though greater, cannot be in satisfaction of that debt, and so he was *in mala fide* to cancel the bonds, and must be liable for the sum; 2*do*, The bond, with the annualrent from the date to this time, will be more than the sum in the contract; 3*tio*, The provision there given him is from his elder brother, and his father is no ways debtor in it. *Answered* to the *first*, *Debitor non præsumitur donare*, and though *l. ult. C. De dot. prom.* makes these distinct *liberalitates*, and all to subsist together, and the one not to be in satisfaction of the other; yet the LORDS now, by the constant tract of their decisions, as in the Lord Yester's case against Lauderdale, No 160. p. 11479.; and many others, always find, what is given in a contract of marriage must be in full of all former bonds and obligations. To the *second*, The 7000 merks ceased to bear annualrent, so soon as he had got the provision in his contract, and so it became extinct. The *third* militates against the pursuer, for the father conveyed the fee of his estate to his eldest son, with the burden of this debt to the second, and so it still flows from the father. THE LORDS found the father had paid the debt, and might warrantably cancel the bonds; and therefore assoilzied him from the pursuit. No 161.

The addition of two clauses would have prevented the debate on either hand. The *first* is, If the grandfather had qualified his legacy, that it should be over and above any portion he was to receive from his father, then an indefinite provision would not have extinguished it. Or, 2*do*, If the contract of marriage had borne in full satisfaction of all former bonds or legacies, in that case there would have been no room for doubting.

Fol. Dic. v. 2. p. 146. Fountainhall, v. 1. p. 14.

1726. *February* 4.

Competition, Sir EDWARD GIBSON of Keirhill, AGNES ARBUTHNOT, Daughter to Mr George Arbuthnot, Rector of the High School of Edinburgh; and JOHN MAJORIBANKS of Hallyards.

No 162.
Found in conformity to Dows against Dow, No 158. p. 11477.

BY contract of marriage entered into *anno* 1685, betwixt Edward Marjoribanks of Hallyards, and Agnes Murray, daughter to Sir Robert Murray of Priestfield, the said Edward Majoribanks bound and obliged him "to ware and employ the sum of 30,000 merks upon land or annualrent, at the sight and by the advice of the persons therein named, and to take the securities thereof to himself and his said promised spouse, and longest liver of them two in liferent, and to him for the use and behoof of the children to be procreate betwixt them in fee; which failing, to his own nearest heirs and assignees whatsomever." This sum was to be divided amongst the children, as the said Edward Marjoribanks in his lifetime should appoint; and failing of such division, to be divided amongst them by the proportions therein mentioned. And in a

No 162.

separate clause concerning the conquest, " he binds and obliges him to provide the just sixth part of all lands, &c. that should be conquest and acquired by him during the lifetime of his said promised spouse, to himself and her, the longest liver of them two in liferent, and the equal half of the said hail conquest to himself for the use and behoof of the children, to be procreated betwixt them in fee; which failing, to his own heirs and assignees whatsomever," and to be divided amongst the children, as he in his own lifetime should appoint; and failing of such division, to be divided in the same manner with the above special sum. And by the contract it is provided, that execution pass thereupon against the said Edward Marjoribanks, at the instance of the persons therein named, or any two of them, or their heirs, for implement thereof, in favour of the said Agnes Murray, and the children of the marriage. This marriage dissolved by the death of Agnes Murray; and only one child, Jean Marjoribanks, survived the marriage, who was first married to Sir Thomas Gibson of Kierhill, by whom she had issue Sir Edward Gibson, one of the contending parties, and several other children; and after Sir Thomas's death, was married to Mr Arbuthnot, by whom she had Agnes Arbuthnot, another of the contending parties; in whose favour she conveyed the hail provisions and obligements in her father Mr Marjoribanks's contract of marriage, to which she pretended the sole undoubted right, as the only child of that marriage. The said Jean Marjoribanks having deceased before her father, Sir Edward Gibson her eldest son, conceiving that the above obligements and provisions in Mr Marjoribanks's contract of marriage in favour of the children of the marriage, were but destinations of succession, which could not be established in the person of those children, any other way than by service as heirs of provision to Mr Marjoribanks; and which service, his mother Jean Marjoribanks neither did nor could expede, having died before her father took out brieves for serving himself heir of provision;—in this service, compearance was made for Mrs Arbuthnot, and the above disposition in her favour produced, as her title to oppose the expeding thereof. The point of right being reported to the Lords by the assessors,

It was *pleaded* for Mrs Arbuthnot, That, indeed, provisions in contracts of marriage, in favour of children to be procreated, are for the most part so conceived, as to import no more but destinations of succession; but at the same time it is now a settled point, that provisions may be so conceived in contracts of marriage, in favour even of children *nascituri*, with regard either to lands or money, as to constitute these children upon their existence proper creditors, and not heirs of provision; whereby, they have it not only in their power to compel the father to implement the contract, and to denude of the fee in their favour during his lifetime, but may even compete with other onerous creditors, according to their diligences. The only question therefore to be determined, is, whether by the conception of this contract, and meaning of parties, the children of the marriage were intended to be proper creditors, so as they might have compelled Mr Marjoribanks, even in his lifetime, to vest the fee in their

person, or only heirs, and to have right by way of succession; for if Jean Marjoribanks, the only child of the marriage, was a proper creditor without necessity of a service, for certain she might convey that right in what manner she thought proper. As to which Mrs Arbuthnot conceives both the meaning and words of the contract are in her favour. The proper interests of the several parties are in this contract carefully distinguished, the father is bound to take the securities for the 30,000 merks to himself and wife in liferent; as to the fee, he is to take the securities to himself, for the use and behoof of the children of the marriage in fee, and the obligement concerning the half of the conquest is conceived the same way. The father's interest in these subjects, whereto he was entitled in his own right, was no more than a naked liferent, as to the fee, that could not indeed be vested in the children before they had a being, and therefore a method is devised to establish the fee in the person of a trustee for the use and behoof of the children, and the father by this contract is appointed the trustee, so that he had the liferent in his own right, but as to the fee was but trustee for behoof of his children, and might as any other trustee have been compelled, how soon the marriage dissolved, to denude himself of the trust, and to establish the fee in their persons. It is a material circumstance, that execution is provided to pass at the instance of the friends named in the contract, even against Mr Marjoribanks himself, for implement of the contract in favour of the children of the marriage; for had no more been intended but a destination of succession, there could be little use for providing that execution should pass against him in his lifetime. No 162.

Answered for Sir Edward Gibson, It has been frequently determined, that an obligation in a contract of marriage upon the husband, to take a subject to himself and wife in liferent, and to the children of the marriage in fee, does not constitute the children creditors, but only heirs of provision; if then an explicit obligation to take the fee directly to the children make them not creditors, far less an obligation to take the fee to himself for their use and behoof. It is very hard to conceive a reason, why the paction should be interpreted less strong, where the fee is directly stipulated to the children, than when covenanted to be in the father for their use and behoof; in the one case, there might seem some reason for pleading that the fee must be directly put in their person, so soon as they are capable of it; but in the other, none at all, parties having chosen this methed of letting the fee rest wtih the father till his death, but limited in his person for their use and behoof. And the case here is the more plain, that the father had a power of distribution at any time during his life, and even at the last moment before his death, he might have made what division in the fee he pleased amongst his children. Is not this inconsistent with their character of creditors? For how could an action be competent during the father's life? If there was an action, each of them could pursue; but what could any of them pursue for? It is obvious, till their father's death not one of them could ask a sixpence, which is a demonstration they could have no action,

No 162. and consequently were not creditors. A power of division, therefore, to be exercised at a father's last moments, plainly imports, that the use to the children is only to commence at the father's death, and that they are heirs, not creditors. To strengthen this, let it be considered, the principal question here is not concerning any determinate obligation of a specific sum, or particular lands, which might more easily imply a *jus crediti*, but concerning an undetermined obligation to provide an *universitas*, *sciz.* the conquest, to the children of the marriage, which has always been interpreted to resolve into a succession; nor in any case has the contrary been determined, and there is the more reason here, that besides the power of division in the father, no particular time is limited for him to denude; and therefore these obligements, were they even explained as proper debts, with relation to the particular sum of 30,000 merks, as to the conquest could import no more but a destination of succession. The last evidence shall be mentioned, that these obligements concerning the conquest import no more but a destination of succession, is this, whatever debts were contracted by Mr Marjoribanks any time of his life, must certainly affect the conquest, the childrens' provisions notwithstanding, which is plainly inconsistent with these provisions being strict obligations.

Replied for Mrs Arbuthnot, The clauses with relation to the conquest are concerted in the same form and stile with that of the special sum; now, whatever meaning the parties had with relation to the special sum, how is it possible to put a different meaning upon the same words in the clause of conquest? were there therefore any foundation for the distinction of an obligation to provide an *universitas*, and to provide a definite sum, it could have no place here. But 2*do*, There is no foundation for the distinction; without question, one may convey or dispone even a *spes successionis*, what he may succeed to by the death of another, and upon devolving of the succession, the disponee has an action against the disponer to make up proper titles, and denude. In the same way may one assign, or oblige himself to assign, the profits to be made in any particular adventure, or during a particular time. The obligement in question is of the same nature; Mr Marjoribanks became bound, " whatever lands, &c. he should acquire during his wife's lifetime, to take the rights and securities of the half to himself, for the use and behoof of the children of the marriage in fee." Would not a contract of this kind, entered into with any third party, been effectual? or let it be supposed Mr Marjoribanks had been obliged to take these rights in name of some third party, for the use and behoof of his children, as aforesaid, would these children have succeeded as heirs of provision to their father? Certainly they would not. And if that is admitted, then there is no difference, as to this point, betwixt an obligement for a special subject, and an obligement of conquest within a time limited. Nor can it make any difference in the dispute, whether the father or a third person had been trustee for the children; otherwise this contract would be a destination of succession even as to the special sum; the contrary whereof must however be ad-

mitted. In the *next* place, It is wrong to advance, " that the subject could not be ascertained, nor the father obliged to denude during his life;" for even heirs of provision have a title to ascertain the extent of the conquest upon the dissolution of the marriage, which undoubtedly Jean Marjoribanks might have done, after which she had another obligation upon her father, to take the infeftments of the half of the conquest to himself, for her use and behoof *nominatim* in fee, or in her option to have denuded himself of the fee of that half, because a trust implies in the nature of it, an obligement to denude; and the one or other would equally have served her purpose; for though he had continued in the trust-right, after taking infeftment to himself for her use, she would have been as much fiar, as if he had been denuded in her favour, and might have disposed of the subject as she thought proper, even during his life, as any person possessed of a backbond of trust might do. As to the other argument, " that no time is limited for his denuding," it can signify nothing in this question; because, had the father taken the securities of the half of the conquest to himself in trust, for the use and behoof of his daughter *nominatim* in fee, it would have had the same effect, as if he had totally denuded in her favour; and that he was obliged to have done, so soon as it could appear what was the extent of the conquest, and how many children were of the marriage; that is, he ought to have done it immediately after the dissolution of the marriage. Add to which, *quod sine die debetur statim debetur*, and a trustee may at any time be obliged to denude, though no special time be limited. The power of division is also laid hold on, to help out this argument, that the father was designed to be proper fiar, and not trustee; but it seems evidently to point the other way; indeed a power of division is a native consequence of one's having the property; but the reserving such a faculty, directly implies, that the father had no right of fee, no power to divide without that reservation. Where the father is fiar, and the children only heirs of provision, he cannot only do onerous deeds, but likewise rational deeds, in favour of a second marriage, or so, and consequently much more has he a power of making a division amongst his own heirs of provision of the same marriage, without any reserved faculty, as has been frequently found; the natural import, therefore, of a clause reserving such a faculty, is, that without the reservation he has no such power, and consequently that he is not fiar; for though a power of division may subsist without the property, there can be no property without a power of division. *Answered* to the last argument about the debts, That if by Mr Marjoribanks' debts here, are meant debts contracted before dissolution of the marriage, there is no question these would affect the conquest even preferably to the children, because albeit these children upon their existence became creditors to their father, they were only creditors *sub conditione*, providing there should be any conquest during the marriage, which conquest could only be computed *deductis debitis*. And 2*dly*, As to debts contracted after the dissolution of the marriage, so long as the trust-right remained *in nudis finibus obligationis*, while the father

No 162.

No 162. was by the rights and investitures of his lands absolute proprietor, there is no doubt that creditors contracting with him, or purchasing from him, would be preferred, at least according to their rights and diligences; but even in that case, it must be admitted, that the children would have a proper action against their father, or his heirs of line, to relieve the conquest of these subsequent contractions, though for onerous causes, which is a certain evidence that this is no destination of succession.

"The Lords found, that Edward Marjoribanks of Hallyards, by the contract of marriage, obliged himself to provide the equal half of the conquest to himself, for the use and behoof of the children of the marriage in fee, whereby he became a trustee for the behoof of the children of the marriage; and that action was competent to the only child of the first marriage, after the decease of the mother, against her father in his own lifetime; and that the same action is now competent to her daughter, as her assignee, against the heirs of her father; and therefore found there is no place for Sir Edward Gibson's service, as heir of provision to his grandfather."

And again, after a reclaiming petition and answers, they found the right of the clause of conquest, in Edward Marjoribanks contract of marriage with Agnes Murray, passes by assignation, and not by a service; and therefore preferred the assignee; and found there was no place for Sir Edward Gibson's service to his grandfather Mr Marjoribanks.

In this same process it was *pleaded* by John Marjoribanks of Hallyards, heir of the said Edward Marjoribanks his second marriage, against both the above parties, Sir Edward Gibson and Agnes Arbuthnot, That their mother Jean Marjoribanks, only child of Edward Marjoribanks' first marriage, being provided to the sum of 25,000 merks in her contract of marriage with Sir Thomas Gibson, whereof 15,000 merks, payable soon after the marriage, and the remainder at his death, it must be understood in satisfaction of all she could demand in name of conquest or otherwise, although not expressly bearing to be in satisfaction; from this principle, that provisions in contracts of marriage are always understood to be in satisfaction; Stair, l. 1. t. 8. § 2. in med. which was pleaded with the more assurance in this case, in respect it was a most equal transaction, and the 25,000 merks an ample equivalent for what her claim was worth at the time of her marriage with Sir Thomas. For the provision of 30,000 merks being restricted in the case of one daughter to 16,000, and that not payable till after the father's death, it cannot be denied but the 25,000 merks, whereof 15,000 presently payable, was a full equivalent for the 16,000 payable after the father's decease, and for the present worth of her share of the conquest, which might have been nothing at all, which she might not have lived to have right to, and which might have proved very inconsiderable, if more children of the marriage had existed, her father and mother's marriage subsisting at her marriage with Sir Thomas Gibson. And though this point should

not be pleaded so high, as to presume provisions in contracts of marriage to be always in full satisfaction; let them be in satisfaction *pro tanto*, and imputable in former provisions, which must be allowed and determined; 29th June 1680, Young *contra* Pape and Vans, No 157. p. 11459. This will be sufficient for John Marjoribanks; because it follows, that where the last provision is higher than the first, it must be reckoned in satisfaction of the first; which squares precisely with the present case, in that, according to any rational way of computing, the provision here given in the contract of marriage was more valuable at that day than any claim or *spes successionis* the daughter had. No 162.

Answered for Sir Edward Gibson and Agnes Arbuthnot; It is a general rule, that a creditor is not presumed to discharge his right; and in the present case, where a father is giving to a daughter, the presumption is rather whatever provisions he stipulates in the daughter's contract, beyond what he was expressly bound to, are done *animo donandi*. It is granted indeed that provisions in a contract of marriage will, so far as they go, extinguish every former special provision, but by no means any determined general claim, as a clause of conquest, a legitim, or such like; which is perfectly agreeable to the decision Young, cited above: Thus, the 25,000 merks will extinguish the former 16,000 merks specially provided to the daughter, because he who gives 25,000 at the same time gives 16,000; but the excrescent sum of 9000 merks will not be imputed in satisfaction of her claim of conquest *pro tanto*, which was not so liquid as to admit of any thing like compensation or imputation; nay, properly speaking, was not in being at the time, but did afterwards supervene at the dissolution of the father's marriage by the mother's decease; and therefore that superplus will be understood as a donation flowing from paternal affection, not as payment or anticipation of a claim that had no proper existence till afterwards, and for that reason not presumed to have been under consideration. The same way, a bond of provision, or a tocher contracted, though never so great in extent, if it bear not in satisfaction, will not exclude the accepter from his legitim. It is true, to make an equality amongst children, collation or imputation is introduced; and so, if there had been more children of Mr Marjoribanks' first marriage, the half of the conquest would have been set apart to them from the heir; and in drawing her share thereof Mrs Jean behoved to collate the sum already received; but the benefit of that would not in the least accrue to the heir, but to the other children: And therefore Mrs Jean being the only child of the marriage, she must have the provision of conquest entire, beside the general provision in her contract of marriage. It has no influence upon the argument, though it should be found, that the provision of conquest falls not to the children as heirs (which is Sir Edward Gibson's plea) but as creditors; for still the right is but conditional during the marriage, and not presumed to fall under the consideration of parties, more than a succession in the proper sense; because it was only at the dissolution of the marriage their right became absolute, purified then by their surviving; and in this it goes hand in hand with a legitim, which

No 162. becomes an absolute right no sooner than the father's death; nor is it a succession in a proper sense, because the child does transmit it without confirmation.

"The Lords found, that the tocher given to Jean Marjoribanks by Edward Marjoribanks her father, albeit more than the sums specially provided to her by her mother's contract of marriage, does not import her acceptance thereof in full satisfaction of the clause of conquest so provided by the said contract."

The same was found with respect to the legitim, betwixt the Ladies Balmain and Glenfarquhar, No 2. p. 4778. *voce* Forisfamiliation, where the Lords found, 11th December 1719, though the daughter was forisfamiliate by marriage, and had got a considerable tocher, not mentioned indeed in satisfaction, "that she had right to a full third of the defunct's moveables, without any deduction or regard to the portion formerly received by her from her father." Here it was mainly pleaded for the relict, that the legitim is a right of property in the communion of moveables, which the children must lose by forisfamiliation, since thereby they abstract themselves from the society or partnership.

Fol. Dic. v. 2. p. 146. Rem. Dec. v. 1. No 82. & 83. p. 162.

SECT. VII.

Where the cause of granting is expressed, that must be the rule.

1622. *July* 18. Kennedy *against* Jack.

No 163.

Vide Ephem. practica in divisione testamenti, dated the 14th July 1622, where it is found, that the executor and only bairn has right to the two parts, and the wife only to a third, albeit the executor be heir also. *Item*, there *alleged* also in that action, at Kennedy's executor his instance against the relict his own mother, for her absolvitor frae the equal half of the two part, quhilk half is the defunct's third; because the defunct her husband left in legacy to her be the testament the equal half of all his hail free goods and gear, whilk is the defunct's hail third. Finds the allegeance relevant *pro tanto*.

Fol. Dic. v. 2. p. 147. Nicolson, MS. No 604. p. 413.

*** A similar decision was pronounced, 12th January 1681, Morison against Trotter, or Trotter against Rochead, No 12. p. 2375. *voce* Collation.