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the husband would not have relinquished the marriage, but rather have yielded to it; nor would the Lady have gone on without it, seeing there was no visible way of making conquest but by the Lady's great liferent; for the husband was an illiterate man, and could make no improvement of his fortune but by his sword, by which he acquired abroad the money that bought the barony of Livingston; but he had deserted that service, and settled at home by this marriage; and though he gained in the civil war that ensued at home, yet there was no thoughts of that war in April 1633, the time of the minute; *3tio*, The meaning of parties is yet further cleared by a bond granted by the husband, bearing date in September 1633, and which the defender hath pleaded to be of a later date, as after the marriage complete, whereby the husband renounces his *jus mariti*, and gives his Lady the sole disposal of her opulent jointure, which is much more extraordinary than the half of the jointure, in case of no issue; and if this posterior bond had been granted the time of the minute, it might have been a cause to have limited the ground of the conjunct fee; which being so long after, it can be no ground at all.

THE LORDS found, That by the terms of the clause of conquest, and by the meaning of parties elicite from the circumstances foresaid, it did not import a naked liferent, with a personal faculty to the Lady to dispoise the half; but that she being conjunct fiar with that power, was fiar of the one half of the conquest; for albeit the conquest, in the manner of security, was regulate by the infestment of Livingston, both being conjunct fiars; yet the power of disposal not being in the conjunct fee of Livingston, but of the conquest, it made the security, as differing in that point, to have different effects as to the fee; but seeing this clause was but a general clause of conquest, the LORDS found that it could only extend to what the husband acquired during the marriage, more than what he had the time of the minute, and with the burden of all his debts contracted during the marriage; so that though the whole estate he now hath, was acquired during the marriage, yet as much of it as was equivalent to the barony of Livingston, was not to be reached by the clause of conquest, but only the superplus that were free, over and above the debt contracted during the marriage, of which free superplus the pursuer, as succeeding to the Lady, was to have the half, but no part of the bygone rents from the Lady's death till her husband's death, because they belonged to the husband, as the surviving conjunct fiar. See This case by Dirleton, *voce* FACULTY.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 430.

1677. January II. BAILLIE against SOMMERVILLE.

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The clause,
si sine liberis
found not to
take place,

LITTLEGILL having charged Mr William Sommerville to make payment of the sum of 10,000 merks, contained in his contract of marriage with Mr William's daughter, and upon a bond of corroboration, and a decret of consent; there

was a bill of suspension given in, bearing several reasons, which the Lords distrust upon the bill; the *first* was, that his consent to the decret was the day before he should have been execute, being in prison for a slaughter, upon Littlegill's promise to get him a remission; and for the bond of corroboration, it was extorted for fear of losing his escheat, being charged with horning upon the contract of marriage; and having presented a bill of suspension, it was unjustly refused, the reason of that bill being, that the contract had a special condition, that if his daughter did die within six years, there being no children of the marriage then alive, and that if Sommerville himself had an heir of his own body, that then he should have repetition of the half of the tocher, if it were paid; but so it is, that his daughter died within a few years, as likewise the child of the marriage died thereafter, and Sommerville had an heir of his own body. The *second* reason was compensation, founded upon a ticket granted by Littlegill, to be comtable to him for the half of the benefit of a commission of Chamberlain, granted by the Marquis of Douglas.—It was *answered* to the *first*, That the decret was opposed, being *in foro* upon consent; and Sommerville was not imprisoned nor processed at Littlegill's instance, who denied that ever he made any such promise; and for the bond of corroboration, it was voluntarily granted, and the refusing of a bill of suspension could not be interpreted *metus causa*, he never having complained thereof, nor given in a new bill; and for the condition of the contract of marriage, it was clearly copulative, being conceived in these words, that in case there were no heirs of the marriage, and also that Sommerville had an heir of his own body.—It was *replied* to the *last*, which was the only point that the Lords considered, as being the ground whereupon the bond of corroboration and decret were founded, if the condition was disjunctive and not copulative; and albeit it did bear these words, (and also) yet it ought to be interpreted (or if,) many lawyers being of that opinion, that where several conditions are set down and conjoined with the word *item*, it ought to be interpreted disjunctive, *in resolutione orationis*; and in this case it is presumed in law that it was so intended, Sommerville's daughter being only Littlegill's second wife, and Sommerville being a man of no great fortune.—THE LORDS considered the contract of marriage and the foresaid condition several times, and at last did all resolve, that the condition was copulative and not disjunctive, being conceived in these terms, that if the Lady should die within six years before her husband, without any child of the marriage, and also that Sommerville should have heirs of his own body, that then he should repay 5000 merks; both which not having existed, there being a son of the marriage who survived his mother, the condition did thereby exist; and so they decerned the whole tocher to be paid.

Fol. Dic. v. 1. p. 187. Gosford, MS. No 936.

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where a child had been born of the marriage, although the child died, but after his mother, whose tocher was to return in case of no children.