No 3. provision, but not as heir of line.——The Lords found she had only right as a legatar, and so liable to deduction; and that he could not be liable as heir, unless he were heir of provision, but not as heir general; which was hard, seeing the provision made to the heir of the marriage was affected; and if this were granted, all heirs of provision of the marriage would elude provisions made to second sons or daughters by serving heir general, and relicts of creditors might be defrauded, seeing the heir general might be free, and yet enjoy the provision.

Gosford, MS. No 859. *p.* 542.

No 4. What understood a personal faculty.

1676. *June.* E. Dumfermling *against* Callender.

By minute of contract betwixt the deceased Earl of Callender, and Dame Margaret Hay, Countess of Dumfermline, he was obliged to infeft the said Lady in the lands and barony of Livingston, in liferent and conjunct-fee, and whatsoever other lands and sums of money should be conquest during the marriage; he is obliged likewise to grant surety of the same to her in liferent, in the same manner as of the former lands; and in case of no issue of children, the one half of the said conquest to be disposed upon as the Lady shall think fit. And the Earl of Dumfermline having intented a pursuit as assignee by his father, who was heir to the Lady his mother, for implement of the said minute; for declaring what lands, sums of money and others were conquest by the said Earl, during the foresaid marriage; and for infefting the pursuer in the half of the said conquest, it was *alleged*, That the said obligement and clause of the minute as to the conquest, are conditional, viz. in case of no issue of children; and that the said condition did not exist, viz. there being a child procreated of the said marriage.

The Lords, upon debate *in præsentia*, and among themselves, did find, That the said condition did exist, in so far as, though there were children of the marriage, yet there were no children or issue the time of the dissolution of the marriage, by the decease of the Lady.

Albeit it was *urged*, That these conditions, *si liberi non extiterint, vel non sint procreati*; and that condition, *si non sint liberi superstites*, were different in law, and in the conception and import of the same. And in the first case, *si non sint liberi, sine adjecto tempore decessus vel dissoluti matrimonii, deficit ipso momento* that there is a child; and the condition, being in the terms foresaid, in case of no issue, both in law and in propriety of speech, cannot be otherwise understood and interpreted; and *in claris non est locus conjecturæ aut interpretationi*, which is only where words are homonymous or ambiguous; and where a clause is of itself such as may be understood without addition, to make any, upon pretence of the intention of parties, is not *interpretari sed addere, et intentio in mente retenta nihil operatur*; and that if there had been children of the

marriage, who had lived to that age, that they had been married, and had had children who had all died before dissolving of the marriage, it could not be said, without absurdity, that there had been no issue; and both in law and by our custom, when there is any advantage given or provided by the law, or by contract, in favour of the husband in case of issue, it is ever understood *si liberi sint procreati*, though they do not survive; as in the case of a courtesy of Scotland; and that conditions ought to be taken strictly and according to the letter; especially in this case, the provision foresaid, that the Lady, in case of no issue, should have either a fee or the half of the conquest, or a faculty to dispose of the same. No 4.

It was further *alleged*, That the said clause doth not import that the Lady should have the fee or the half of the conquest, but only a personal faculty and power to dispose of the half of the conquest; which she had not used. And nevertheless it was found by plurality, that the said provision imported a fee, in respect the said minute was a short paper, drawn by my Lord Callender himself, who was altogether ignorant of the style and conception of writs; and, if it had been extended, as it was intended, it could not otherwise be extended, but the fee behoved to be provided to the Lady as the half of the conquest; and, that the half of the conquest should be disposed of by the Lady, did import that she should have a fee and *dominium*, the very nature and essence of property consisting *in potestate disponendi*.

Some of the LORDS were of opinion, That the said clause did only import a personal faculty, upon these considerations, 1*mo*, That the right of *dominium* being the highest right and interest can be given, it cannot be thought to be given but when the words are such as are not applicable to any other interest; whereas the said words do quadrate as well, if not more, to a personal faculty, than to an heritable fee; 2*do*, The said clause is conceived *per verba maxime personalia*, viz. that the half of the conquest should be disposed by her, and if she should think fit, which are *verba arbitrii et facultatis*; 3*tio*, *In dubiis minimum* is to be understood *et solitum, et ut evitetur absurdum*; and respect is to be had to the quality of the person; and albeit mean persons, in their contracts of marriage, do sometimes provide that the longest liver may have all, it is not usual, nor can it be instanced, that ever, in a contract of persons of quality, a fee was provided to a wife; it being the great design of the marriage of such persons, to raise a family to the husband, and it being very ordinary, that a personal faculty should be given to the wife; 4*to*, If the contract had been extended, it might and ought to have been extended in these terms, that the Lady should liferent the hail conquest; and, in case of no issue, she should have the personal faculty foresaid. And though the conquest had been provided to the husband and her, and the longest liver of them two, and the heirs of the marriage, which failing, the one half to his heirs, and the other to her's, her husband would have been fiar; and, in the case foresaid, her heirs would have been heirs of provision to him, as to the half of the conquest. *See* No 7. p. 2941.

Act. *Sinclair, Birnie, &c.* Alt. *Lockhart, &c.*

Dirleton, No 364. *p.* 178.

*** Gosford reports the same case:

No 4.

Alexander, now Earl of Dunfermline, as having right by disposition and assignation from his deceased father, who was heir served to Dame Margaret Hay, late Countess of Dunfermline, his mother, did of new insist against the Earl of Callender, in that same action which was intented against him and the deceased Earl of Callender, wherein there being interlocutors, from which that unhappy appeal was given in, which occasioned so great a rupture and unhappy differences. The ground of the whole debate was a minute of contract of marriage in *anno* 1633, whereby Sir James Livingston, thereafter Earl of Callender, was obliged to infeft the Lady in conjunct-fee in the barony of Livingston; as also, that whatsoever lands, or sums of money, he should conquest during the marriage, he should infeft her in the same, and grant her security thereof in liferent, as of the former lands in liferent; and in case of no issue or children, the one-half thereof to be disposed upon if the said Lady should think fit: Whereupon the Earl of Dunfermline did insist in that same action against this Earl of Callender, as having accepted a disposition of the said lands without any just onerous cause. It was *alleged*, That the declarator could not be sustained to infer that the pursuer had any right of property of the lands conquest, because the said minute being drawn by the Earl of Callender himself, who had neither skill of law, nor style, being then an officer in the Holland war, ought to be interpreted *ex bono et æquo*, and according to the true meaning of parties, and that which is most ordinary in such cases; and should not be extended to any interpretation which may infer no less than the total alienation of a fortune from his own brother, the Earl of Lithgow, and his children, and all descended of his family, and to give the same to strangers, or any the Lady should nominate; and, therefore, as the interpretation of all contracts, especially of marriage, ought to be restricted to that which, in all probability, was intended, so this provision can never be extended to the right of property, to the half of the conquest, but only to the liferent, there being no mention at all of any fee or property; but, on the contrary, bearing to infeft the Lady in the conquest in that same manner as she was to be infeft in the barony of Livingston, which, without all question, was a naked liferent. 2*do*, Albeit it should be found to import a right of fee and property from that part of the provision, bearing, in case of no children, with power to the Lady to dispose upon the half of the conquest as she should think fit; yet that clause being conditional, in case of no issue, can be no ground to infer that conclusion; because, it is offered to be proven, that there was a living child, and issue of the said marriage, which did extinguish any such power granted to the Lady, neither of property. 3*tio*, Albeit there never had been children procreated of the marriage, yet the provision, as it is conceived, cannot be constructed to be a real right of fee, but only a personal faculty granted to the Lady, in case of no existence of children, to dispose upon the half of the conquest to her own heirs, or to any other she should think

fit; which faculty she never having exercised during her lifetime, by declaring her pleasure in favours of any person, or requiring the Earl of Callender, after his conquest of a considerable estate, and that, through age, she was past all hopes of children of her own, to infeft her in liferent of the conquest, and any other person she thought fit in the half of the fee, that personal faculty did die with herself, to whom only it was granted, and could never be transmitted to her heirs, who were not at all mentioned. It was *replied* to the 1*st*, That the provision, bearing a power to dispone of the half of the conquest, did naturally imply a right of property; and it was against common sense, that it should import a right of liferent only, she being provided to the liferent of the whole. It was *replied* to the 2*d*, That the conditions of the parties contractors, as to fortunes and estates, being so unequal, and the minute being drawn by the Earl of Callender himself when he was only a gentleman, without any title of honour, and the Lady was Countess Dowager of Dunfermline, having a great and an opulent fortune, it cannot be presumed in law but he would then contract and grant whatever condition could be required; and the subject in question being only the conquest during the marriage, which, in reason, could not but be thought to arise from her jointure, for the most part, it was just, that, failing of children, the half thereof should belong to her and her heirs; and that condition in law, *si sine liberis decesserit*, is likewise understood to be applied to the time of the dissolution of the marriage, so that there being no surviving child, the condition is never extinguished *per momentaneam existentiam unius prolis*, which deceasing, the power to dispone, during the whole time of the marriage, as is clear by the law, *Lib.* 34. *t.* 1. *D. ad senatusconsultum Trebellianum*, and several other lawyers, who put no difference betwixt the expressions, *si liberos non habuerit*, *vel si sine liberis decesserit*, which are declared to be *pares termini in jure*, as likewise it is clear, by practiques related in Durie, 4th February 1642,* and 27th January 1630,† where a part of tocher being to return, failing of children, to the wife's heirs, there being a child of the marriage who survived the same, and after his death, the wife's heirs, as being substitute, pursuing for that portion, the LORDS did then find, that they could have no right, because that the child survived the marriage, which necessarily implied, that if he had died before the dissolution thereof, then the heirs substitute would have had right. Likeas Craig, in his chapter, *De conditionibus investituræ expositis*, expressly affirms, that the condition *si sine liberis decesserit*, requires *ut existant liberi post matrimonium dissolutum*, who thereafter dying, then the person substituted may have right, but not otherwise. It was *replied* to the 3*d*, That the right of disponing being settled upon the Lady, cannot be interpreted to be *nuda facultas*, but is transmissible to the heirs, as are all other real rights.—THE LORDS having seriously considered the whole debate, and arguments adduced by both parties, as to the first point of the provision, did only contain a right of liferent, or a right of property, they were all unanimous, and did adhere to their former interlocutor pronoun-

No 4.

* Lutfit against Johnston, *voce* SUBSTITUTE and CONDITIONAL INSTITUTE.

† No 3. p. 2938.

No 4. ced upon the 14th of January 1674, finding, that it was a conditional provision of property; but, as to the 2*d* point, if, by the existence of a child, the condition was fulfilled, and the power of disponing extinct, they did much differ among themselves; but, by plurality of votes, it was carried, that albeit there was a child born of the marriage, the power of disponing was not extinguished, but did continue during the whole time of the marriage; and there being no child living the time of the dissolution, it did stand in force, and did belong to the Lady; and they did found themselves upon these principles of law, *si liberos non habuerit, vel si sine liberis decesserit*, as being equal terms; as likewise, upon that ground, that failing of issue of the marriage, behoved to have *tractum futuri temporis* during the whole time of the marriage, which was the subject of the provision; as also, upon that ground, that the Lady having so great a fortune, out of which the conquest should have arisen in reason, the interpretation and meaning of the parties could not be interpreted but in her favours; but others of the Lords were of another judgment, whereof I was one, being chiefly founded upon these grounds and considerations, 1*mo*, That the clause of provision did not fall under any general construction, *si sine liberis decesserit aut non habuerit*, but was of itself of a special and distinct nature, and being negative in case there be no issue of the marriage, so that there being a child of the marriage, both law and reason did extinguish the provision as being the true meaning of parties; and, if it were otherwise sustained, then this inevitable contradiction would follow, that one and the same sentence might be given upon *supposita contraria*, yet *contradictoria*, and the condition, being negative of itself, should stand in force, albeit, by existence and reality of the thing supposed never to be in law, it were extinguished as if it had never been granted; and that, in reason, it could never have been thought to have been the meaning of parties. The Earl of Callendar having then, in property, the barony of Livingston, and being of a noble family, as a colonel in Holland, of a great expectation, and having renounced his *jus mariti* as to the Lady's estate, how could it be thought that ever he would condescend, that, having children of the marriage, and they dying, he should be so ungrate and irrational to put away his own conquest from his own noble and near relations, or give it to strangers, or such that he might never know who they were; but the contrary was decided the 25th June 1675, which seems hard, specially seeing it is unanswerable, that, by our law, in the case of the Courtesy of Scotland, *sola et nuda existentia prolis* gives right of liferent to the husband, *et e contrario*, if there be no child he hath no right at all; and this being the provision *dat legem contractui*.

The advising the dispute, as to the *last* point, was continued until the next day, as being of great importance and difficulty, and then likewise it was carried by plurality of votes, that the provision, bearing a power to dispone during the Lady's lifetime, was not *nuda et personalis facultas* but did give her a real right in the property of the conquest, so that albeit she did never assign or dispone the same during the lifetime, yet it did not fall by her death, but was

transmitted by law to her heirs, as all other heritable and real rights; and those of that opinion did found themselves upon this ground, that the power to dispone, albeit it was not real by infeftment and investiture, yet it was of the nature of other real and heritable rights, whereupon never any infeftment did follow, such as rights of reversions or dispositions, bearing procuratories of resignation and precepts of sasine; and, that a power to dispone of lands is of that same nature and quality as if they were really infeft in such lands, and so, by the law of succession, they ought to be transmitted without distinction; but others, whereof I was likewise one, were of another judgment and opinion, that the power to dispone depending upon an uncertain condition, that might exist or not, it was a mere faculty, and could never give right to any person unless it had been actually exercised by the Lady, and could noways in law belong to her heirs, unless she had disponed it; the power being personally to her only, without mentioning heirs at all, who, upon no ground of law, by any brieve raised out of the Chancellory, could be served either heir special or heir of provision to such a faculty, there never having been any such practice or ground for the same; but, on the contrary, it being often decided, and generally holden as a principle, that, in contracts of marriage, there being a special provision in favours of the wife, reserving to her to dispone upon her half, or a part of the tocher to whom she pleased, failzieing of heirs of the marriage, that if there be no children, and she die without making assignation, or any right thereto, that power is extinguished as being a personal faculty, and can never belong to her heirs; and here the case is far stronger, seeing a wife gives her own tocher, expressly affected with that reservation and power; whereas here the Earl of Callender did grant this conditional power to dispone of all that which was his own conquest, and wherein the Lady could never have any right, and was in effect of the nature of a donation, wherein all conditions ought to be most strictly interpreted, and not conform to conditions in mutual contracts and obligations, founded upon reciprocal performances, which are interpreted *secundum æquum et bonum*, which is the opinion of all lawyers, and is so declared by Mantica in his treatise *De tacitis et ambiguis conventionibus*, *Instit.* § 4. *l.* 14. which expressly meets this case now in question, for there he affirms, *conditio si liberos non susceperat non requirit veritatem actus permanentis sed transeuntis tantum*; but the contrary was found upon the 26th of June 1676, which was likewise hard.

Gosford, *MS. p.* 546. *No* 867. & 868.

No 4.

1705. *July* 11.

GEORGE DUNDAS of that Ilk *against* WILLIAM DUNDAS, Merchant in Edinburgh.

No 5.
One having resigned his estate in favour of his

THE said William being the only son procreated by Ralph Dundas of that ilk, with Mrs Elisabeth Sharp, daughter to Houston, and laying claim to twenty-