No 81.

dest son, the LORDS ordained inquiry to be made, whether that part of the executry conquest in the first wife's time, would be sufficient to pay that son his part, which would make it effectual, and what heritage the son would succeed to, that the LORDS might consider whether it was a rational provision for the father to add 7000 merks to his son, who had a land inheritance, which they would accordingly sustain, as they did in the case of Littlejohn; and as to the remainder of the executry conquest in the first or second wife's time, the LORDS found the universal legacy effectual to bring in all the six children equally.

Fol. Dic. v. 2. p. 284. Stair, v. 2. p. 523.

1679. *January* 3. GIBSON *against* THOMSON.

No 82.

A provision of lands within three chalders of victual to a second wife and children was sustained, though acquired during the first marriage, the heir of the first marriage, who was creditor for the conquest, being otherwise competently provided.

UMQUHILE Sir James Gibson, by his first contract of marriage, was obliged to take the conquest during the marriage, in favour of himself, and the heirs of the marriage, during which marriage he conquested the lands of Keirhill, and yet he dispones the same to Dame Elizabeth Thomson his third wife in liferent, and to the eldest son of the marriage in fee. Mr Alexander Gibson, his heir of the first marriage, pursues reduction of this right, as in prejudice of the clause of conquest. It was *answered*, That the said clause being but a destination, Sir John, though it had been fulfilled, and the rights taken to him and and his heirs of that marriage, would have been fiar, and so might have disponed; and this pursuer being his general heir, could not quarrel it, for though heirs of tailzie or provision, by subsequent marriages, may quarrel posterior deeds in their prejudice, because they are not *provisione legis*, and so *eædem personæ cum defuncto*, but *provisione hominis*; and therefore, though they represent the defunct as to strangers, the heir of line being first discussed, yet *quoad* the heir of line, they are creditors, and may reduce any gratuitous deed, hurtful to their provision; but here the pursuer is heir of line, and must represent the defunct *simpliciter*, and cannot renounce to be heir of line, and claim to be heir of the marriage. 2*do*, Conquest is always considered with respect to the defunct's death, and with the burden of his debt; for if at any time of his life he should dispose of what he had conquested, it was never found, that the heir was obliged to make it up, much less when he provides it upon a rational account to a wife and children of a posterior marriage; and it was found in Littlejohn's case, No 79. p. 12943, that such clauses of conquest could not prejudge provisions to a wife or children by a posterior marriage. It was *replied* for the pursuer, That he might renounce to be heir of line, and yet be heir of the marriage, and needs no entry for a general clause of conquest. 2*do*, Albeit clauses of conquest exclude not posterior deeds for onerous causes, and a just and rational consideration, yet here there is no consideration; for there is a plentiful fortune belonging to the defunct, out of which he might

plentifully provide to the wife and bairns of this marriage; neither was there any debt contracted at the time of the conquest of Keirhill, nor yet at the defunct's death; because any debt that was contracted was for purchasing Pentland, which was disposed to Mr Alexander for purging of the debt. It was *duplied* for the defender, That regard is to be had to the time of the last contract, although by the tocher then gotten, and by the liferent, place, and industry of the defunct, there arose considerable means before his death, it was rational, the time of his contract, to provide his wife and bairns to this Keirhill, which is within three chalders of victual, they having no other certain provision, but obligements for money, which was not then acquired. THE LORDS assoilzied from the reduction, and sustained the provision of Keirhill to the wife and children of the last marriage, notwithstanding of the clause of conquest in the contract of the first marriage.—Mr Alexander did also insist in a declarator, that whereas his father had disponed his estate to him, with the burden of 40,000 merks in favour of his remanent children allenarly; and his father having applied 10,000 merks thereof in favour of his son of the last marriage, that this was unwarrantable, because it was only applicable to the children of the first marriage, being brethren and sisters-german with Mr Alexander, whom he could not but provide, though his father had not. It was *answered*, That the words, remanent children, in the native and proper sense, must extend to all Sir John's children, who were alike related to him, who did voluntarily dispone his estate to his son, and so might affect it with what provisions he thought fit; and this clause doth frequently occur in bairns' provisions by bonds or legacy, as when the eldest is nominated executor, and a sum left in legacy to the remanent children, as to which, neither a posthumous child, or those begotten after the testament, could be excluded; but the father's affection and duty being equal to all, both the words and meaning would quadrate with all alike. It was *replied* for the pursuer, That *actus agentium non egrediuntur eorum intentionem*, so the father's intention appeareth in this case to have been in favour of his children of the first marriage, he being married to a second wife the time of this disposition, who was younger than he, and yet without hope of bairns, being about 50 years, and having had no bairns to him, though for several years married before this disposition, and being past 60, so that it cannot be thought that he intended a third marriage, and to provide the children thereof, especially seeing in the disposition he leaves no power to burden the estate with any liferent for any subsequent wife; and, in this case, if the children of the last marriage were not abundantly provided otherways, there being but one son, Mr Alexander is content to secure him in L. 500 Sterling; whereas the disposition to him by his father was of lands all conquested in his mother's time, and were taken with the burden of 27,000 merks of debt, and 40,000 merks of portions, and his father's liferent, and Sir John's second wife being Mr Alexander's wife's mother, did restrict her liferent of 6000 merks to three, that the fee might be secured to Mr Alexander.

No 82.

No 82.

Upon consideration of all which circumstances, the LORDS declared, that no part of the 40,000 merks provided to the rest of the children was applicable to any subsequent children.

Fol. Dic. v. 2. p. 285. Stair, v. 2. p. 663.

*** Fountainhall reports this case:

SIR JOHN GIBSON had a faculty to burden his eldest son with 40,000 merks, he leaves 10,000 merks to his children of the third marriage. Mr Alexander Gibson raises a reduction of it, that *tales facultates sunt strictissimi juris*, and not being exerced *debito modo*, they became void and extinct; that he reserves it for providing his remanent children, which in sense, reason, and law, could only be Mr Alexander's brother-german, there being then no other children *in rerum natura, et verba obscura contra preferentem interpretantur*. THE LORDS, upon presumptions, reduced it, seeing their children were opulently provided beside; but as to the lands of Keirhill, they assoilzied them from Mr Alexder's reason of reduction upon the clause of conquest in his mother's contract of marriage, and that they were acquired during the first marriage, and so he had no power to dispone them, he being creditor. This the LORDS repelled by one or two votes only, though some LORDS inclined rather to sustain this second reason, and repel the first about the 10,000 merks.

Fountainhall, MS.

1680. *December* 1. & 21. ANDERSON *against* BRUCE.

No 83.

A MAN, in his contract of marriage, being obliged "to provide his conquest to himself and wife in conjunct-fee and liferent, and to the heirs of the marriage; which failing, the one half to his heirs, and the other half to her heirs;" and there being a considerable conquest, but no bairns of the marriage; the LORDS found a provision of the said conquest in favour of the children of a second marriage, was a rational and effectual deed, and therefore sustained the same against the wife's heirs.

Fol. Dic. v. 2. p. 284. Stair. Fount.

*** This case is No 46. p. 12890.

No 84.

Where provisions to children were exorbitant and unusual, found, that

1683. *February* 6. LAIRD of NIDDRY *against* JAMES WAUCHOPE, his Brother.

THE Laird of Niddry, by his contract of second marriage, *anno* 1653, being obliged to provide the lands, annualrents, and tenements to be acquired during the marriage, to the heirs thereof; and they having claimed the barony of