

KATHERINE SINCLAIR and Trustee; and HEN- RIETTA JANET, EMILIA and MARGARET SIN- CLAIR, infants, and JAMES SINCLAIR, their Administrator at Law, - - -	}	Appellants;	SINCLAIRS, &c. v. SINCLAIR, &c.	1770.
DAVID THRIEPLAND SINCLAIR, Esq., an infant, and STEWART THRIEPLAND, his Administra- tor at Law, - - -	}	Respondents		

House of Lords, 13th February 1770.

PROVISION—DISCHARGE BY ONE CHILD OF SHARE OF CON-  
 QUEST—HOW IT OPERATES AS TO THE OTHER CHILDREN.—  
 The bonds of provision fell under the father’s powers of distri-  
 bution, and therefore effectual to bar the children from further  
 claim, if these were accepted by them, but not otherwise: and  
 that Katherine was not bound to accept of her bond of provision.

In 1714 Mr. David Sinclair of Southdun married Lady Janet Sinclair, and executed in 1716 a deed of settlement, settling Southdun “ upon Lady Janet for life, and the heirs “ male or female of the marriage in fee.” By this marriage there was a son and three daughters, who all died without issue except Janet, who left a son, the respondent, David Thriepland Sinclair.

After Lady Janet’s decease, David Sinclair married a second time, and entered into marriage articles, by which he “ became bound and obliged to settle and secure the sum of 10,000 merks Scots, (£555. 11s. 1¼d. Sterling), and whatever lands, heritages, sums of money, or others whatsoever he should happen to conquest or acquire during the marriage, the one half to the said Marjory Dunbar in liferent, and the whole to the children of the marriage in fee; to be divided amongst them by the said David Sinclair.” Of this marriage there were two daughters, Marjory, who died leaving issue, and the appellant Katherine.

During this second marriage, David Sinclair acquired, by purchases and mortgages, considerable estates in land and houses.

Marjory, his eldest daughter, married John Dunbar, and upon his death without issue, she married James Sinclair of Harpsdale, with whom she had four children, who appear as appellants in this action, as representing their mother.

David Sinclair, the father, when his daughter Marjory married John Dunbar, became a party to their contract of 1748.

1770. marriage, by which he, on his part, became bound to pay  
 Sir Patrick Dunbar, the bridegroom's father, in name of to-  
 SINCLAIRS, &C. cher or portion, and as her share of the conquest, the sum  
 v. of 10,000 merks (£555. 11s. 1¼d. Sterling) at the term  
 SINCLAIR, &C. therein limited. This deed was signed by the whole three  
 parties.

1756. On his wife's death he executed a bond of provision in  
 favour of Katherine Sinclair, his other daughter, obliging  
 himself to pay her and her executors or assigns £1000  
 Sterling, at the first term of Whitsunday or Martinmas after  
 his decease, " declaring the same to be accepted of by the  
 " said Katherine Sinclair in consideration and *full satisfac-*  
 " *tion to her of her share* of the said provisions granted by  
 " him in his contract of marriage in favour of the daughters  
 " of that marriage, failing heirs *male* ; and in consideration  
 " and full satisfaction to her of her share of the provisions of  
 " conquest, or lands, heritages and others whatsoever, which  
 " should be acquired during the marriage, granted by him  
 " in favour of the daughters of the said marriage, failing  
 " heirs male ; and in consideration and full satisfaction of  
 " the said Katherine, her portion natural, bairns part of  
 " gear, share of moveables, legitim, or other pretensions  
 " whatsoever."

1757. In like manner, he executed a bond of provision in favour  
 of his daughter Marjory of 8000 merks (£444. Sterling) pay-  
 able at the first term after his death, which sum of 8000  
 merks, together with the 10,000 merks formerly paid to her,  
 was to be accepted of by her in full satisfaction of all claim  
 in the marriage contract, precisely in the same terms as the  
 above clause. This bond was never delivered to, nor accept-  
 ed by Marjory.

David Sinclair, after having married a third time, died in  
 1760, leaving a daughter of this marriage, with a provision  
 to her, under the marriage articles, of £1000.

Mutual actions were brought by David Thriepland Sin-  
 clair, the only descendant of the first marriage, against  
 Katherine Sinclair, and the children of her deceased sister  
 Marjory, and by them against the former ; which actions be-  
 ing conjoined, the questions involved and raised were, 1st,  
 Whether the oldest daughter Marjory had, by her marriage  
 contract in 1748, effectually released all claim of conquest  
 under her father and mother's marriage articles ; 2dly,  
 Whether Katherine has also discharged her claim to con-  
 quest by the bond of provision in her favour ; 3dly, Suppos-

ing Marjory barred, and Katherine not, whether Marjory's exclusion entitled Katherine to the whole provision contained in the marriage contract of conquest, or whether the benefit of Marjory's release and satisfaction operated in favour of the father by way of discharge or assignment of her share.

After various procedure, the Lord Ordinary, of this date, pronounced the following interlocutor:—“ Having considered the debate, with the several writings therein referred to, finds that Mrs. Marjory and Katherine Sinclair, the pursuers' cedents, having been the only children of the marriage between David Sinclair of Southdun and Marjory Dunbar, were entitled to *full implement* of the provisions to the children of that marriage, in terms of the marriage articles between their parents, viz. 10,000 merks, and *the whole that should be conquest* during the marriage, the conquest being declared to be what Southdun (*i. e.* David Sinclair) should leave at the dissolution of it, over and above the land estate he was then possessed of, and after payment of all debts, as was then owing, or should be owing at the dissolution of the marriage; but finds that neither of these daughters was entitled to the foresaid provision, in respect the father, by the conception of the contract of marriage, *had the power of division*; and, therefore, finds that, though in his daughter Marjory's contract of marriage, he settled 10,000 merks upon her as her share of the conquest, which was effectual to cut out Marjory and her heirs, who behoved to rest satisfied with the division he made, *he still continued bound* to make good the provisions to the other heir of the marriage, Katherine, so far as Marjory's share had not exhausted them.” On representation, the Lord Ordinary adhered “ to the former interlocutor, so far as it finds the sums advanced to Marjory do not preclude Katherine from claiming *effectual implement* of the obligation for conquest, in so far as not implemented: And farther, having considered the condescendence for the defenders (respondents) and Katherine Sinclair's answers; and more particularly having considered that it is an agreed fact that Katherine Sinclair, at the time of the alleged transaction, was living in family with her father; that there is no deed under her hand renouncing her claim on her mother's contract of marriage; that it is not alleged that she, after her father's death, ever made any claim upon this bond,

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1770. —“ or even in her father’s life made any claim upon it ; finds  
 “ that she is not bound to accept of that bond ; and that  
 SINCLAIRS, &c. “ her claim, and the pursuers, in her right, to the conquest,  
 v. “ in terms of her father and mother’s contract, remains ef-  
 SINCLAIR, &c. “ fectual.” The respondents preferred a reclaiming peti-  
 tion to the whole Court, who pronounced this interlocutor :  
 Dec. 4, 1767. —“ Finds Katherine’s acceptance of the bond of provision,  
 “ granted to her by Southdun, *not instructed*; and that she  
 “ is not bound to accept of said bond ; neither is she obliged  
 “ to hold the same in satisfaction of her claim of conquest :  
 “ and in so far adhere to the Lord Ordinary’s interlocutor  
 “ reclaimed against, and refuse the desire of this petition.  
 “ But before answer, as to the other points in this petition,  
 “ viz. whether Marjory’s renunciation of her share of the  
 “ conquest must operate a discharge of the one half, and  
 “ must restrict Katherine’s share to the other half, appoints  
 “ parties to give in memorials thereon *hinc inde*.” The first  
 part of this interlocutor the respondents acquiesced in as  
 to Katherine.

In the memorials ordered on the other point, it was con-  
 tended for the respondents, David Thriepland Sinclair, &c.  
 that, according to the law of Scotland, marriage-contract pro-  
 visions, containing a clause of conquest, made every child of  
 that marriage a creditor of the father for an equal share there-  
 of, subject, however, to the father’s power of distribution.  
 That in all cases of debt, the discharge of the debt was a  
 discharge of the debtor ; and that this rule must equally  
 hold in debts arising by provisions of conquest from the fa-  
 ther to every child of the marriage, and consequently Mar-  
 jory, having discharged her right to the residue of the con-  
 quest, the benefit thence arising accrued to the father to the  
 extent of one half ; the other half going to Katherine.

For Katherine, it was contended that she was entitled to  
 the whole, in virtue of the marriage-contract—that the bene-  
 fit of the renunciation of her sister’s share accrued to her,  
 and not to the father ;—and that the rule that the discharge  
 of the debt is a discharge of the debtor, was not applicable  
 to provisions by conquest.

The Court, after much difference of opinion, pronounced  
 July 26, 1768. this interlocutor :—“ Find that the words Marjory Sinclair’s  
 “ contract of marriage in 1748, import a renunciation and  
 “ discharge of the half of the conquest provided to her by  
 “ her father’s contract of marriage in 1722, and consequent-  
 “ ly must restrict her sister Katherine’s share of said con-

“ quest to the other half ; and, therefore, prefers the heirs  
 “ of line of Southdun to that share of the conquest now in  
 “ question, which would have fallen to Marjory, if she had  
 “ not been excluded by her contract of marriage, and de-  
 “.cern.”

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Against these interlocutors the present appeal was brought to the House of Lords by Katherine, in so far as her claim was restricted to the half ; and by Marjory’s children, in so far as it was held that their mother’s marriage contract imported a discharge of her claim to conquest. The respondent also appealed, in so far as the above interlocutors found that it was not established that Katherine had accepted her bond of provision.

*Pleaded for the Appellants.*—That there was no ground whatever for maintaining that Katherine had accepted her bond of provision made by her father ; or that she was bound in law to accept in satisfaction of the provisions in her father and mother’s marriage contract. But this point was foreclosed in consequence of the respondent acquiescing in the unanimous judgment of the Court, and the appeal against it thirteen months after it was pronounced, was now incompetent.

Further, marriage contract provisions do not confer a debt on the children favoured for particular shares, but to the whole of the children, among whom it must be made good. The power of division in the father is merely a right of appointing the shares in which it is to be distributed. This being the nature of marriage provisions, it followed that the WHOLE that has been destined to the children must be good, and go to them, whether there be less or more, and whether in equal or unequal shares ; and the father cannot, by contract, composition, or transaction with one, entitle himself to retain any part. The father is but a trustee for the whole children, and so any bargain cannot operate in *his favour*, but only to the beneficiaries under the trust.

Marjory’s marriage contract, neither by the words or intent, can bar from her share of the conquest, because there is nothing in that deed, sufficient to exclude it, and a discharge ought not to be raised up against her by mere implication.

*Pleaded for the Respondents.*—In conquest, it is conceded, that the father has the power of division among his children as he thinks proper, at common law, unless he has restrained himself by deed. He may give more to one, and less to an-

1770. other. If, therefore, no distribution be made, the children  
 \_\_\_\_\_ will take equally, but if a distribution be made in terms of a  
 SINCLAIRS, & C. power reserved, it must be exercised conform to that power.  
 v. Here a power was reserved to distribute, only with consent  
 SINCLAIR, & C. of his wife, and during her life, and this sufficiently restrain-  
 ed him so as only to possess a power to distribute in terms  
 of the deed. The bonds granted to the children were not  
 an exercise of that distribution, and, in point of fact, no dis-  
 tribution ever took place, and, consequently, the two daugh-  
 ters were entitled to an equal share of the conquest. But,  
 as the eldest daughter Majory thought proper to compound  
 with her father, and to accept of a special sum in full satis-  
 faction of all she could claim under the said provision of con-  
 quest, her claim was at an end, and her children have now  
 no claim, which is entirely excluded by their mother's ac-  
 ceptance in her marriage contract of a specific sum, in full  
 thereof; and the benefit of that transaction operated in fa-  
 vour of the father, whose discharge was equal to an assigna-  
 tion in his favour of her share.

Then, again, as to Katherine's share, it was clear, from the  
 nature of the whole transaction at the time, that her father,  
 David Sinclair, understood that the bond in her favour was  
 given and accepted of by her in full satisfaction of her share  
 to the conquest. She got the bond into her own hands, she  
 read it, and returned it to Sir Patrick Dunbar. He put it on  
 record, took extracts for her use; and this recording made  
 the deed a regular delivered deed. From all these acts,  
 done with her own knowledge and acquiescence, acceptance  
 of the bond was to be implied.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and  
 that the interlocutors therein complained of be af-  
 firmed.

For Appellants, *Al. Forrester, Tho. Lockhart.*

For Respondents, *Ja. Montgomery, Al. Wedderburn.*

*Note.*—Not reported in Court of Session Reports.