No 23.

As to the *second* parcel, it was *contended*, That, as the same were conquest in the person of him to whom titles fell to be made up, the father's heir of conquest, and not his heir of line, could alone take up the succession.

The Lord Ordinary pronounced the interlocutor following: 'Finds, that, by the disposition granted by John Kid in the year 1733, the fee of his part of the lands of Wester Crounerland was vested in the deceased John Boyd; and that the titles, which were afterwards made up by Robert Boyd, his father, were insufficient to carry the property of the said lands, which must still be considered as *in hæreditate jacente* of John Boyd; and therefore, and in respect that the said land was a *feudum novum* in him, finds, that the property thereof does now devolve and fall to the defender, as heir of conquest to him; but finds, that the titles made up by Mr Robert Boyd, the father, were sufficient to carry the superiority of said lands; and being therefore to be considered as heritage in him, must, of consequence, devolve and fall to the pursuer, his heir of line: Finds, that, by the disposition granted by John Scot in the year 1749, the fee of his part of the lands of Wester Crounerland was vested in John Boyd, the son, and is to be considered as a *feudum novum* in him; but, in respect that the substitution in said disposition is not in favour of his own heirs whatsoever, but in the favour of the heirs whatsoever of Mr Robert Boyd, his father, which might have been different from the heirs whatsoever of the son, finds, that the pursuer, as heir of line to the father, is entitled to take John Scot's part of said lands, as heir of provision called by said substitution, and decerns and declares accordingly.'

Upon a report, the Court unanimously (one Judge excepted, who had some difficulty with regard to the first parcel of lands, whether the taking this parcel in that way was not to be considered as a kind of *præceptio hæreditatis* in the son, and, therefore, this particular subject not to be considered as conquest, but as heritage *quoad* him, and as such to go to his heir of line) approved of the Lord Ordinary's judgment upon both points, and pronounced their own in the precise terms thereof.

Reporter, *Colston.* Act. *Baillie.* Alt. *M'Queen.* Clerk, *Ross.*

Fol. Dic. v. 3. *p.* 163. *Fac. Col. No* 117. *p.* 315.

No 24.
The Lords found, that where conquest lands have been sold, the *jus representationis* takes place upon the price.

1779. *March* 9. Mary Russel and Others *against* John Russel.

Russel of Arns, in his son William Russel's contract of marriage, disponed the lands of Arns to his son, and the heirs of the marriage. On the other part, the son obliged himself to take the rights and securities of the whole heritable and moveable conquest which he should acquire during the subsistence of the marriage to himself, and the heirs thereof; which failing, to his own

heirs and assignees. The marriage dissolved by the predecease of the wife, leaving issue two sons and four daughters. Both the sons, and one of the daughters, died without issue. No 24.

During the subsistence of the marriage, William Russel purchased some heritable subjects, and sold them *after* his wife's death. Subsequent to this sale, he executed a deed, by which he disponed his lands of Arns, and his whole effects whatever, to Agnes, his second daughter, in liferent, and to John Speirs, her second son, in fee, under burden of certain legacies to his other daughters. The deed declared, that these legacies should be in full satisfaction to them of all they could claim by their mother's contract of marriage.

Agnes predeceased her father, leaving several sons and daughters.

After the father's death, an action was brought by his eldest daughter Mary, and third daughter Jean Russel, for setting aside his settlement on John Spiers, and the other children of Agnes, as *ultra vires* of the granter; and for having it declared, that the pursuers were entitled to succeed to the real and personal estate of their father, in terms of the contract of marriage. The Court had no doubt in determining, that this settlement on the second son of the second daughter, which excluded the whole heirs of provision, was *ultra vires* of the granter, and that the succession to the subjects must be regulated by the contract of marriage.—The lands of Arns, therefore, which were *specially* provided to the heirs of the marriage, devolved, without dispute, on the pursuers, (the two surviving daughters), and the eldest son of Agnes, the predeceasing daughter, being the heirs-portioners.—As the conquest was likewise provided to the 'heirs of 'the marriage,' the lands conquest descended to the same persons. But it was disputed betwixt the parties, who were the persons under the marriage-contract entitled to take up the succession of the conquest moveables.

The pursuers insisted, that the moveables ought to be divided betwixt them, as nearest in kin, exclusive of the children of Agnes, there being no right of representation in succession to moveables.—The defenders contended, that, as the succession to the moveables in this case went to heirs of provision, and not to heirs *ab intestato*, it could only be taken up by service, and the *jus repræsentationis* must take place. This general point was argued by the parties, but received no judgment; the necessity of deciding upon it in the present case being removed by the following speciality; that, though there was a moveable estate left by the father at the time of his death, this estate, *ex concessis*, arose solely from the sale of the conquest lands by the father after the dissolution of the marriage. On this ground,

Pleaded, *separatim*, for the defenders; That it is needless to enquire, who is the heir in the moveable conquest; for the whole of it must go to the heirs in the heritable conquest.—The father, no doubt, during the existence of the marriage, might have changed heritable subjects into moveable, and moveable into heritable, at his pleasure. But the dissolution of the marriage, by the prede-

No 24. cease of the wife, fixes not only the *quantum*, of conquest, but what particular subjects the respective heirs of the marriage are entitled to succeed to:—The heirs in heritage having right to succeed to such subjects as are then heritable, and the heir *in mobilibus* to such as are then moveable.

The dissolution of the marriage has the same effect as if special subjects had, from the beginning, been settled on these heirs by the marriage-contract. They have, from that period, a proper *jus crediti*; and, although they cannot insist for immediate possession of the subjects, yet, if the father dissipates the conquest, he is liable in warrandice. A sale of the subject made by him is valid to the purchaser; but he is bound to make good the damages suffered by that heir of provision who is hurt by the sale, and who would otherwise have succeeded to the estate.

If a subject, therefore, which was heritable at the dissolution of the marriage, is afterwards sold by the the father, as in the present case, the heir in heritage is entitled, when insisting after the father's death for implement of his provision, to have the price or value of such estate re-funded to him out of the father's moveable or other subjects.

Answered for the pursuers: A provision of conquest has not, at any time during the life of the father, the same effect as a special provision.—It is considered as little better than a simple destination. The dissolution of the marriage fixes the *quantum* of the conquest in this respect, that the children can claim nothing acquired after that period; but the ample fee of the subject remains in the father. It is observed by Erskine, b. 3. tit. 8. § 43, 'That the conquest is computed *quoad* the father, not as at the time of the dissolution of the marriage, but of the father's death; November 27. 1684, Anderson against Anderson; February 24. 1685, Cruikshanks against Cruikshank; *voce* PROVISION to HEIRS and CHILDREN.'

But, although the dissolution of the marriage should be considered as fixing in general the *quantum* of the conquest, which the father is bound to transmit to the heirs of provision, it does not give an heir of conquest the *jus crediti*, which an heir of provision, in a special subject, is entitled to. In that case, the father being obliged to transmit a particular subject, if it is sold, or in danger of being carried off, the heir may, even during the father's life, do diligence, or bring an action against him for making the provision effectual in the event of his death.—But, in the provision of conquest, the father comes under no obligation to transmit any particular subject; and, therefore, if the conquest consist of a land-estate, the heir has no *jus crediti* from the marriage-contract to insist that this land-estate shall descend to him. The obligation of the marriage-contract is fulfilled, if the whole value of the conquest at the time of the dissolution of the marriage goes either to the heir in heritable, or the heir in moveable subjects conquest; and the father is always entitled, during his life, to vest his property in subjects of the one kind or the other, as he chuses.

The COURT found, ' That Robert Spiers, eldest son of Agnes Russel, has right to the same share of the conquest provided by William Russel's contract of Marriage that Agnes would have had, had she been alive; and remit to the Lord Ordinary to proceed accordingly.' No 24.

Lord Ordinary, *Covington.* Act. *D. Rae, W. Bailie.*
Alt. *M'Laurin.* Clerk, *Campbell.*

Fol. Dic. v. 3. *p.* 163. *Fac. Col. No* 76. *p.* 147.

How far the Husband is bound by clauses of Conquest; *See* PROVISION to HEIRS and CHILDREN.

See APPENDIX.