No 3. stood of such annualrents wherein James was infeft, or at least might have been infeft into; but so it is, that there was a number of bonds whereof she craved her liferent, whereupon no infeftment could follow, bearing only an annualrent of ten for the hundred. THE LORDS found that she should have her liferent, albeit they had not the clause (as well not infeft as infeft) and although the heir could not infeft her in such annualrents, yet they found that she should be provided to them by some other legal course.

Spottiswood, (HUSBAND & WIFE.) *p.* 158.

1673. *July* 15. ROBSON *against* ROBSON.

No 4.
A clause of conquest providing to the wife the liferent of all lands, annualrents, goods, and gear conquest during the marriage, was found not to extend to bonds, unless the wife could prove that they came in place of, and were purchased by the goods and gear acquired during the marriage.

ISOBEL ROBSON pursues James Robson her son, as heir to his father, for implement of her contract of marriage, by which she is provided 'to all lands, annualrents, goods and gear, conquished during the marriage;' and subsumes, that her son sold and disposed of several goods belonging to his father, and took the bonds in his own name, which therefore he ought to re-employ for her liferent use. The defender *alleged* absolvitor, because the goods libelled were his own proper goods in his own possession, and sold by himself, whose possession infers property in moveables; and it is not relevant that once they were the father's goods, because he might have gifted or disponed them to his son, without either witness or writ, unless the pursuer referred to the defender's oath, that the goods belonged to his father, and were neither gifted nor disponed to him. It was *answered* for the pursuer, That albeit possession of moveables presumes property, and that a prior right of property is not relevant, yet it is but a presumptive probation of property, which may be taken off by a stronger contrary probation, and thus the pursuer offers to prove, that the son when he sold the goods was in his father's family, and that the goods were his father's proper goods.

THE LORS found the answer relevant to be proven by witnesses, but as for the goods that the son sold after he was married and forisfamiliate, the LORDS sustained not the answer as to these, but ordained the son to be examined, how he got them from his father, and before whom, unless he had meddled with them violently or clandestinely.

The pursuer *insisted* further for the liferent of all bonds, bearing date during the marriage. The defender *alleged*, That this clause of conquest could not be extended to bonds, unless they had been expressed; for lands, annualrents, goods and gear, never comprehend *nomina debitorum*. It was *answered*, That the meaning of the parties was certainly to give the wife the liferent of bonds, seeing she was provided to lands and annualrents, which was more, and here, she had no more provision but this clause of conquest; and seeing the bonds behoved to have been made up, either of money or other moveables, which are comprehended in the clause; it is to be presumed, that the same was acquired

during the marriage, which ought to put the burden of probation upon the son, and that the bonds was granted for sums due, or moveables acquired before the marriage. No 4.

THE LORDS found, That the clause did not extend to bonds bearing date after the marriage, unless the wife prove that they were granted for sums or moveables, acquired during the marriage.

The pursuer further *insisted* for her liferent of lands acquired originally in the name of his eldest son, when he was in his family, and had no means. It was *answered*, That such clauses of conquest among the meaner sort, do run of course, and are insert by notaries without communing, and their meaning can never be understood to impede the husband in the free disposal of his estate and goods during his life; but that is only understood to be conquest during the marriage, which remain so at the husband's death, and the furthest extension that can be of this clause is, that a husband should not do any fraudulent deed to prejudge his wife of a competent provision; but it cannot hinder the father to give portions to his children, or to give a competent provision to his eldest son at his marriage, which is onerous, and for a tocher. It was *replied*, That by such provisions, wives are most favourable creditors; and, though the husband may dispone for necessary and onerous causes, yet he cannot gratuitously gift to his own children; and it hath been found by former decisions, that a right taken in the name of a second son, fell under the clause of conquest, much more of the eldest son; and that bonds taken to the father, and after his decease to such children named, were by that clause to be liferented by the mother, especially where she hath no special provision. It was *duplied*, That in these cases it was not alleged that the deeds in favours of the children, were only competent provisions, leaving means for a competent provision to the mother.

THE LORDS did not find that such clauses would exclude competent provisions to the children, even to the eldest son, if there were competent means for a provision to the mother remaining; but, for making it appear, whether there was any thing done fraudfully in prejudice of the clause, they did, before answer, ordain the son to condescend what remained for a provision to the mother. *See* PROVISION to HEIRS and CHILDREN.

Fol. Dic. v. 1. *p.* 197. *Stair, v.* 2. *p.* 211.

*** Gosford reports the same case:

THE said Isobel being provided by her contract of marriage, to the liferent of all rents, lands, annualrents, goods and gear, that should be conquest during the marriage betwixt her and the defender's father, pursues the said James as heir, to infeft her in liferent in a tenement of land purchased during the marriage, in name of his said son, who was *in familia*, and had no means of his own to purchase the same; as likewise, for a liferent of several bonds assigned by the father to the children during the marriage. It was *alleged* against the first member, That the defender could not be obliged to give her a liferent in-

No 4.

feftment of the tenement, as being conquest; because, nothing can be repute conquest, but that wherein the conquisher died infeft and seased; and, notwithstanding of any obligement to infeft a wife in lands, conquest during the marriage, if he disponed the same in his own lifetime, his heir is not obliged to give her as much yearly as the liferent would amount to; and, in this case, the defender is stranger, seeing the father was never infeft, but the right is made to the son himself *proprio nomine, et non constat* if the same was purchased with the father's means. As to the second member, it was *answered*, That the wife being provided to a certain conjunct-fee, with an additional clause of liferent of all lands, goods and gear, the same cannot comprehend bonds which are not at all enumerate, and being *nomina debitorum*, are, of their own nature different from goods and gear, rents, or annualrents, and so ought not to be comprehended in that clause, which is not favourable, and ought not to be extended. It was *replied* to the *first*, That there was a great difference betwixt dispositions made of lands conquest to strangers or creditors for an onerous cause, and those made to apparent heirs, or when the rights are taken in their name, which ought to be looked upon as if the father had been infeft, and resigned in favours of the apparent heir; in either of which cases, he being liable to his father's creditors, ought to fulfil his obligements in the contract of marriage, the pursuer being the most favourable creditor. To the *second* it was *replied*, That the clause of conquest, bearing not only rents, but annualrents, and all goods and gear whatsomever; the same must comprehend bonds of borrowed money to which annualrents can only relate, and which are ordinarily the product of goods and gear, being sold and converted into money or security. THE LORDS, as to the *first* member, did find that it ought to be considered, if the wife was provided sufficiently to a liferent, without respect to the said clause of conquest; and, in order thereto, the defender was ordained to condescend and instruct, after which, they declared they would decide this point in law; and, with regard thereto, as to the *second*, they found that bonds not being specially mentioned could not fall within the clause of conquest, unless the pursuer would offer to prove that they were made, as the price and product of merchandise, which were the goods and gear wherewith the father did traffic.

Gosford, No 625. & 626. *p.* 362.

1678. *January* 29. STUARTS *against* STUART.

No 5.
A bond granted as the price or composition of a succession, found not to fall under conquest.

UMQUHILE Walter Stuart, in his contract of marriage with his second wife, provides 20,000 merks to the heirs or bairns of the marriage, and obliges himself, that what lands or annualrents he shall acquire during the marriage, to take the same to himself, and the heirs or bairns of the marriage, one or more. Of this marriage there was a son and five daughters. The said umquhile Walter