

1680. December 21. ANDERSON against BRUCE.

By contract of marriage betwixt Andrew Bruce and Agnes Calender his spouse, he was obliged to employ the tocher, being 4000 merks, and 3000 merks being his own stock, in security to him and his future spouse, the longest liver; whom failing, the one-half to him and his heirs of the marriage, and the other half to her and hers, and to re-employ the same so oft as he should uplift it, and to provide the conquest in the same way. This cause having been decided the first day of December instant, and the LORDS having found, That, by these provisions, Andrew was fiar, his wife's heirs were but heirs substitute to him, and that there being no heirs of that marriage, he might apply his means for provision of the children of this or any other marriage. It was now further *alleged* for Anderson, *1mo*; That by a decreet-arbitral, pronounced by Provost Dick, 2000 merks were decerned to Anderson, as deriving right from Andrew's first wife, and 2000 merks further at his death, and 10,000 merks more if he died without children: In which decreet Andrew had acquiesced; and albeit, *stricto jure*, he might apply his means to the children of this marriage, yet arbiters are not obliged to observe strict law, but to determine *secundum arbitrium boni viri*; and therefore Andrew having acquired such a great estate in his first wife's time, the Provost's decreet-arbitral could not be reduced as to justice and equity, but much more when it was acquiesced in and homologate by Andrew himself. *2do*, There is now proponed a speciality from the contract of marriage, as to the 7000 merks, that Andrew could not apply that to his children, because he was obliged to employ and re-employ it, and so behaved to leave it so employed at his death; whereas there was no obligation to re-employ the conquest, and therefore he could not refuse to re-employ the half of the 7000 merks in favours of the wife's heirs. *3tio*, Though the LORDS have found that he might provide his children with the means he acquired during that marriage, seeing there was no children of that marriage, yet that cannot be interpret indefinitely, nor any further than a rational and suitable provision; and his means being then so great, the LORDS ought to determine, how far he might apply the means he had in that marriage, for the children he had in the subsequent marriages, and the superplus ought to be employed conform to the contract. It was *answered*, That Andrew being found fiar, and his wife's heirs being substitutes to him, they could never quarrel, but were obliged to fulfil all his obligations and dispositions, and therefore such tailzies or provisions do import no restrictions upon the fiar, but *spem successionis*, if he change not the same, as it is ordinary for fiars to change their tailzies at their pleasure, unless the tailzie contain an obligation not to alter, for thereby heirs of tailzie become not only heirs but creditors, as to that obligation: And as to the obligation to employ fums, the LORDS do never sustain it effectual amongst merchants who must trade, but find it always sufficient to employ once in their life, *nisi sit vergens ad inopiam*, or that he leave trading; for if Andrew

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Found that one who had succumbed in the reduction of a writ, wherein he had a partial interest, could not afterwards recur to it, and take the benefit of it.

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Bruce had put the 7000 merks, which he and his wife had at first, upon security, he would have had no stock to trade with, and so could not have raised his fortune: Neither is there any difference that the clause of conquest bears only employed, and that the first stock bears also re-employed, for wherever employing is express, re-employing is implied; it being elufory to employ and lift again without re-employing. And as to the decreet-arbitral, though it could have subsisted, if it had not been rejected by Anderson, yet he having rejected the same, and raised and insisted in a reduction upon iniquity, it imports a renunciation thereof; and though Andrew Bruce had homologate, yea ratified the same, Anderson's reclaiming and renouncing the same excludes him from ever founding thereon hereafter. It was *replied*, for Anderson, That, albeit, gratuitous tailzies in favours of children, or other heirs of tailzie, import no restriction upon the fiar, but that he may alter or burden the same by mere donation; yet such tailzies or provisions as are *ex causa onerosa*, as mutual tailzies or provisions between man and wife, *ex causa matrimonii et dotis*, albeit the husband be fiar, yet he can do no fraudulent or gratuitous deed to alter or burden such provisions, which hath been frequently found in the competition of children of different marriages, frequent amongst burgessees, whereby the particular sums, and the conquest, during each marriage, are provided to the heirs or bairns of the several marriages, and the father's applying the conquest in one marriage to the children of another marriage, is always reputed as fraudulent, *contra fidem pactorum nuptialium*; and therefore Andrew Bruce cannot indefinitely apply his means and conquest of the first marriage to the children of a subsequent marriage; and so the LORDS found in the case of the bairns and second wife of Thomas Littlejohn*, That, albeit, Thomas was obliged to provide his conquest, during that marriage, to the bairns of that marriage; yet, that a moderate jointure to his second wife was not a fraudulent or gratuitous, but a rational deed, and therefore the LORDS did sustain the same, but it was never pretended that such provisions could be evacuated by fraudulent, or mere gratuitous deeds.

THE LORDS found, that Baillie Anderson having reclaimed against, and raised a reduction of the decreet-arbitral, he could not return thereto; but found that Andrew might not do a mere gratuitous or fraudulent deed to exclude his wife's successors of their share of his means; but found, that his application both of his stock and conquest of the first marriage (having no children of it) to the bairns of this, and any subsequent marriage, was a rational and an effectual deed, and so adhered to their former interlocutor. (*See PROVISION to Heirs and Children.—See MUTUAL CONTRACT.*)

Fol. Dic. v. 1. p. 49. Stair, v. 2. p. 820.

* Examine General Lift of Names.