without the consent of either. Afterwards, he took a disposition to other lands, in favour of himself and his wife in liferent, and to their son in fee; whom failing, to the father's nearest heirs or assignees in fee. On the failure of father and son, the succession devolved on the heir of line, not of conquest.

1774. June 28.

GEORGE BOYD *against* JOHN BOYD.

A PART of the lands of Wester Crounerland, which some time ago belonged to William Fisher, holden of a subject superior, were, in 1718, conveyed by him to John Kid, by a disposition containing procuratory and precept; and John Kid was accordingly infeft base upon the subject.

Mr Robert Boyd, in the year 1733, purchased these lands from John Kid, and took the disposition to them, 'in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her liferent use allenary, and to John Boyd their lawful son, his heirs or assignees, in fee,' under a faculty therein reserved to the said Mr Robert Boyd to burden the lands with any sum of money, without the consent of his wife and son.

Another parcel of the said lands of Wester Crounerland, which belonged to one John Scot, were, in the 1749, disposed by him 'in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in liferent, during all the days of their lifetime, and to Mr John Boyd their eldest lawful son, in fee; which failing, to the said Mr Robert Boyd, his nearest heirs or assignees whatsoever.'

The dispositions to both parcels contain procuratories and precepts; and Mr Boyd, his wife, and son, were infeft in virtue of those precepts, in the above terms.

John Boyd the son having predeceased his father and mother, and there being no other children, Mr Robert Boyd the father expedite a general service, as heir to his son; and, in the 1756, he obtained from the superior a charter and precept, to the purport following; The superior gives, grants, disposes, and for ever confirms, to and in favour of the said Mr Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her liferent use allenary; and in favour of the said Mr Robert Boyd, his heirs and assignees whatsoever, in fee, all and whole the lands, as described in the first disposition above noticed; and to which said disposition, so far as the same was competent to, or conceived in favour of the said John Boyd, now deceased, the said Mr Robert Boyd his father has now right, as heir served to him; and which lands were, by virtue of the procuratory of resignation contained in Fisher's disposition to Kid, and assigned by him to Mr Boyd, his wife and son, duly and lawfully resigned in his the superior's hands, in favour, and for new