

No 128. marriage by the decease of the pursuer's father, there was a son existing; therefore found, That the pursuer had no right to the 8000 merks; but found, That by the bond of provision in November 1722, the pursuer's share of the said sum of 18,000 merks was habilely restricted to 6000 merks. See APPENDIX.

Fol. Dic. v. 4. p. 191.

1761. *January 14.*

MARGARET WILSON *against* JOHN MILLER.

No 129.

In a provision to bairns of a marriage, where the parents have the power of division, they are not obliged to make a division of every separate subject.

The consent of one parent may be interponed to the deed of the other, though deceased.

By marriage-articles, of date January 3. 1690, betwixt James Lindsay and Marion Aitchison, James Lindsay bound himself to have in readiness the sum of 9000 merks Scots, "which he obliges himself to secure to the use and behoof of himself and the said Marion Aitchison, and longest liver of them two, in conjunct-fee and liferent; and to the bairns lawfully to be procreated betwixt them, to be divided amongst them, as their father and mother shall think fit."

Moreover, James Lindsay bound himself, "That whatever lands, heritages, debts, goods, or gear, he shall happen to conquest or acquire during the marriage, that he shall provide the just half thereof to himself and the said Marion Aitchison, and longest liver of them, in conjunct-fee and liferent, and the bairns to be procreate betwixt them, as their father and mother shall think fit."

Lastly, Marion Aitchison obliges herself "to convey the lands of Mauchlenhole, of about L. 600 Scots yearly rent, in favour of the said James Lindsay and Marion Aitchison, and longest liver of them two, in conjunct-fee and liferent, and to the bairns, lawfully to be procreated betwixt them, in fee, to be divided amongst them as their father and mother shall think fit."

Of this marriage there were several children. They all died young except two daughters, Anne and Isabel.

On the 16th of October 1724, James Lindsay gave 2000 merks to his daughter Anne in her contract of marriage; and in the year 1729, he gave to his youngest daughter Isabel L. 200 Sterling in her contract of marriage.

Some months after, he disposed the lands of Mauchlenhole to James Semple, the eldest son of his daughter Anne.

The disposition bears to have been made with the special advice and consent of his spouse Marion Aitchison; however, she did not sign her consent till four years after, to wit, in the year 1732, and after her husband's decease.

Margaret Wilson, in right of Isabel Lindsay her mother, brought a reduction of this disposition against John Miller the purchaser from James Semple, *insisting*, That her mother had a right to one-half of the lands of Mauchlenhole.

She *pleaded*, *imo*, By the marriage-articles betwixt James Lindsay and Marion Aitchison, the lands were provided to the bairns of the marriage, not to

the heirs of the marriage. That under this destination, the father and mother had a power indeed of dividing the lands according to what proportions they thought proper; but they had not a power to give all the lands to one, and none of them to another.

2do, By the marriage-articles, a power of division was reserved to the father and mother jointly; but they did not exercise it jointly; for Marion Aitchison did not consent till after her husband's death.

Answered to the first; James Lindsay's 9000 merks, his conquest, and the estate of Mauchlenhole, are all to be considered as one subject. It was not required of the parents, that they should divide each of the three subjects; it was enough that a division was made upon the whole thrown together; which accordingly was done; for Isabel got L. 200 Sterling in her contract of marriage.

Answered to the second; Marion Aitchison's consent, after her husband was dead, marks her *animus* more firmly than if she had interponed her consent to her husband's deed during his life.

“ THE LORDS repelled the reasons of reduction.”

Act. C. Hamilton-Gordon, Jo. Dalrymple. Alt. Lockhart, Miller, Montgomery. Clerk, Gibson.
J. M. Fol Dic v. 4. p. 192. Fac. Col. No 4. p. 7.

1768. November 25.

HEIRS OF LINE OF SOUTHDUN *against* KATHARINE SINCLAIR and the CHILDREN OF MARJORY SINCLAIR.

SOUTHDUN was thrice married, and had issue of each marriage. In his second contract of marriage he became bound to secure 10,000 merks to the issue of the marriage, and also the conquest during the marriage, reserving a power of division. He had two children of this marriage, both daughters, and both of whom survived him. In the contract of marriage of the eldest, Marjory, he provided her in the sum 10,000 merks “in name of tocher, and as her share of the conquest.” The other daughter, Katharine, remained in family with him at the time of his death. And as the provision that Marjory received at her marriage did not amount to half of the conquest, the question occurred between these children of the second marriage, and the children of the first marriage being heirs of line, in what manner the residue of the conquest should be divided.

The parties to Marjory's contract of marriage were Southdun on the one side, and she and her husband on the other. Her acceptance of the sum provided to her in lieu of her share of the conquest, implied a renunciation of that share to her father. The very nature of the transaction proves it to be in his favour, not in favour of Katharine, who was not a party to the contract. It was accordingly found, that as Katharine could not be hurt by a contract to which she was not a party, neither could she take benefit from a contract in

No 129.

No 130.

Extent of the father's power of distribution of the conquest provided to the children of the marriage.