SECT. II.

Whether Competent to Heirs of Provision.

1676. *June* 16. MITCHELL *against* the CHILDREN of THOMAS LITTLEJOHN.

No 11.
A person, although bound by contract of marriage to provide the conquest to himself and the children of the marriage, was found entitled, on death-bed, to grant a rational provision to his second wife, to the extent of the dead's part.

KATHARINE MITCHELL, by her contract of marriage with Thomas Littlejohn, is provided 'in liferent to an annualrent of 750 merks yearly;' and by a posterior writ during the marriage, the said Thomas declares, 'That if the marriage 'should dissolve within year and day, the contract should stand valid for the 'annualrent of 600 merks yearly, and obligeth himself, his heirs and execu-'tors, to pay her the same during her life;' whereupon she pursues his children, as heirs and executors, to make payment; who did *allege* absolvitor, because by the defunct's first contract of marriage with the defender's mother, he received 8,000 merks of tocher, and is obliged to wair and employ other 8,000 merks for the bairns of the marriage; and there is a several clause of conquest in these terms, 'That whatsoever lands, heritages, goods or gear, he shall hap-'pen to acquire during the marriage, he shall take the same to himself and 'wife in conjunct fee, and the bairns of the marriage;' by which provision, the defenders, being bairns of that marriage, are creditors, and the father could not in their prejudice evacuate this obligement in favours of this wife, or her children, either by contract of marriage, or other provision, as *inter vivos*, or by legacy; but all his means acquired in the first marriage can only belong to the bairns of that marriage. 2*do*, This writ granted, *stante matrimonio*, can have no effect, because by the foresaid contract of marriage, the defunct's whole means, acquired during the marriage, being destinate for the bairns of the marriage, the bairns are heirs of provision in the whole means, and cannot be prejudged by legacies, or any deeds done on death-bed: And it was offered to be proven, that this writ was granted on death-bed, in so far as the defunct had contracted the disease whereof he died, and though he was induced by his wife to go to kirk and market, of design to validate this deed, yet he was not able to make it out by evidences of health, for he did not expose himself to the market or kirk of Edinburgh, where he lived, but was carried in a coach to Leith, accompanied with persons confidents to the wife, and yet he staggered ere he went in the coach, and vomited by the way. It was *answered* for the pursuer, that it was offered to be proven, that albeit the defunct went in a coach to Leith, and was accidentally sick by the way, yet that he walked freely unsupported up and down the market of Leith, which is all the law requires for evidences of health, which infers the presumption *juris et de jure*, not admitting a contrary probation that he appeared sick.

No 11.

THE LORDS ordained witnesses to be examined *hinc inde*, anent the condition of the defunct, when he made this writ, and of his manner of going to kirk and market, but reserved to themselves to determine how far clauses of conquest of this nature are effectual.

And now the cause being called as concluded, it was *alleged*, that the clause of conquest does not constitute the children simply as creditors, but only in so far as they crave implement according to the destination; but though the implement were perfected, the father remains fiar, and the children heirs of provision, and therefore they do represent the defunct, and are liable to all his deeds and obligations, and so to this obligation in favours of the pursuer: And though it were proven that this deed were on death-bed, yet the privilege of death-bed doth secure the heir, but noways the executors; and therefore all deeds on death-bed will exhaust the executry, and will be valid either as debts or legacies; for clauses of conquest are never understood to bind up the contractor from the disposal of his means during his life, but only that what remains undisposed of at his death, which was conquest during the marriage, should belong to the heir of the marriage, with the burden of his debts; and it is so likewise in clauses in favours of wives, who cannot acclaim the liferent of the things acquired during the marriage, unless they remain in the property of the defunct at his death, otherwise such clauses being common, most men would turn liferenters, and ground would be laid for wives and children to inhibit and pursue men for implement of any thing they had acquired, which would ruin their freedom and their commerce; but such clauses import only a destination of succession, and do pass, of course, without notice, especially among merchants, tradesmen, and other minor people: and, in this first contract of marriage, there is a special provision of 8000 merks, beside the general clause of conquest. It was *answered* for the defenders, that all heirs of provision are creditors, and do not simply represent the defunct, but *qualificate*, and therefore are not liable to all his debts and deeds, but at most for such as are for onerous causes, but not for any gratuitous voluntary deed, such as this wife's provision is; and if it were otherways, children would be generally destroyed, and contracts of marriage evacuate in favours of the wives and children of posterior marriages, and whatever might be pretended in favours of this pursuer by her contract of marriage, which is accounted a cause onerous; yet the marriage being dissolved within year and day, all returns *hinc inde*, and the onerosity ceases, and this posterior provision is merely gratuitous, therefore can have no effect, either as a legacy or debt against the defenders, whether as heirs or executors, because the whole executry must be employed for the bairns, as heirs of the marriage.

THE LORDS found, That such clauses of conquest did not hinder the contractors to dispone during their life, and that all onerous obligations might affect their means, or their children as heirs of provision, as also all other deeds done without fraud upon reasonable consideration, although not for an equivalent-

No 11. cause onerous, and therefore the contractor may dispone or legate upon such reasonable considerations; but found that any deed, without any reasonable consideration, was fraudulent and null in so far as it is prejudicial to the clause of conquest; and found that there was a reasonable consideration to give a gratification by provision to this wife, in case the marriage dissolved within year and day, and therefore sustained the provision in so far as it was suitable to her husband's estate, but that it could not exceed the dead's part of the free moveables.

Fol. Dic. v. 1. p. 211. Stair, v. 2. p. 426.

*** Dirleton reports the same case:

Mr Littlejohn taylor, by contract of marriage with his first wife, ——— Clerk, was obliged to provide whatsoever lands, money, or other moveable goods he should acquire during the marriage, to himself and to the heirs of the marriage. And thereafter having married a second wife, ——— Mitchel, and having provided her to an annualrent, he did grant a right to her a little before his decease, when he was on death-bed as was alleged, whereby he declared, that, in consideration that his wife had been very dutiful, and it was not reasonable that, if the marriage should dissolve before year and day, she should want altogether the benefit of her jointure; therefore he wills, that though he should decease before year and day, she should have a right to the said annualrent, as it is restricted by the said writ to less than she was provided to: And that the contract of marriage and infeftment thereupon should be effectual *pro tanto* in the case foresaid; and is obliged to pay the said annuity.

This deed being questioned upon these grounds; 1. That he cou lnot do any deed in prejudice of his heirs on death-bed; 2. That the conquest being provided (as said is) to heirs of his first marriage, both as to lands and moveables, he could not by the foresaid deed, being a mere donation, prejudge the children of the first marriage;—upon occasion of the said question, the Lords thought fit to consider what the import of such clauses of conquest should be understood to be, the same being so frequent; and there being *hinc inde Angustiæ*, and difficulties on both hands; seeing, upon the one, it may appear hard, that a husband should be restricted by such clauses too much; and on the other hand, that such clauses should be ineffectual, and in the power of the husband to evacuate them, seeing all obligements ought to be understood *cum effectu et ut operentur*;—and in end it was resolved, that the said clause of conquest, being conceived in the terms foresaid, in favours of the heirs of the marriage; the husband doth not cease to be fiar, so that, for onerous causes, he may dispose of whatsoever he acquires; and the heirs of the marriage will be liable to his deeds and obligements thereanent: 2. It was thought, that the husband could do no deed *in fraudem* of the said clauses, and of purpose to frustrate the same: 3. Though some of the Lords were of the opinion, that the husband could not

dispose of the conquest, but for onerous causes; yet others thought, that he might dispose thereof, without fraud, and for rational causes and considerations; as in the case in question, upon the considerations above mentioned, in favours of a dutiful wife; and it was so found by the major part; albeit others thought indeed, that the husband, notwithstanding of the foresaid clauses, might provide a second wife, and his children by her, out of the conquest during the first marriage, if he had no other estate, and the provisions be competent; but that, in the case in question, the deed foresaid was a donation, which the children of the first marriage, being creditors by the said clause of conquest, might question. No 11.

But the LORDS found, That if the said deed was on death-bed, the defunct having not only granted an heritable right, but having obliged himself, his heirs and executors, to pay the said sum, his executry and deads-part would be liable to the said obligement; even as to moveables acquired during the first marriage, which may appear not to be without difficulty; seeing, as to the conquest, during the first marriage, there could be no deads-part, the same being provided to the children of the first marriage, as said is.

Though the heir of the marriage may renounce to be general heir, and may take a course to establish the conquest, either in his own, or in the person of an assignee to his behoof, and so not be liable to the defunct's obligement without an onerous cause; yet it is to be considered, whether, if they should be served heirs of the marriage, they would be liable to the same, seeing all heirs represent the defunct *suo ordine*, and are *eadem persona?* Or if they be liable only to the defunct's deeds and obligements for onerous causes?

Item, If such provisions be not in favours of the heirs of the marriage, but only of bairns; whether the bairns will be liable to the defunct's debts? And if all the bairns will be liable to the same, as heirs of provision?

It is thought, If infeftment follow in favours of the father and the bairns of the marriage, they must be heirs of provision to him; and, that all the bairns (if it be not otherwise provided) will be heirs of provision.

But these points did not fall under debate. *In presentia.*

Act. *Cuningham.* Alt. *Dalrymple.* Clerk, *Hamilton.*

Dirleton, No 359. *p.* 174.

1708. *July* 19.

KATHARINE EDMONSTOUN, and Mr STEPHEN OLIPHER, her Husband *against* JAMES EDMONSTOUN.

No 12.
A bond of provision, granted to a child by her father on death-bed, who, by his

JAMES EDMONSTOUN having granted a bond of provision to his younger children, and the portions of the deceasing to accresce to the survivors; Katharine Edmonstoun, one of these children, with the concourse of Mr Stephen Olipher