

SECT. XI.

Obligation to provide the conquest to the issue of a marriage. Import of this obligation with regard to the father.

1669. February 9. COWAN against YOUNG and REID.

No 77.

A small gratuitous bond to a child of the first marriage, was sustained against the children of the second, heirs of provision, tho' the grantee was otherwise provided.

ADAM YOUNG having married his daughter, by the first marriage, to Thomas Cowan, and given him 2000 merks of tocher in satisfaction of all she could claim, did, by a second contract of marriage, provide a thousand merks to the heirs of that marriage, and all his conquest during the marriage; after which contract he gave a bond of L. 400 to his daughter of the first marriage, bearing to be paid in parcels as he was able; and, after the bond, he disposed his goods and gear to his daughter of the second marriage. Now the daughter of the first marriage pursues the daughter of the second marriage to pay the bond, as she who intromitted with the defunct's goods. The defender *alleged*, Absolvitor, because this bond being granted without an onerous cause, after the provision of the second contract of marriage, providing all the goods conquest to the heirs of the second marriage, who were thereby their father's creditors, for fulfilling of that provision, no voluntary deed done without a cause onerous by their father, in favour of his daughter of a former marriage, could prejudice them, or burden the moveables acquired in that marriage. It was *answered*, *imo*, That the provision being to the heirs of the second marriage, they being heirs, could not quarrel, but were obliged to fulfil their father's obligation, whether for a cause onerous or not. *2do*, Such clauses of conquest are ever understood, as the conquest is at the acquirer's death, but do not hinder him any time of his life to dispose or gift at his pleasure; which, if he might do to any stranger, there is neither law or reason to exclude him to do it to his daughter; and albeit it might be interpreted fraud, if nothing were left to the daughters of the second marriage, yet where they have a special provision, and something also of the conquest, with this burden, their father could not be found thereby to defraud them, or to hinder him to use his liberty.

Which the LORDS found relevant, and sustained the bond.

Fol. Dic. v. 2. p. 284. Stair, v. 1. p. 601.

* * * Gosford reports this case :

ADAM YOUNG, by his first contract of marriage, being obliged to provide the heirs to 1000 merks, and his whole conquest during the marriage, there

being but one daughter procreated, he did give her in tocher 1000 merks to Thomas Cowan her husband; and thereafter, the said Adam having married a second wife, by that contract did provide the whole conquest to the heirs of that marriage, and having made some conquest of lands, did get a discharge from the daughter of the first marriage, and her husband, of all that they could ask by virtue of the first contract of marriage, and had given them a bond of 400 merks; whereupon they did pursue his relict and daughter of the second marriage for payment. It was *alleged* for the defenders, That the bond was given after the second contract of marriage, whereby the whole conquest was provided to the defenders; likewise for implement, the defunct, in his own time, had disposed the whole conquest, goods and gear, in their favour. So the debate was, If that provision of conquest did hinder the defunct to contract debts, or to grant this bond to the daughter of the first marriage, which was *alleged* to be a pure donation without any onerous cause. THE LORDS did find, That these provisions in favour of the heirs of a second marriage, did not prejudice a lawful creditor, nor the pursuer, albeit the bond had been a pure donation, seeing the conquest was only founded in favour of the heirs of the marriage; and albeit the defenders had gotten a disposition, yet it could never defend them, they being successors *titulo lucrativo*;—notwithstanding, it was *alleged*, That the contract in favour of the heirs ought to be interpreted bairns, as it had been found at several times by former decisions; and that they were creditors by the said provision of conquest before the granting of the said bond. THE LORDS declared they would make this decision a practise for the future, in all such cases, because they found, that such provisions of conquest were only effectual after the husband's decease, and did not hinder him either to contract debt or to affect the same during his lifetime.

No 77.

Gosford, MS. p. 39.

1673. July 15.

ROBSON *against* ROBSON.

It was found, That a provision of conquest to a wife did not bar the husband from making rational provisions to his children of a former marriage, provided a competency was left to the wife.

No 78.

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

* * * This case is No. 4. p. 3050, *voce* CONQUEST.1677. June 16. & 20. MITCHEL *against* CHILDREN of LITTLEJOHN.

A DEED granted by a husband to his second wife, declaring, That though the marriage should dissolve within year and day, the contract, by which she

No 79.