

EXECUTRY.

1638. *November 17.* The BAIRNS of FRASER *against* BISHOP.

THE Bairns of one Fraser in Currie, having obtained decret against one Bishop, relict of their father, and intromissatrix with his goods, for payment to them, as executors confirmed to their father, of a certain sum; and the suspender *alleging*, That the executors ought not to have paid the sum of alleged addebted to the bairns of her said husband, gotten in his first marriage, by the which her third, as relict, was prejudged, for that should not be respected as a debt to exhaust her third, as other debts owing to lawful creditors do; for that debt owing to the bairns is of another nature, and should only affect the bairns' part of gear, and the defunct's own part, and the relict's third part should be free thereof. This allegiance was repelled, and the LORDS found, that the provision made in favours of the bairns of the first marriage, was a debt which affected the whole goods, as any other debt does, and that it ought not to be taken off the two parts of the defunct's goods, so that the relict's third should be free thereof, but that it ought to be taken off both the third and two parts *in cumulo*.

Fol. Dic. v. 1. p. 279. Durie, p. 861.

1671. *January 25.* SANDILANDS *against* SANDILANDS.

THE Children of Alexander Sandilands pursue Agnes Sandilands their mother, for count and payment of their father's means, the tutory being now finished by her marriage; in which account the mother gave up in defalcation the third of all moveable sums, as ships, merchant goods, household plenishing, &c.—It

No 1.

Provisions in favour of children of a first marriage are not to be taken off the two thirds of the moveables, to make the second wife's third free thereof, but affect the defunct's whole moveables.

No 2.

A clause of conquest in a contract of marriage, in favour of the children of the mar-

No 2.
riage, must
come off the
whole head;
and therefore
a wife insist-
ing for her
third, was
found entit-
led only to
a third of
what remain-
ed, after de-
duction of the
conquest dur-
ing the first
marriage.

was *answered* for the Children, That she can have no part of the moveable sums or moveable goods, because, by the contract of marriage produced, she is provided to the annualrent of 5000 merks, which was her own tocher, and L. 10,000 of her husband's, which is her husband's, and was the whole fortune he then had; and as to the conquest, it is provided that all sums of money, lands, annualrents, tacks, and others whatsoever, conquest during the marriage, shall be taken to the husband in liferent, and to the bairns in fee; and because the wife is provided to be a bairn in her father's house, what shall come that way is provided to be taken to the husband and wife, the longest liver of them two, and the bairns of the marriage; so that all the sums and moveables in question being conquest during the marriage, they are by the contract destined to the husband in liferent, and the bairns in fee; and which provision is a debt upon the husband, his heirs and executors, so that the wife can have no third thereof.—The defender *answered, first*, That her right of the third of the moveables being constituted by the law, cannot be taken away but by an express clear deed renouncing the same, or accepting such provisions in satisfaction thereof; which being a clause now ordinarily adjected in contracts, and not put in this contract, albeit in the same the wife's tocher bears 'in full satisfaction,' the clause can never be so interpreted as to exclude her third, especially a contract of marriage being so favourable, that words are always understood therein according to the meaning of parties; and here the meaning of parties may be cleared by this, that the defunct, who was a very intelligent man, did declare that he would leave his wife so much of his moveables in full satisfaction of her third; so that he thought she was not excluded; and if need be, the parties alive, writers and witnesses in the contract, may be yet examined to clear the meaning of the contract; *2dly*, Albeit the clause could not exclude her from a third of money, which is expressed therein, yet not from a third of moveable goods and gear, which is not exprest; and albeit the clause bears, 'and others,' it can only be understood of rights due by a stated security, and the intent of the clause has only been to substitute the bairns of this marriage heirs of the conquest, and to exclude the bairns of any other marriage; but did neither exclude the father but that he might dispoise on his moveables, albeit the clause expresth him but liferenter thereof, neither does it exclude the mother from the third thereof. And there was adduced a decision in the case of Lady Oxenford; wherein, albeit by her contract of marriage she accepted certain lands in full satisfaction of her terce, and third of all lands, annualrents, and others, yet that was not found to exclude her from a third of moveables, but only from a terce, or third of heritable rights.—It was *answered* for the Children, That their mother having consented by the contract of marriage, that all conquest during the marriage should be provided to their father in liferent, and to them in fee, she had excluded herself as clearly and effectually as if she had renounced her third thereof, or accepted of her jointure in full satisfaction; neither is there a necessity that these words must always be used, nor is this al-

leged as a consequential renunciation, but as an express obligation or destination of the husband, consented to by the wife, which must have its native effect, and so the children must be fiars of the whole conquest, and therefore the wife cannot be fiar of a third; and albeit moveable gear be not exprest, the generality, 'others,' must necessarily comprehend them, being of the same nature with sums which are exprest, and may be moveable, and of less importance than they; and the case wholly differs from that of the Lady Oxenford, wherein nothing but heritable rights are exprest, and it is an unaccustomed clause amongst persons of that quality to exclude ladies from a third of moveables; but here sums are exprest, and it is most ordinary for merchants to exclude their wives from their merchant goods, which is the greatest part of their estate: As to the meaning of the parties, clear clauses cannot be enervated upon that ground; and as for any thing exprest by the husband, it was on death-bed in a great fever whereof he died, and no testament followed.

THE LORDS found, That the foresaid clause in the contract did exclude the relict from a terce of moveable sums or moveable goods during the marriage, which could be understood to be meant to be put upon security at any time, but that it did not exclude her from a third of household plenishing.

Fol. Dic. v. 1. p. 280. Stair, v. 1. p. 705.

. Gosford reports the same case :

IN a compt and reckoning betwixt the saids bairns and their mother, who was their factrix during her whole widowity, there was an article of the discharge craving allowance of the third of the whole moveables, as due to her, *jure relictæ*. It was *alleged* by the bairns, that they were creditors to their father by contract of marriage, whereby his whole conquest, bonds, goods, and gear, and all others that he should conquest during the marriage, was provided to the father in liferent, and to the bairns of the marriage: Likeas, by a special clause the mother be declared to be a bairn of her father's house with the rest of her brethren and sisters, whatsoever should fall to her by the death of her father should belong to her and her husband in liferent only, and to the bairns in fee, which was inconsistent with a right to a third *jure relictæ*. It was *replied* for the mother, that any provision made to her by contract of marriage was not in satisfaction of terce and third, which being due to her by law, she could not be prejudged thereof, unless she had been expressly secluded by contract of marriage, whereas there was no such clause in it. THE LORDS, notwithstanding, did refuse to allow that article in prejudice of the bairns, who were lawfully creditors, and so nothing could belong to her *jure relictæ*, but after payment of debts. As likewise they found that she being provided to liferent of the bairns's part, it was inconsistent with her right of terce and third; but in respect that a third of the household plenishing was ordinarily provided to the relict, notwithstanding they be secluded from all terce and third, they did allow the article in so far; yet that seems hard, seeing upon the foresaid grounds.

No 2. she behoved to be secluded from all, or have right thereto; and in this case the bairns being provided to the whole conquest, the LORDS found, that thereby the bairns had right not only to bonds and annualrents and all other heritable rights, but also to all moveable goods and gear whatsoever, excepting household plenishing; in respect that the defunct was a merchant, and his whole fortune did consist in trade and merchandize, which otherwise could not have been so found by our law and practick, which as to the interpretation of conquests, hath been variously decided.

Gosford, MS. No 319, 320, 321, p. 142.

1678. June 19. DICKSON and PATERSON against YOUNG.

No 3.
Found as
above.

By contract of marriage betwixt umquhile Thomas Young and Isobel Dickson, he was obliged to have ready in money L. 10,000, and to employ it on security and land for her liferent use, and all the moveables conquest during the marriage, are provided to the bairns of the marriage. The said Isobel and her second husband Robert Paterson pursue Thomas Young the only child of the first marriage, to fulfil the contract, in so far as was not fulfilled by contract in land, bearing to be in implement thereof *pro tanto*, and insisted for the superplus of the annualrent of L. 10,000 over and above the free rent of the land. The defender *alleged*, that the pursuer had intromitted with the moveables, which behoved to be employed in the first place, for making up the liferent, and so *intus habuit*. *2do*, That seeing the pursuer liferented the defunct's whole estate, she ought to be liable to a modification to the defender, as apparent heir. The pursuer *answered*, that this employment being an heritable destination, it could not burden the moveables; for though a creditor might distress either heir or executor, yet the executor would have relief against the heir: And in this case, the defender being both heir and executor, the heritage must be first affected, so that the moveables must be free, and the pursuer will have the third of them, and cannot be liable in this process for any intromission with them, much less for a modification to the heir. The defender *replied*, that the obligation to employ sums, has ever affected the moveables *primo loco*, and is a moveable debt *quoad debitorem*; neither can the pursuer claim a third, because the moveables acquired during the marriage, are provided to the heirs of the marriage; and as to the aliment to be modified to him, as apparent heir, he hath a process depending for it, which ought to be taken in *incidenter*, in this process.

THE LORDS, found the moveables to be liable *primo loco*; and found the relict to be excluded from the moveables conquest during the marriage, accounting these moveables only conquest, which exceeded the defunct's moveables before the marriage, and declared that they would modify an aliment, according as the condition of the estate should be proven. See HERITABLE AND MOVEABLE.

Fol. Dic. v. 1. p. 280. Stair, v. 2, p. 622.