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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 marriag-contract, "to heirs or chil-

THE father of John Dollar, in his son's contract of marriage, disponed certain lands "to him and his wife in liferent, 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 in favour of the "heirs" of the marriage; and the conquest was by another

clause given to the child or children." The lands disponed were held burgage of the burgh of barony of Kirkintilloch, and consisted of about 60 acres. The parties differed about their value, but they appear to have been worth from L. 70 to L. 100 Sterling yearly. They had been in the same family for above 200 years, and the privilege of being a burgess of Kirkintilloch was annexed to them.

No 131. dren, one or more," how to be interpreted?

Of this marriage there were seven children; John Dollar junior, Jane, and five other daughters.

In 1776, John Dollar, their father, executed a disposition of the whole subjects contained in the contract in favour of his son, and in 1787, he died, leaving personal debts nearly equal to his moveable property.

After the father's death, Jane and her husband brought the present action against her brother, concluding to have it declared, that in virtue of the destination to "heirs or children," in her father's contract of marriage, she was entitled to an equal share, along with her brother and sisters, of the subjects thereby disponed; and

Pleaded; If it had been intended by the divise in the marriage-contract, that the heir at law should succeed, the addition of the words 'or children' was altogether superfluous. The natural meaning of the expression, and indeed the clear intention of the parties in using it, must have been, that the whole children might succeed as heirs of provision. The subsequent part of the clause giving the father a power of division, as it did not entitle him to exclude entirely any of his children, is also favourable to the pursuer's argument, by shewing that her grandfather had no predeliction for the eldest son, who might thereby have been cut off with a very small share.

From the nature of the property likewise, consisting of a number of detached pieces of ground, the representation of a family could not enter into the views of the contracting parties. Accordingly, in destinations similar to the present, where the subject was either money heritably secured, or land-property of a trifling value, the Court have been in use to decide in favour of the whole children, especially in cases where the lands held burgage. Indeed, in the late case of Fairservice against White, No 57. p. 2317, quoted by the other party, it was admitted by the heir at law, that subjects held by this tenure, when destined to heirs and bairns, would in every case go to the whole children equally; 13th June 1760, Creditors of Scott against Scotts, No 100. p. 985, 1st December 1769, Wilsons against Wilson*.

Answered; The subject contained in the contract, although holding of the burgh of Kirkintulloch, is a considerable property, both in point of extent and value. It has been handed down from father to son for many generations, and is in every respect different from common urban tenements, which are in general so small as to make it necessary for their proprietor to engage in some handicraft for his subsistence. Accordingly, in judging of the meaning of destinations like the present, where the subject in dispute fell to be considered as

* Not reported.

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a proper landed estate, the Court proceeding on the authority of our law writers, the probable intention of parties, and the legal presumption in favour of primogeniture, have always preferred the eldest son; Dirleton and Stewart, *voce* Heirs of Provision; Bankton, b. 3. tit. 5. § 48.; 13th February 1768, Kempt against Russel*; 17th June 1789, Fairservice against White, No 57. p. 2317.

As to the subsequent words in the dispositive clause, 'as shall be disposed of by the father to them,' their sole purpose seems to have been to put it in the father's power to disappoint the succession of the heir at law, if he should be so inclined. It appears, however, that so far from wishing to exercise this power, he corroborated the destination laid down in the contract, by granting a disposition in favour of his eldest son.

THE LORD ORDINARY pronounced the following judgment: 'Finds the destination in the contract in question calls all the children of the marriage 'as heirs of provision,' and that they were thereby entitled each to an equal share, if the father did not make a division; finds, That the subsequent part of the 'clause, as shall be disposed of by the father to them,' gave him no greater power than is implied in such cases; and that though both powers enabled him to make an unequal division, yet neither enabled him to give the whole to one, or totally to exclude any of the children.'

On advising a reclaiming petition, with answers, the COURT (27th June 1792) altered this interlocutor, and 'sustained the defence with regard to the lands contained in the contract of marriage libelled on, and assoilzied the defender.'

The pursuers reclaimed; but on advising the petition, with answers, the LORDS adhered to their former judgment.

Lord Ordinary, *Dreghorn*. Act. *Fletcher*. Alt. *Dean of Faculty, Wight*.
Clerk, *Menzies*.

R. D. *Fol. Dic. v. 4. p.* 184. *Fac. Col. No 7. p.* 16

SECT. XV.

Can provisions in favour of Children in a Marriage-contract be disappointed by deeds of the Father?

1743. *June* 9. WILLIAM GRAHAM *against* JOHN COLTRAIN.

No 132.
Where an estate was provided by marriage-con-

JOHN STEWART writer in Edinburgh, (afterwards of Phisgill) intermarried, with Agnes Stewart, and, in the contract *anno* 1668, 'she disponed all her lands to him, and to the heirs to be procreated betwixt them of the said mar-

* Not reported.