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Upon consideration of all which circumstances, the LORDS declared, that no part of the 40,000 merks provided to the rest of the children was applicable to any subsequent children.

Fol. Dic. v. 2. p. 285. Stair, v. 2. p. 663.

*** Fountainhall reports this case:

SIR JOHN GIBSON had a faculty to burden his eldest son with 40,000 merks, he leaves 10,000 merks to his children of the third marriage. Mr Alexander Gibson raises a reduction of it, that *tales facultates sunt strictissimi juris*, and not being exerced *debito modo*, they became void and extinct; that he reserves it for providing his remanent children, which in sense, reason, and law, could only be Mr Alexander's brother-german, there being then no other children *in rerum natura, et verba obscura contra preferentem interpretantur*. THE LORDS, upon presumptions, reduced it, seeing their children were opulently provided beside; but as to the lands of Keirhill, they assoilzied them from Mr Alexder's reason of reduction upon the clause of conquest in his mother's contract of marriage, and that they were acquired during the first marriage, and so he had no power to dispone them, he being creditor. This the LORDS repelled by one or two votes only, though some LORDS inclined rather to sustain this second reason, and repel the first about the 10,000 merks.

Fountainhall, MS.

1680. *December* 1. & 21. ANDERSON *against* BRUCE.

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A MAN, in his contract of marriage, being obliged "to provide his conquest to himself and wife in conjunct-fee and liferent, and to the heirs of the marriage; which failing, the one half to his heirs, and the other half to her heirs;" and there being a considerable conquest, but no bairns of the marriage; the LORDS found a provision of the said conquest in favour of the children of a second marriage, was a rational and effectual deed, and therefore sustained the same against the wife's heirs.

Fol. Dic. v. 2. p. 284. Stair. Fount.

*** This case is No 46. p. 12890.

No 84.

Where provisions to children were exorbitant and unusual, found, that

1683. *February* 6. LAIRD of NIDDRY *against* JAMES WAUCHOPE, his Brother.

THE Laird of Niddry, by his contract of second marriage, *anno* 1653, being obliged to provide the lands, annualrents, and tenements to be acquired during the marriage, to the heirs thereof; and they having claimed the barony of

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the clauses in the contract relative to them ought to be strictly interpreted.

Lochtoure as conquest; it was *alleged* for the heir of the first marriage, That his father, before the second contract of marriage, had a wadset of these lands, and also a disposition in the year 1650, from the apparent heir of Lochtoure, and a right to an expired apprising. 2*do*, The contract doth not provide sums conquest.

Answered; 1*mo*, A wadset being a redeemable right, doth not carry the land, but is only a servitude effeiring to the sums in the wadset; as to the disposition, it carried only a right of reversion, which was all that pertained to the apparent heir, the disponer, the property being exhausted by former wadsets and comprisings, which being acquired by the pursuer's father from creditors, after the second marriage, must be looked upon as conquest, especially considering that he was never in possession by virtue of the disposition. 2*do*, It matters not that the contract does not bear sums of money; seeing the father, who drew it, had promised to his lady, that it should contain the same obligements that were in her first contract of marriage, which bore sums of money; and the lady's signing the contract with that clause is not a passing from it.

Replied; The father having had a *talis qualis* total right to the land, by the disposition and apprisings, before the marriage, though not altogether sufficient and unquarrelable, the posterior rights acquired by him to fortify the same must be considered as accessory to the first right; and so he cannot properly be said to have acquired the lands after the marriage, having had them before.

Duplied; The design of the clause of conquest in favour of the children of a marriage being, that what estate was acquired during the marriage should be applied to the children thereof, it cannot be expended, but so as the children of the marriage may have the profit and benefit thereof; otherwise the children of a second marriage, though true creditors in respect of the children of the first, might always be disappointed.

THE LORDS found it relevant, that the father had in his person irredeemable rights, viz. the disposition or expired apprising above-mentioned, reserving *contra producenda.*

It was afterwards *alleged* against the disposition 1650; That it appeared to be in trust for Gilbert Ker, in so far as, long after the date, he granted wadsets of the lands to his sisters for 26,000 merks, which Niddry afterwards redeemed. 2*do*, Niddry acquired right to apprisings led after the date of the disposition, and pursued a poinding of the ground for his lady's jointure, 3*tio*, By a missive letter, some years after the disposition, he wrote to Gilbert Ker, that it was not safe for Gilbert that he should give a backbond. 4*to*, It being found relevant by the interlocutor, that he acquired irredeemable rights, it is clear, from the letter, that the right was redeemable in so far as he offered to denude upon payment of his just debts.

Answered; The disposition must be looked upon as an irredeemable right and no trust; for Niddry having probably undertaken the debt (whereof the

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sister's provisions, and the grounds of the apprisings after the marriage were a part) the granting of the wadsets was but rational, and which Gilbert might do, Niddry not having been infeft upon the disposition. It appears, again, that Gilbert was to have the benefit of the eases, which was not fit to have been put in the backbond, lest the creditors had discovered it; nor doth the offering to depart from the bargain, upon payment of his just debts, infer that the right was redeemable, but only that Niddry found it to be no good bargain; and the disposition 1661 does expressly ratify the disposition 1650.

THE LORDS adhered to their former interlocutor, and found the disposition was neither redeemable nor in trust; and now Niddry did not insist upon the apprisings, against which there were several objections.

Niddry being obliged, by the contract of marriage, to employ 10,000 merks in fee to the heirs of the marriage, and to put it to the fore for their use; and it being expressly provided, that any posterior provisions he should make should not be imputed in satisfaction of the said 10,000 merks, notwithstanding any clause in the posterior deed to the contrary; he granted a L. 20,000 bond of provision to James the only heir and child of the second marriage, with an express quality, That he, James, should discharge all obligements or provisions he could claim by virtue of his mother's contract of marriage, otherwise he should have no right to the L. 20,000. James raised a declarator of his right to the said sum, by virtue of the clause in the contract, notwithstanding of the contrary quality in the bond.

Answered; The provision being exorbitant and unusual, the clause in the contract ought to be strictly interpreted, viz. That posterior lesser provisions should not prejudge the right to the 10,000 merks, but that the obligement to employ that sum might be implemented *specifice*; otherwise, if the father had given the son 100,000 merks in implement, he might claim also the 10,000 merks, which were absurd; and therefore the pursuer cannot have right to the L. 20,000 bond, unless he fulfil the condition of it.

THE LORDS found, That James could not have right both to the 10,000 merks and the L. 20,000 bond; and found, that the 10,000 merks was to bear annualrent from February 1683.

Harcarse, (CONTRACTS of MARRIAGE.) *No* 352. *p.* 86.

*** Fountainhall reports this case:

1683. *February* 6.—JAMES WAUCHOPE against Alexander Wauchope of Niddry, his elder brother, claiming from him the right of a comprising of the lands and barony of Lochtoure, acquired by Sir John Wauchope, his father, during the standing of the marriage with his mother, and, consequently, belonging to him, by virtue of a clause of conquest in his mother's contract, conceived in favour of him, as heir of that marriage: "The LORDS found James, the pursuer, had no right to it; because it was proved there was a blank disposition taken

to it by Sir John, before his second marriage with this pursuer's mother, and his acquiring and renewing of posterior rights to it *stante matrimonio* with the second wife, were only accessories to the first right, and *ex præsumpta et conjecturata defuncti voluntate*, it cannot be presumed, or once dreamed, that the father designed to put the children of the second marriage by the ears together." Yet certainly the money with which the father conquest and bought in these rights *stante matrimonio* would have been conquest, and so have belonged to James; but the clause of conquest bore only lands and tenements, and not sums of money. But he might have purchased other lands with it, and these would have belonged to James, the heir of the second marriage. No 84.

1683. *February* 20.—THE case between Niddry and his Brother, mentioned 6th current, being heard in presence; "The LORDS adhered to their former interlocutor, and repelled James's defences." Though it was proved, that the first disposition old Niddry had to that apprising before the marriage was only a trust, and not for his own behoof; because, Sir Alexander Wauchope offered to prove that his father had the money before his second marriage, with which he bought in the subsequent rights *stante matrimonio*; and, therefore, James ought to make his election, *&c.* seeing his father had declared the last to be in implement of the first.

Fountainhall, v. 1. *p.* 216. & 219.

*** Sir P. Home also reports this case:

1683. *February.*—BY contract of marriage betwixt John Wauchope of Niddry and the Lady Lochtoure, relict of the deceased Kerr of Lochtoure, Niddry being obliged to employ 10,000 merks, and to take the security thereof in favour of himself and the Lady in liferent, and the bairns of the marriage in fee; and whatever lands and tenements he should happen to conquest and acquire during the marriage, he should provide the same in favour of the heirs-male of the marriage; and if he should provide the same in favour of the heirs-male of the marriage, or if he should provide the same to any other than the heirs of the marriage, in that case, his heirs of line should be obliged to denude themselves in favour of the bairns of the marriage: And James Wauchope, the son of the second marriage, having pursued Andrew Wauchope of Niddry, the heir of line, and eldest son of the first marriage, for payment of the 10,000 merks, and annualrents thereof, since the marriage, and for denuding himself in his favour of the right of the lands of Lochtoure, acquired by his father during the marriage; and Niddry having raised a reduction of the contract of marriage, containing a declarator upon these grounds, which he repeated by way of defence, that his father having a bond of provision in favour of the said James Wauchope for L. 20,000, in satisfaction of the contract of marriage, and that by acceptation thereof he should grant a discharge, he cannot receive both the L. 20,000 and L. 10,000, provided by the contract of marriage, but he must take his election;

No. 84. and if the bond of L. 20,000 was discharged by the contract of marriage, conform to the express provision in the bond, or if he take himself to the 10,000 merks provided by the contract, it cannot bear annualrent from the father's decease, which is the term of payment of the sum, and Niddry cannot be obliged to denude himself of the right of the lands of Lochtoure, nor can the same fall under that clause of conquest, as it is conceived, containing only a destination of succession, whereby the heir of conquest might have succeeded to his father, if he had not been denuded; but the father remaining fiar of the conquest, that clause did not hinder him to sell and dispose of the lands to any person he pleased, and have done all rational acts and deeds, for the welfare and standing of his family, notwithstanding of any destination in favour of the heirs-male of the marriage, as is clear by many decisions, and, particularly, in the case of Andrew Bruce against Bailie Anderson, No 46. p. 12890. and the case of the first and second Children of Bailie Murray, No 81. p. 12944. and in the case of the Children of the deceased Sir Thomas Nicolson, (see APPENDIX), where there was not only the father's obligement and tailzie in favour of the children of the second marriage, failing the heirs of the first marriage, but an express clause, that it should not be in the power of the heir male to do any deed to evacuate the same; yet the LORDS found the heir-male, as fiar, might do profitable and rational acts, for the profit and advantage of his family; and the father, before he entered into the second marriage, having not only a right of wadset in the lands, upon which he was publicly infeft, but also had right, by disposition, in two expired comprisings, led at the instance of —— Pringle, in the year 1636, and another at the instance of Rame, in the year 1637, and acquired an absolute and irredeemable disposition from Gilbert Kerr, heritor, in the year 1657; and albeit, after the second marriage, he found it unnecessary, for his security, to buy in other partial rights and comprisings, for strengthening and fortifying of his former right, these partial rights, that thereafter he had acquired, cannot be reputed conquest, he having an absolute right to the lands before, but must be drawn back *ad suam causam*; so that, unless the lands had been fully and absolutely conquest during the marriage, they cannot be understood to fall under the clause of conquest, especially the clause being as to all lands and tenements, which cannot comprehend sums of money; as also, the father, by the articles of his eldest son's contract of marriage, being expressly obliged to assign to him all sums of money belonging to him, reserving only to himself 50,000 merks, for provision to his other children; and the sums then belonging to the father being far greater than any sums he thereafter gave out for acquiring these partial rights of the lands of Lochtoure; and so the father being debtor to the son, by the foresaid obligement, albeit the lands of Lochtoure had been conquest during the second marriage, yet the father might lawfully have disponed these lands to his eldest son, for implement of the articles of his contract of marriage, which was an antecedent onerous cause; it being a principle in law, that, albeit a father cannot do any unnecessary gratuitous deeds, to ex-

haust the conquest, in prejudice of the heirs of the second marriage, yet he being fiar, may dispone thereupon, either in favour of the son of the first marriage, or of strangers, for an onerous cause. *Answered*, That the said James Wauchope had not only right to the 20,000 merks, contained in the bond of provision, but also to the 10,000 merks, provided by the contract of marriage; because, it is declared by the contract, that the 20,000 merks is only to be a help to the bairns' portion natural, and that in case it should happen him to provide the bairns, by virtue of any other securities, to any other provisions, then it is declared, that the said provision to be made should be noways prejudicial, or defaulk from the 10,000 merks, and should be so estimated and holden, albeit the securities to be made should not make mention of the same, and although there should be any clause contained therein to the contrary; and the 10,000 merks must bear annualrent, not only from the father's decease, but from the date of the marriage; because, by the contract, the father is only obliged to employ the 10,000 merks upon security, for payment of annualrent, and take the rights thereof in favour of himself, and the bairns of the marriage; but also, by a posterior clause, he is obliged that it shall be put to the fore, for the use and profit of the bairns; which imports, that not only the principal sum, but the annualrents of the 10,000 merks, should be made forthcoming to them, from the date of the marriage; especially seeing the provision was so mean and inconsiderable; and, as to the lands of Lochtoure, the rights acquired by the father during the second marriage must fall under the conquest; for, albeit the father was fiar of these rights, and might have sold and disposed thereupon in favour of strangers, yet he could make no voluntary gratuitous right thereof in favour of his eldest son, to the prejudice of the children of the second marriage; for if that were sustained, then it were easy for fathers to evacuate all provisions of contracts of marriages, in prejudice of the children of the second marriage; and the practicks alleged do not meet this case, because, in these cases, either the dispositions were made in favour of strangers, or for some just and rational provision in favour of his other children, who, by the law of nature, he was obliged to provide; and the father had no heritable or irredeemable right to the lands before the second marriage; for, as to the wadset of 25,000 merks, there were 14,000 merks of it paid, as appears by the father's discharges; and as to the 11,000 remaining, the same was likewise paid by the price of the lands of Cherrytree, which were a part of the barony of Lochtoure, and which Niddry, the father, disponed to William Kerr of Cherrytrees; and albeit that sum had been resting, yet it being only but the remainder of a wadset, it did not give the father any heritable and irredeemable right to the lands; and, as to the disposition granted in the year 1651, by Gilbert Kerr, the apparent heir, it was only on trust, to bring Lochtoure's creditors to a more reasonable composition, which is evinced from these particulars, that, after the disposition, Gilbert Kerr grants wadsets and infeftments to his brothers and sisters, for upwards of 20,000 merks, upon which they obtained decreets of poinding of the ground against Gilbert and the

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No 84. tenants, and did actually poind the tenants; whereas, if the disposition had not been upon trust, Lochtoure would not have granted these rights, neither would Niddry have suffered his tenants to be poinded; and, notwithstanding of that disposition, Gilbert Kerr continued in poinding of the lands, and uplifted the rents, and paid the public burdens, and Ministers' stipends, till the year 1661, that he granted a new disposition; and the Lady being infeft by her first husband in an annualrent out of the lands, she and Niddry, her second husband, pursued a poinding of the ground against the tenants, which he could not have done, if the lands had been his own, by virtue of that disposition, and by several letters, written by Gilbert Kerr to Niddry, after that disposition, it appears they were only but in terms of agreement concerning these lands, and it is evident that the disposition has been drawn blank in the name, and bears to have been granted for sums of money; and thereafter it is added upon the margin (for divers other weighty reasons and considerations) which has been added when Niddry's name has been filled up, which evinces that there has not been an equivalent price paid for the lands, but that the same has been in trust, and that the onerous cause and weighty considerations have been that Niddry might transact with Gilbert's creditors, and Niddry was never infeft nor did take possession by virtue of the disposition, which he would certainly have done if it had not been upon trust; and the trust is farther made appears by a letter written by Niddry in the year 1653, which bears that the right that Gilbert had made him would make him odious to Gilbert's creditors, and that he would deal with the creditors, and call the debt rather more than less, and that if they will grant him an ease he shall get them possession of as much lands as will pay the annualrents of the sum agreed upon, and that he was willing to give a back-bond, that he being satisfied of the just sums he shall repone him, but it was thought that the back-bond would do Gilbert prejudice at that time, but when ever Gilbert required a back-bond it should be granted, and writes that he had sent warnings to the tenants, who desire that it may be done privately, that the creditors should not be suspicious that it was to Gilbert's behoof, and desires that the tenants may subscribe tacks in his name to put him in possession, but that Gilbert may keep the tacks, which clearly imports a trust; and by the settlement in the year 1657, betwixt James Forsyth and Niddry, who is a creditor upon the estate, albeit the contract betwixt them narrates all the comprisings and other rights whereunto Niddry had acquired right, yet it does not mention that disposition, nor does Niddry found upon the process of competition, and he did take a new disposition in the year 1661, which he needed not to have done if the former had not been in trust, upon which immediately he past infeftment, and entered to the possession; and as to the two comprisings whereunto the father had acquired right, they were satisfied and paid by Lochtoure, the Lady's first husband, and the comprisings and assignations thereto were lying in his charter-chest at his decease, and when Niddry acquired the lands, these comprisings and blank assignations were delivered up to him with

with the rest of the writs and evidents, and it can be made appear that Niddry's name was filled up in the assignations long after his decease, and after the intenting of this process, and that these comprisings were satisfied and paid by Lochtoure, as evinced from these grounds, that after the date of the comprisings and assignations, Niddry takes a wadset of a part of the lands from Lochtoure for 25,000 merks, which he would not have done if the lands had been his own by virtue of these apprisings, or if these apprisings belonged to himself, he would have caused insert the ordinary caution in the wadset, reserving his rights of apprising unprejuged, as likewise he would have inserted that same in the dispositions 1651 and 1661; and if he had right to these apprisings he needed not to have taken the disposition in the year 1651, to have induced the creditors to give leases, because he might have excluded them by the apprisings and so forced them to compositions; and Gilbert after his father's decease having contracted great debts, for which there were apprisings led, if Niddry had then right to these apprisings, he would have passed infeftments to have excluded these creditors; and when he acquired rights to the lands from Gilbert, he passes the infeftment upon the disposition and his right to the other apprisings, but not upon these two apprisings, which he would have done if the rights of these apprisings, had been made to him, they being first expired apprisings, especially seeing by the dispositions and other apprisings he had not only right to the reversion; and when James Forsyth was pursuing for a debt due to him, Niddry made all the opposition he could to defend himself and tenants with the rights that then stood in his person; and if they had right to these two apprisings, he would have founded upon them, because they would have excluded Forsyth's right; and when he transacted with Forsyth, and gave him security for 10,000 merks out of the lands, in that security he mentions all the rights that then stood in his person, but makes no mention at all of these two apprisings; as also in the disposition made by him to William Ker of the lands of Cherrytrees, albeit his rights were then deduced, yet there is no mention of these two apprisings; whereas if these two apprisings had belonged to Niddry, he would have narrated these in the right, and disponed the same in so far as concerned the lands of Cherrytrees, as well as the other rights that then stood in his person; as also when the Lady Boghall pursued the tenants for mails and duties upon her right, for affecting the lands with 12,000 merks, albeit Niddry made all the opposition he could, yet he was necessitated to pay the 12,000 merks, which he would not have done if he had right to these two apprisings; and inhibitions upon the grounds of the debts were long prior to the Lady Boghall's right; and Mr William Riddel, then Niddry's advocate, being examined upon oath concerning these apprisings, he declared he found them amongst Lochtoure's paper's, and having questioned Niddry why he did not produce them in the Lady Boghall's process? Niddry *answered*, He knew not he had them; and these apprisings and assignations are prescribed, there being no documents nor diligence thereupon, for the space of 40 years, and Niddry cannot ascribe

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No 84. his possession to these apprisings, not only because they are retired rights by Lochtoure, but because his name was not filled up in the assignations till after his decease; as also Pringle's apprising is not recorded nor allowed, and the assignation made by Pringle is of a comprising led at his instance the year 1633, whereas this comprising is in the year 1636, so that the comprising produced is not the comprising assigned; and the said apprising being upon a bond of 20,000 merks in the assignation, there is excepted out of the warrandice 1400 merks that has been paid of the sum conform to two discharges, and it is probable that the remainder has been paid when the assignation was granted of Rennie's comprising, which is not produced, but there is a bond granted by Lochtoure to Rennie for L. 454 which it seems has been granted for what remained of the sum unsatisfied when Rennie granted an assignation to that apprising; and the grounds ought to be sustained at least to transfer the burden of the probation upon the eldest son, that these apprisings and assignations thereto were delivered to his father before he entered into the second marriage; and albeit the clause of conquest mentions only lands and tenements, yet that might comprehend all sums secured upon these lands by an heritable right, especially seeing the father, by a letter to the Lady before the marriage, desired her that he may be entrusted with the drawing of the contract, and obliged him that it should be in the same terms of her former contract; with Lochtoure; and by the former contract it is expressly provided, that all rights and securities whatsomever of lands or money, should belong to the heirs of the marriage, so that letter ought to be as effectual as if the clause of conquest in Lochtoure's contract of marriage had been inserted in Niddery's contract; and if there were any doubtfulness in that case, it ought to be interpreted against Niddry, because he was intrusted with the drawing of the contract of marriage, according to that principle in law, that, Interpretatio est favenda contra eum qui potuit apertius dicere; and by another letter, written by Niddry to his Lady when he was at London, about the changing of the holding both of Niddry and Lochtoure, he writes to the said James his elder brother of the second marriage, who was then alive, that he was to settle the lands of Lochtoure upon him and his brother, and desired to keep it secret, that his eldest son might not know of it; and albeit the father was obliged in his contract of marriage to assign him all sums of money that belonged to the father, who is fiar of the sums, conform to the said James Wauchope's own principal bonds, to employ the sums upon lands, and consequently fell under the clause of conquest in the second contract of marriage; as, also, the contract bears, that the father was only obliged to assign his eldest son to all debts which were due to him, after payment of the debts due by him, with the 50,000 merks, did more than exhaust all the debts due to him, so that clause, in the eldest son's contract of marriage, could not prejudge the clause of conquest, in the second contract, in favours of the children of the second marriage. *Replied*, That the provision for the 10,000 merks does only import that any provision that the father should thereafter give to

the children should not be prejudicial to the sum provided by the contract of marriage, so that it is acknowledged, that if the father had granted a posterior provision, in satisfaction of the bairns' part or portion natural, or some such other general clause, in that case it could not have been ascribed to have been in satisfaction of the sum contained in the contract; but where the posterior provision bears expressly to be in satisfaction, and that the defender, by the acceptation, should grant a discharge thereof, in that case it must be ascribed in satisfaction of the provision in the contract, otherwise it had been impossible for the father to have fulfilled that provision in the contract, albeit he had granted a thousand provisions, expressly in satisfaction thereof, which were absurd; and the 10,000 merks cannot bear annualrent but from the time of the father's decease, not only because it does not bear annualrent by contract, and, if it had, it would have belonged to the father during his lifetime, the security being to be taken in favour of himself and the bairns of the marriage; and the clause of conquest, because, in the terms foresaid, the father was certainly fiar, and the said James Wauchope cannot have right to any benefit of that clause being served heir to his father, who was fiar, and therefore the father might dispone thereupon, not only for just and onerous causes, but also exercise all just and rational acts, in relation to the conquest; and it was just and rational to provide the same to his eldest son, especially he having provided the said James Wauchope to L. 20,000, which was a sufficient provision for a son of the second marriage; and the father having absolute and irredeemable rights in his person, before the second marriage, any partial rights that he had thereafter acquired, being but accessory, follow the nature of the former rights, and so cannot be understood to be conquest; and albeit there was a part of the sums of the wadset paid by Lochtoure, and retired, and that the assignations thereto were in Lochtoure's charter-chest, is only probable by Niddry's oath, or by writ, these writs being now in his possession; and albeit the assignations had been blank, Niddry might lawfully fill them up, after his father's decease, and all the grounds alleged for making it appear that the disposition granted by Lochtoure in the year 1651 was in trust, being but slender presumptions, cannot take away Niddry's right, and there is nothing can be gathered from the letter written by old Niddry to Gilbert Kerr, but only that Niddry was to transact with the creditors, that there might be some superplus gotten for the said Gilbert's subsistence and livelihood; and that Niddry was to have the lands, and that tack was to be let by him, and warnings used in his name; and albeit the letter bears that he was to grant a back-bond, yet the back-bond did not make the disposition in trust, but only for securing of Gilbert Kerr of any ease and compositions that could be gotten from the creditors for his livelihood; and if there had been a trust designed by the back-bond, then it needed not to be concealed from the creditors, because it would have been for their advantage; so that it is evident that the design of granting of a back-bond was only for securing of Gilbert in the rents of the lands, which was thought fit to be concealed from the creditors

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No 84. lest they should have affected the same for their debts; and there was never any back-bond granted; and that is no presumption of trust, that Niddry paid the infeftment of annualrent granted by Gilbert Kerr to his brothers and sisters, it being agreed betwixt the parties, and it being just and rational that the childrens' provision should be paid; and there being a competition of rights amongst the creditors, it was fit that Niddry should have made use of his lady's infeftment of annualrent as a ground of preference; and it imports not that Niddry did not produce these comprisings in these actions, at the instance of the Lady Boghall to Forsyth, it being ordinary for parties to make partial productions; and it appears, by Mr William Riddel's oath, that he does not remember that Niddry had these apprisings; and these rights are not prescribed, seeing Niddry was in possession of the lands, which are the subject of the apprisings; and these rights being found in his possession, they must be understood to have been delivered to him, of the date of the assignation; and no man is obliged to prove the delivery of writs that are in his possession; and albeit Niddry did cause write the contract of marriage, yet it being subscribed by the lady, and she having accepted and subscribed the same, it cannot be taken in any other terms then it stands; and the father being obliged to assign all debts due to him, to his eldest son, by his contract of marriage, and he having purchased the right of these lands of Lochtoure, with these sums, it was just and reasonable that he should provide the lands to the eldest son; and it does not alter the case, albeit the father had been in debt at that time, because the eldest son, as general heir, is liable for the debts; and albeit the rights of the lands of Lochtoure could be looked upon as conquest, as they cannot, yet the father might lawfully have provided the same to his eldest son, for an antecedent onerous cause.

THE LORDS sustained the defence, that the Laird of Niddry's father had either right, by expired apprisings, or an irredeemable right before the marriage, and found that any rights, acquired thereafter, during the marriage, albeit preferable rights, yet they did accresce to the former rights, and were a completing of the conquest, formerly begun, before the marriage, and therefore did not fall under the clause of conquest contained in the contract of marriage with this second wife; and that in respect the father had belonging to him, sums of money, and other estates of a great value prior to the marriage, of which any sums he debursed, after the marriage, in acquiring right to the lands, were the true product, and must be ascribed to the sums of money, and other estates, which belonged to him before the marriage.

Sir P. Home, MS. v. 1. No 419.

*** P. Falconer's report of this case is No 16. p. 3062. *voce* CONQUEST.