

S E C T. H.

Provision of Conquest, whether burdened with Debts contracted during the Marriage.

1627. July 3. E. of DUMFERMLINE against His MOTHER.

IN a suspension betwixt the Earl of Dumfermline and his Mother, where the Lady his mother charged the Earl suspender, her son, upon her contract of marriage, as heir to his father, to infeft her in the lands of Inneresk, which were conquered by her husband the time of their marriage; seeing, by her contract of marriage, her said husband was obliged to provide her to her liferent of all lands which he should conquer the time of their marriage; the LORDS found the suspender was holden to give the charger an liferent infeftment of the saids lands, in respect of the said clause of the said contract of marriage, which clause they found no ways to be elided by the reason of the suspension, which proported, that the suspender his father, who was contractor, was only obliged, by the said contract, to provide the Lady to the liferent with himself, of such lands as he should conquer during their marriage, which words necessarily implied, that the conquest behoved to be made to himself, and that he should be first infeft therein himself, otherways it could not be repute a conquest to him; and it was of verity, that these lands of Inneresk, albeit acquired in the time of their marriage, were not acquired to her husband, neither was he ever infeft therein, but by the contrary the same were by the principal contract of vendition acquired to the suspender heritably, no mention being made therein of his father; likeas the suspender was infeft therein, and not his father; and so the suspender *alleged*, that the clause of the contract could not be effectual to the Lady to give her the liferent of these lands, whereof her husband's self (if he were living) could claim no liferent, the same being provided to his son, without any reservation; which was repelled by the LORDS, and found, that the liferent thereof was due to her: And albeit the suspender further *alleged*, that he stood debtor in the same sums which were given for the price of the lands, or in as great sums as the price thereof extended to, which rested unpaid the time of his father's decease, and which he as heir behoved now to pay; so that it were against all reason that he should be subject to pay the price of the land, and that the Lady should bruik her liferent thereof, as if it had been his father's conquest, which could not be so repute, the price thereof lying yet on the defender's head: This was also repelled; and, notwithstanding thereof, the Lady was found to have right to seek her liferent thereof, seeing the time of the buying of these lands the defender was but an infant.

No 10.

A lady being provided in her contract of marriage to the liferent of the conquest during the marriage; her husband having purchased some lands, but infeft his son therein without any reservation to himself; these lands were found conquest in the father's person, *ad hunc effectum*, to give the Lady the liferent thereof, altho' the price was still unpaid, and the son, as heir to his father, was bound to pay the same, and yet the Lady to have the liferent of the lands.

No 10. The like decision done 11th July 1632, La. Bonitoun *contra* L. Harden, where the relict, upon the like clause of her contract of marriage, got her liferent of lands acquired by her husband to his son, reserving only to the husband his liferent thereof.

Clerk, *Gibson*.

Fol. Dic. v. 1. p. 197. Durie, p. 302.

* * Spottiswood reports the same case :

By contract of marriage, the Earl of Dumfermline obliged himself to infest himself and his Lady, in conjunct-fee, in all lands acquired by him during the marriage. She pursued her son, and the Earl of Winton his tutor, for implement thereof. *Excepted* by them for some lands near Musselburgh, That she ought not to be infest in them, because they were acquired by her son, and her husband's name was not in them. *Answered*, That the purchase was her husband's, her son being but a child, *et in sacris paternis, et nullum habens peculium adventitium*, and if way were given to such things, it were to open a gate to all frauds for frustrating of contracts of marriages.—THE LORDS repelled the exception, the pursuer proving, that the lands were conquest by my Lord's own money, and not by his son's.

Spottiswood, (HUSBAND and WIFE) p. 155.

1629. *January 24.* LA. RENTOUN *against* L. RENTOUN.

No 11.

In a case parallel to the above, the heir having paid the price after his father's death, and retired the bond granted by the father for the same, the Lords found, that the heir ought not to provide the relict in the liferent thereof, but with the burden of paying annualrent for that sum unpaid by the defunct: The reason of which was,

UMQUHILE L. Rentoun being obliged to provide his wife to her liferent of all conquest to be made by him during the time of their marriage; whereupon she having charged her son, his heir, to provide her to some lands conquered by her husband after the bond, which conquest being made by contract, no infestment having followed to him in his lifetime, but only a contract, by virtue whereof he possess the land; the charges were sustained, and albeit the husband was not infest, yet it was found a conquest, he possessing by virtue of that contract, and dying in possession, and the son continuing in that same possession; and because the husband, the time of his decease, stood obliged in a part of the price of the land conquered to the seller, which his heir was compelled to pay to him since, who sold that land to him. It was found, that the heir ought not to provide the relict to her liferent thereof, but with the burden of paying annualrent for that sum unpaid, and which the heir was compelled to pay sensine of all terms after the provision, to be made to her by the heir, of her liferent thereof, seeing the sum which he was compelled to pay was by virtue of a bond made by the husband, expressly bearing payment of the sum owing by him for the price of the same land; whereas, if the bond had not