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

did secure 20,000 merks, due to him by Blackhall, to himself, and the heir of the marriage. The five daughters do now pursue their brother to denude himself in their favour, as bairns of the marriage; because the bond bears *borrowed money*, and of a date during the marriage, which was always sufficient probation of conquest during the marriage. It was *alleged* for the defender, 1*mo*, That this clause of conquest must be understood, not of all the bairns of the marriage, but the heirs of the marriage, at least it bearing bairns or heirs, it must be interpret as an alternative obligation, either to provide to the heirs or bairns of the marriage; and the father being debtor, and having made his election, by securing the heir of the marriage in this sum, the bairns are excluded *nam in alternativis electio est debitoris*. 2*do*, Clauses of conquest were never extended to rights, in which the contractors do succeed, and are not acquired by their own industry; for such clauses are to encourage wives to be diligent in acquiring, which cannot relate to accidental succession. And it is offered to be proven, that albeit this bond bears, *borrowed money during the marriage*, yet the true cause thereof was this, that David Stuart, the defunct's younger brother, by a second marriage, having died without issue, in a land estate, the same befel to the defunct as heir of conquest; and, by transaction, this bond was granted to the defunct for his right, whereupon he did denude himself in favours of Blackhall his eldest brother; so that this bond being either the price or composition for his succession to his brother, falls not under the clause of conquest, and therefore was warrantably taken in favours of himself and the heirs of the marriage, and not of the bairns. No 5.

THE LORDS found, that, by the clause of the contract, all the bairns of the marriage were heirs of provision in the conquest, and that heirs or bairns was not alternative, but exegetic; and that the father, being debtor in the clause, could not effectually alter the clause of conquest in favours of one of the bairns; but found, that clauses of conquest did not extend to rights falling by succession, even though the defunct was heir of conquest; for conquest, as to heirs, is in opposition to heritage. But in these clauses of conquest, albeit the right was conquest to the first defunct David, yet was not so to Walter, succeeding as heir to David, but he did succeed to his brother therein; and therefore the allegeance was found relevant to be proven by the oaths of the witnesses, and communers in the agreement betwixt Walter and his brother and Black-hall, that this sum was either the price or composition for the defunct's succession to his brother David.

Fol. Dic. v. 1. *p.* 197. *Stair, v.* 2. *p.* 604.

1682. *February.* AITKIN *against* ———. No 6.

FOUND, that an obligement, in a contract of marriage, to provide the wife to a liferent of what lands, teinds, annualrents, &c. not mentioning sums of money,