1770.

JAMES FAIRIE, - - - *Appellant.*
JAMES WATSON, - - - *Respondent.*

FAIRIE *v.* WATSON.

House of Lords, 19*th February* 1770.

CONQUEST—APPROBATE AND REPROBATE.—In a marriage contract, the husband had conveyed the whole lands and heritages that he might conquest or acquire during the marriage, one half to themselves in conjunct fee and liferent, and to the children of the marriage in fee; *whom failing*, to his wife's own nearest heirs. And in case of his dying without children, and his wife surviving him, then in that case disponing to her 100 merks, in full of all she, or her next of kin could claim: Held, in an action by her next of kin, for one half of the conquest after her death, that she could not approbate and reprobate the same deed by accepting the 100 merks, and also claiming the conquest; and that the house purchased during the marriage was not conquest, it appearing to have been purchased with funds at his disposal at the commencement of the marriage, and not with funds acquired by him subsequent thereto, and during the subsistence thereof.

James Stewart, by his first wife, had a daughter, Elizabeth, who married James Watson, father of the respondent.

On his second marriage with Janet Auld, he entered into a contract of marriage, by which she, on her part, conveyed her tocher, and he on his part disponed to himself and the said Janet Auld, and the longest liver of them, in conjunct fee and liferent, and to the heirs of the marriage in fee, whom failing, to his own nearest heirs and assigns whomsoever, his tenement, yard, and land in Rothsay; and further provided all lands, heritages, tenements, annual-rents, tacks, steadings, rooms, possessions, corns, cattle, insight plenishing, bills, bonds, &c. that he *should conquest, acquire or succeed to during the marriage*,—one half thereof to himself and wife in conjunct fee and liferent, and to the bairns to be lawfully procreated between them in fee; whom failing, to the said Janet Auld, her own nearest heirs, executors, legators, or assigns whatsoever; and the other just and equal half thereof, to and in favour of himself, and the bairn or bairns to be lawfully procreated, whom failing, to his own nearest heirs, executors, or assigns whomsoever. There was a restrictive clause, providing that if he should die without children of the marriage, then his said wife should be bound to accept of 100 merks, which he thereby dis-

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pones to her, in full satisfaction of all she or her next of kin could ask or claim.

During the subsistence of the marriage he disposed of the heritable subjects in Rothsay, and purchased others in Glasgow. He took the disposition to himself, his heirs and assigns whomsoever, and passed infeftment in like terms, giving in the same instrument a liferent to his wife. These premises were afterwards disponed by him to his daughter by his first marriage in liferent, after his own and the liferent of his wife Janet Auld, and to the heirs-male procreated of the marriage between the said Elizabeth Stewart and James Watson.

He died in 1729, leaving his wife to survive him, but no issue. His wife died in 1733. Her representative was the appellant Fairie; and having served himself heir in general to her, he raised the present action against Watson, for one half of the conquest. Defence. That there was no conquest. That the house purchased by him during the subsistence of the marriage was not conquest, it having been purchased with the sum which his wife brought with her at marriage. But even supposing it was otherwise, there was a restrictive clause in the conveyance, which confined Janet Auld's right, and that of her next of kin, merely to 100 merks, in the event of there being no issue of the marriage, and of her surviving him. After a proof as to the conquest. The proof did not shew that the deceased had gained or acquired any additional means after his marriage. At its date he was a man of considerable means, and it was proved that he got a sum with his wife sufficient to purchase the house, which the appellant contended was conquest. The

Feb. 26, 1763. Lords pronounced this interlocutor:—"Having advised the "state of the process, testimonies of the witnesses adduced, "writings produced, with the memorials given in, in conse- "quence of a former interlocutor, and having heard parties' "procurators thereon, they sustain the defences, assoilzie, "and decerns."

Mar. 10, 1763. On reclaiming petition their Lordships adhered. Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—That the one-half of the conquest came to him as representative of Janet Auld, in terms of the articles of marriage, and that as the house in question was purchased by him, during the subsistence of the marriage, the presumption in law was, that it was purchased with funds acquired by him during the marriage, and the

onus probandi lay with the respondent, to prove that it was not.

Pleaded for the Respondent.—The intention of the parties by the marriage contract, must be taken from the whole tenor of the instrument. The 100 merks were expressly given in full satisfaction of every claim, and having taken this specific gift, they were not also entitled to claim the benefit of the conquest provision. Besides, to maintain a claim for conquest, it must be proved that the deceased, at the time of the dissolution of the marriage by that event, had acquired means over and above that which he possessed at the time of his marriage. The evidence in the cause proves the contrary; and the tenement purchased during the marriage, was purchased entirely with the funds which he had at his own disposal at the commencement thereof, so was not conquest.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

Note.—The appellant did not deliver in his case.

For Respondent, *J. Dalrymple, Thos. Lockhart.*

WILLIAM GRAY and WILLIAM STUART, Merchants, Perth, - - } *Appellants;*

ALEXANDER OGILVIE, Merchant, Leith, *Respondent.*

House of Lords, 2*d March*, 1770.

SALE.—A bargain was entered into for the sale of 100 hogsheads of *Philadelphia* lintseed, of Messrs. Alexander's Importation, for which £4. 4s. per hogshead was agreed to be paid. Instead of this, the seller purchased himself Virginia lintseed of inferior quality, at £3. 10s. per hogshead, and sent it to the buyer ás the Philadelphia lintseed which he had bargained for. Held, reversing the judgment of the Court of Session, that the buyer was not liable for the price.

William Gray bargained for 100 hogsheads lintseed, of Philadelphia quality, with the respondent, a merchant in Leith, who stated in answer, "the Philadelphia flax seed is now some-" time arrived in Clyde, and there is part of that cargo or-