

1665. *December 20.*LAIRD KILBOCHO *against* LADY KILBOCHO.

No 12.

Found in
conformity
with the
above.

THE Lady Kilbocho, by her contract of marriage, being provided to certain lands, with this provision further, that she should have the liferent of all lands conquest during the marriage, whereupon she obtained a decret in the English time, which being now under reduction, it was *alleged*, the clause of conquest could only give her the lands conquest, with the burden of the annualrent of a sum due by the defunct to a person from whom he bought the land, as being a part of the price of the land, especially seeing, by a writ under the defunct's hand, he acknowledged that this bond was granted for a part of the price. It was *answered*, 1st, That a personal obligation cannot affect the land, neither can it affect the Lady's person; but, if the defunct had pleased, he might have granted an annualrent out of the lands conquest, which then would have affected it, which not being done, his declaring that this sum was a part of the price, cannot be effectual, nor can infer a probation against his wife in prejudice of her anterior right. 2dly, This allegiance might be proponed as well against the heir of conquest as liferenter thereof; and yet it was never found, that the heir of conquest behoved to accept the land with the burden of the sums borrowed to buy it, nor yet to relieve the heir of line thereof; but, on the contrary, the heir of conquest has relief against the heir of line for personal debt, though borrowed for acquiring the right.

THE LORDS found, that the case was not alike with the heirs of conquest, whom defuncts do infest without any burden, and liferenters, who having a special competent provision, this general clause being but adjected as uncertain, is not so favourable, or so to be extended, seeing the husband did not infest the wife in his own time in the conquest; and therefore found her to be liable to the annualrent of this sum, which they found instructed by the husband's declaration, where the Lady's father is a subscribing witness.

Fol. Dic. v. 1. p. 198. Stair, v. 1. p. 328.

* * Dirleton reports the same case :

IN the case betwixt ——— Dickson of Killoch, and Sandilands his mother, and her present husband, it was found, that a husband being obliged, by contract of marriage, to provide the liferent of such lands as he should acquire during the marriage, to his wife in liferent, and to the heirs of the marriage; and his heir being pursued for implement, and for resigning certain lands acquired by the husband, for a liferent to the relict;—the relict her liferent and right should be with the burden of a sum of money borrowed by the husband for making the said purchase; as to the annualrent of the said debt during the relict's lifetime.

THE LORDS considered, that though, in order to other ends and effects, and in special to determine the succession in favours of an heir of conquest, whatever lands are acquired by any person *titulo singulari*, are esteemed conquest; yet, in contracts of marriage, such obligations, anent conquest, are to be understood of what is acquired by the husband, with his own means and monies, seeing what is acquired otherways (the price or a part of it being borrowed, and the husband being debtor for the same) upon the matter, and in effect, is not conquest, and a free accession to the husband's estate; in so far as the price is a burden upon the husband's estate; and as the husband, if he had been charged himself, might have satisfied the obligation by giving an infeftment with the foresaid burden, so the heir may do the same.

Dirleton, No 9. p. 5.

* * * The same case is also reported by Gilmour :

In the contract of marriage betwixt Mr Alexander Dickson of Kilbocho, with consent of John Dickson of Hartrie his father, and Isobel Sandilands, with consent of ——— Sandilands of Hilderston her father, beside jointure lands particularly provided to her, her husband is obliged to provide her to all conquest lands; and he having, during the marriage, acquired the lands of Mitchellhill, she, in the Englishes time, pursued her son as heir, and obtained decret against him, to infeft her therein. Of the which decret there being a review and reduction intented before the Lords, upon this reason, that the English Judges had repelled a relevant defence, viz. that the defunct having acquired the land a little before his death, the price thereof was borrowed from John Kello the time of the acquisition; whereupon he gave bond, bearing, that the money was borrowed to pay the price, containing an obligation to infeft him, not only in the saids lands acquired, but in certain others, for an annualrent to be paid furth thereof. This allegiance being resumed in the review; and it being added, that her own father, who was party-contractor with and for her, was witness subscribing in the bond; and it was offered to be proven, that the bond was granted the very day of the subscribing of the alienation, at least within a day or two after; and a practique betwixt this Renton, and his Mother was repeated, No 11. p. 3056. To which it was *answered*, That the obligation providing the conquest is simple, without condition or burden; and, in case of conquest, a wife is as favourable as an heir of conquest, who would succeed to the conquest lands, albeit the heir of line behoved to relieve him of the debt contracted for the acquiring thereof; the executor also would be obliged to relieve him thereof. And the practique meets not; because there the money was due by bond to the seller of the land for granting the alienation, which is not in this case, the money being borrowed from a third party, which was the reason of that decision. *Replied*, When the case of an heir of conquest

No 12. shall occur, the Lords will consider of it, whether it be alike with the relict or not; but as to the relict, she is no ways to be favoured as to the general clause of conquest, she being more than sufficiently provided *aliunde*, and more than effecting to any portion that she brought with her; and law and reason allow, that lands acquired should be *cum onere* of the price.

THE LORDS found the reason of review relevant. Thereafter it was offered to be proven, by John Kello's oath, that a part of the money was owing to him before the acquiring of the land, which the LORDS would not sustain to take away the clause exprest in the bond, and to which her own father was witness.

Gilmour, No 172. p. 123.

No 13. 1676. June 27. EARL OF DUMFERMLINE *against* EARL OF CALLENDER.

A CLAUSE of conquest, in a contract of marriage, in favour of a wife, of all lands, sums of money, &c. to be purchased during the marriage, extends only to what the husband acquired during the marriage, more than what he had at the time of the contract, and with the burden of all his debts contracted during the marriage.

Fol. Dic. v. 1. p. 198.

*** See The particulars No 7. p. 2941.

SECT. III.

Subjects purchased partly before and partly after the Marriage, how far, reputed Conquest.

No 14. 1627. July 19. LADY DUMFERMLINE *against* The EARL.

REVERSION, used after a contract of marriage, found to be of that nature, that the benefit thereof should be disposed to the wife, by virtue of a clause of the contract, to provide her to all conquest made *stante matrimonio*.

Fol. Dic. v. 1. p. 198. Kerse, MS. fol. 65.