

No 88.

married, cannot prejudge her of the clause of conquest contained in the mother's contract of marriage, seeing she did not accept the same in satisfaction of the said provision. THE LORDS refused to sustain process for the half of the conquest during the father's lifetime, and found that the father, notwithstanding of the foresaid clause, may dispose upon the conquest for any rational or necessary use, and that it may be affected with the father's debts, contracted or to be contracted at any time during his lifetime, and any other rational or necessary deeds done by him.

Sir P. Home, MS. v. 2. No 620.

1685. February 24.

No 89.

ELSPETH CRUIKSHANKS, and Mr JOHN JOHNSTON, Merchant in Aberdeen, Her Husband, *against* ROBERT CRUIKSHANKS of Banchry, Her Father.

THE LORDS, on Carse's report, found, That the obligation in the said Robert's contract of marriage with the pursuer's mother, providing the conquest to the bairns of the marriage, resolves only into a destination; and that, notwithstanding of that clause, the father is fiar; and therefore refused to sustain process during the father's lifetime, either for liquidation or payment, or declaring that the father may do no deed that is gratuitous or voluntary, to the prejudice of the said clause of conquest. See the parallel case decided 27th November 1684, Simpson *against* Anderson, No 88: p. 12960.; only, here the clause of conquest runs, that he provides the conquest to the bairns *in integrum*, which conception was not so strong in Anderson's case.

Fol. Dic. v. 2. p. 287. Fountainhall, v. 1. p. 343.

1687. February —.

No 90.

Mr ROBERT IRVINE *against* ELIZABETH and JEAN IRVINES.

A MAN having obliged himself to provide 4000 merks to himself and his wife in conjunct fee and liferent, and to the bairns of the marriage in fee, and to pay the money to the bairns, the next term after their mother's decease, she predeceasing, the children pursued their father for payment.

Alleged for the defender, That the provision to pay the 4000 merks to the pursuers, the first term subsequent to their mother's decease, supposed her to be the survivor, and was not intended as a renunciation of the father's conjunct fee.

THE LORDS found the father had the liferent of the sum during his life.

Fol. Dic. v. 2. p. 285. Harcarse, (CONTRACTS OF MARRIAGE.) No 383. p. 99.

* * * Fountainhall reports this case :

1687. February 23.—THE case of Irvine and her curator against Mr Robert Irvine her father was reported by Drumcairn, being a pursuit for employing the sums contained in her mother's contract of marriage. THE LORDS modified 500 merks to be paid by him to her for bygone aliment, and find it relevant to oblige the defender to secure the pursuer in the terms of the obligation for 4000 merks, that the defender the father has acquired the said sum, and in a condition to employ it ; and as to the other obligation of other 4000 merks, decern him to employ it in the terms of the contract, and reserving his own diferent. This was contrary to a former interlocutor on Tarbet's report, whereby the father was found *dominus* and fiar of the sums, and that the provision was only a destination of succession, if he disposed not otherwise on them. Against this, Mr Irvine gave in a bill, *alleging*, *imo*, The conquest must only be understood of what he acquired during that marriage with her mother, he having many children now of a subsequent marriage ; *2do*, That having two daughters of that first bed, he has the power of distributing it as he finds them deserving, and she having misbehaved, he will give it to the other, a father being best judge of that.

No 90.

Fountainhall, v. 1. p. 449.

1696. July 2.

HAMILTON *against* HAMILTON.

HALCRAIG reported the Children of Hamilton of Newtown, and Gabriel Hamilton of Westburn, their uncle, against the said Hamilton of Newtown, their father, for implement of the provision of 10,000 merks contained in their mother's contract of marriage, whereby it was made payable at the death of the first deceaser, and *ita est* their mother was dead. *Alleged*, The children being minors within pupillarity, none could give him a valid discharge and renunciation on payment, he being their administrator in law. *Answered*, The uncle, by the contract, being the person at whose instance execution was appointed to pass, he could discharge, and he craved up the sum that it might bear annualrent. THE LORDS thought it not fit to loose the filial dependence on parents ; but, in respect of the conception of the contract, they decerned him to secure that sum to the children with the annualrent thereof ; out of which he was to have allowance for the alimenting and entertaining them *primo loco*, seeing they would not permit his children (though he was married again) to be taken from him, their education belonging to him *jure naturæ* ; and that the securing it could not be suspended to their respective marriages or majority.

No 91.

Fol. Dic. v. 2. p. 285. Fountainhall, v. 1. p. 725.