

1770. June 15.

GEORGE CAMPBELL, Eldest Son of the deceased John Campbell of Ottar,
against JOHN CAMPBELL, now of Ottar.

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Interpretation
of clauses in a
contract of
marriage,
containing a
special provi-
sion, and pro-
viding the
conquest to
the heirs of
the marriage.

By marriage-contract, in 1701, between Mr John Campbell, Minister of Kivivoden, and Margaret Campbell, daughter of Sir Colin Campbell of Ardkinglas, the said John Campbell ' obliged himself, his heirs, executors, and successors, ' to ware, employ, and bestow, all and hail the sum of 8300 merks, including ' the tocher, upon land, annualrent, or any other sufficient security, within the ' shire of Argyle; and to take the rights and securities thereof to himself and ' the said Margaret Campbell, and longest liver of them two, in liferent, for ' her liferent use allenary, in case she should survive him, and to the heirs to ' be procreated of the said marriage, in fee; whom failing, to the said Mr John ' Campbell, his heirs and assignees whatsoever.'

After this followed a clause of conquest to the wife, viz. a liferent of the third of heritable conquest, in case of children, and a half if none.

And, ' Moreover, it is hereby provided and declared, likeas, the said Mr ' John Campbell binds and obliges him, and his foresaids, that the hail conquest ' to be acquired by them, during their lifetime together, shall be provided to ' the heirs to be procreated betwixt them, with the burden of the said Marg- ' ret Campbell her liferent of the half and third of moveables, as said is; which ' failing, to the said Mr John Campbell, his own nearest heirs and assignees ' whatsoever.'

John Campbell, in 1704, by the death of his brother Alexander, succeeded to the estate of Ottar; and, in the years 1705 and 1708, he purchased from M'Alister of Tarbert, and Campbell of Kildalven, certain lands; the rights of which, as well as of the family estate of Ottar, he took to himself in liferent, and to his eldest son, the pursuer, in fee; reserving, however, power to alter.

In 1716, the marriage dissolved, by the death of Margaret Campbell, leaving the pursuer, the only son, and Marion, afterwards married to Campbell of South-hall, the only daughter of the marriage. John Campbell entered into a second marriage; upon the children of which he, in June 1741, executed a settlement of his whole estate, heritable and moveable, in form of an entail, totally disinheriting the pursuer, the son of the first marriage, and not even calling him among the most remote substitutes.

The pursuer brought an action against his brother consanguinean, as general disponee of his father; concluding for reduction of the settlement 1741, so far as concerned the lands conquest during the first marriage; that he should also account for the produce of the personal estate at the dissolution of the said marriage, and should make payment of the special provision of 8300 merks, settled on him by the contract of marriage.

The cause having been reported on informations,
The pursuer *pleaded* ;

By the express terms of the contract, the 8300 merks, provided to the heirs of the marriage, was heritable *destinatione*, and was appointed to be laid out upon heritable security only. It belonged, therefore, to the pursuer, as the heir of the marriage ; and as the father's power of distribution was excluded, it could not, either in whole or in part, be disposed of to his sister Marion ; the application that, according to the defender's statement, had been made of that sum. If Ottar had been entirely destitute of other funds, it might have been maintained, that, in order to give something to his daughter, the heir's provision should be diminished. But the case was very different ; Ottar had great sufficiency of funds to provide her *aliunde* ; so that, whatever he gave her could not, upon any ground of law, be imputed to diminish the provision stipulated to the heir of the marriage, but must be supposed to have been given out of his other funds.

The advances, at different times, made by Ottar to the pursuer, could not, as a discharge of this debt, be taken into account. These were merely alimentary ; and it was adverse to the principles of law, that such payments should be reared up *ex post facto* to discharge or diminish the provisions of a legal and solemn contract. The pursuer had not lived in family with his father ; he had, therefore, as he was entitled, a yearly allowance from him ; which was extremely small, and did not amount, for the space of twenty years, to more than L. 4000 Scots.

The allegation, that the lands acquired by Ottar had been purchased by money, to which he had succeeded, as heir to his brother Alexander, was not well founded : On the contrary, it was long after these purchases, and even after the first marriage was dissolved, that he had received payment of these funds. But although these lands had, *de facto*, been purchased by money the late Ottar had borrowed, the lands themselves would still be conquest, and, of course, be regulated according to the terms of the marriage-contract. It was unnecessary for the pursuer, *in hoc statu*, to inquire into the particular sums which his father had either succeeded to, or borrowed, during the subsistence, and left unpaid at the dissolution of the first marriage. It was not incumbent on him to do so ; he pointed out certain parcels of land acquired during the marriage ; these, as conquest, he was entitled to demand ; and whatever claims the defender, as heir-general of his father, might rear up, were still left entire.

As to the lands purchased from Tarbert, it was certain, that, prior to the 1705, the pursuer's father had only a debt or incumbrance over them. The disposition from Tarbert, in 1705, bore to be for 10,000 merks, as the full price and value of the lands. It did not now appear, whether the legal of the adjudication in Alexander's person had been expired or not ; the objections that might lie against the security were also uncertain ; for, as the adjudication was over the whole estate, and as Alexander had been for a considerable time in

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possession, it was to be presumed, that the legal was not expired, and that the right was, in a great measure, extinguished by intromissions. But whatever inferences might be drawn, and whatever title the defender might have to insist that this incumbrance, so far as unextinguished, should rest upon the lands for his benefit, it could not be controverted, that the lands themselves, as falling directly under the clause of conquest, belonged to the pursuer, the heir of the marriage.

The defender *pleaded*;

Where one, not possessed of a landed estate, provided a sum, such as that in dispute, to the heirs of the marriage, it was intended, according to the true construction of the settlement, as a provision for the whole issue of the marriage, subject to the father's power of distribution. The pursuer and his sister, in the present case, were heirs of provision in the sum of 8300 merks: If the father had not used his power of distribution, they would have shared it equally; but as he had used that power, and given 5000 merks to his daughter Marion, as her marriage portion, the sum provided was thereby so far exhausted, and the remainder had been actually advanced to the pursuer, at different times, for which, accordingly, he had granted bills and receipts.

The rights to the lands acquired from Tarbert and Kildalven had, it is true, been completed by the father during the subsistence of the marriage; but it was also true, that they had been purchased, not by funds gained by his own industry, but by funds to which he had succeeded, as heir to his brother Alexander. These could not, therefore, be considered as conquest; the rational definition of which, in a contract of marriage, was, such lands only as had been acquired by the industry and frugality of the parties; Bankton, B. 1. T. 1. § 12. 29th January 1678, Stewart *contra* Stewart, No 5. p. 3052.; July 1730, Mercer *contra* Mercer, No 9. p. 3054. If the defender's father had, during the marriage, succeeded to lands, had sold them, and lent out the money, it would have been a sufficient defence against the heir of the marriage claiming that money, that it had arisen from the price of lands which had devolved on the father by succession; and if that would have been a good answer, no reason can be assigned why it would not also have availed where the father had succeeded to a sum of money, which he had applied in the purchase of land. The lands also acquired from Tarbert had not, in fact, been purchased by the defender's father; they were in the possession of Captain Alexander Campbell before his death, in virtue of an expired adjudication, and, accordingly, devolved upon his brother John by succession. Though, in order, therefore, to prevent after disputes, Mr John had, in 1705, given Tarbert a sum of money for a disposition to these lands, this amounted to no more than a ratification of his former right, and could never have the effect of bestowing upon lands so acquired the character of conquest; 6th February 1683, Wauchope *contra* Niddy, No 84. p. 12948.

The defender insisted a good deal upon the pursuer's character and undutiful behaviour to his father ; which afforded a just reason for the steps he had taken, and the settlement he had made. The pursuer, on the other hand, denied that the charge was either relevant or proved ; but the Lords, at advising, paid no regard to these allegations, and decided the cause upon the other points stated.

It was *observed* upon the Bench, That, although the pursuer claimed the special provision of 8300 merks, as well as the conquest lands, yet he could not take both, except in so far as there should appear to be sufficiency of conquest to pay the special provision, over and above the lands. The 8300 merks was part of the money by which the subjects composing the conquest had been acquired ; of these it made a part ; out of them, accordingly, it was, in the first place, to be recovered ; and out of the defender's separate estate, only if these should fail.

The following judgment was pronounced, 15th June 1770 : " Find, That the pursuer, in virtue of his mother's contract of marriage, is entitled to the provision of 8300 merks, with interest from his father's death, to be paid out of the conquest of the marriage, in the first place ; or, if there is no conquest, out of the father's separate estate ; and that neither the 5000 merks of tocher, paid to the pursuer's sister, nor the sums given to himself by his father, during his life, are to be computed in extinction thereof : Find, That the pursuer is entitled to the lands of Barpostraig, Achindachy, and Achaliechn, which were acquired by his father, during his first marriage, from M'Alister of Tarbert ; and also to the lands of Darienakierichmore, acquired by him from Campbell of Kildalven ; but find, that he cannot take both the conquest lands and the special provision, unless so far as there shall appear to be sufficiency of conquest to pay the special provision, over and above the lands ; and remit to the Lord Ordinary to hear parties upon the extent of the conquest, the sums to which the father succeeded, during the marriage, and the debts due by him at the dissolution thereof ; and also upon any claim or incumbrance which the defender may have upon the lands separate from his father's purchases ; and also upon any other points in the cause."

Lord Ordinary, *Gardenston.*

For John Campbell, *Macqueen.*

R. H.

For George Campbell, *Ilay Campbell.*

Clerk, *Campbell.*

Fac. Col. No 32. p. 87.