HERITAGE AND CONQUEST.

1625. *June* 24. HEIRS of the EARL of DUNBAR Competing.

No 1.
A tack belongs to the heir of line, although conquest by the defunct. See No 2, *infra*.

THE LORDS fand a tack disponed to the Earl of Dunbar and his heirs-male succeeding to him, by proving of brieve, to pertain not to the heir-male of conquest, who was John Home of Shegden, the elder brother, but to the heir-male descending, viz. the younger brother, and this notwithstanding it was *objected*, that the E. of Dunbar had one general of his own body, viz. his daughter, and that there could not be two heirs general, viz. one lineal, and another collateral; and also, notwithstanding of the word "succeeding," which was contended should be respected heirs succeeding to lands.

Fol. Dic. v. 1. *p.* 375. *Kerse, MS. fol.* 130.

1663. *June* 23. FERGUSON *against* FERGUSON.

No 2.
Found as above.

UMQUHIL ——— Ferguson in Restalrig, having a tack set to him by the Lord Balmerino for certain years, his eldest brother's son, as heir of conquest, and his youngest brother's son, as heir of line, competed for the mails and duties of the lands.

THE LORDS found the tack to belong to the heir of line, albeit it was conquest by the defender.

Fol. Dic. v. 1. *p.* 375. *Stair, v.* 1. *p.* 193.

1675. *July* 7. ROBERTSON *against* LORD HALKERTON.

No 3.
A father granted bond to his daughter, obliging himself to infeft her in

THE Laird of Halkerton having granted a bond to his daughter, 'obligeth 'him and his heirs to infeft her in an annualrent of 100 merks out of certain 'lands expressed,' and containing thereafter a clause of requisition and reversion; she having died without children, Sir Patrick Falconer, her immediate younger brother, having entered heir-general to her, assigns the bond to Ro-

No 3.
an annualrent out of certain lands. The bond contained a power to her to call for the principal sum upon requisition. Found, that the bond being principally conceived as an annualrent-right, though having a clause of requisition, fell to the heir of conquest.

bert Robertson for necessaries furnished by him to Sir Patrick, and now pursues the Lord Halkerton, debtor in the sum, for payment of the 1000 merks, on which it was redeemable, and that by virtue of the clause of requisition. The defender *alleged* absolvitor, because the right of this bond did belong to Sir Patrick, the pursuer's cedent, as heir general or of line to his sister, because it being conquest, it did not descend to Sir Patrick, her younger brother, but did ascend to Sir John her elder brother, and his heirs.—To the first the pursuer *answered*, 1*mo*, That this is *jus tertii* to the defender; 2*do*, The right of this bond must fall to the heir of line, not to the heir of conquest, because *de jure communi*, the younger brother is heir of line and heir general, and to him doth belong *universum jus*, and he is liable for the whole debt; and albeit there be a special statute of King Robert's*, 'declaring lands and tenements acquired by a 'mid-brother to ascend to his immediate elder brother, who thereby is denomi-'nated to have an heir of conquest;' yet that being against the common law, is not to be extended, and therefore can only take place in the case of lands and tenements where there is a complete real right; but if the right be incomplete, it gives no right to the land, and is but a personal right, and at best *jus ad rem*, not *in re*, and therefore the statute ought not to be extended thereunto; according to which Skeen, explaining conquest, and what befalls the general heir, doth only except 'lands and tenements,' but 'declares reversions to be-'long to the heir-general;' and Craig expresseth himself in the same way.—It was *replied* for the defender, We are not now to debate what were fit to befall to the heir of conquest, there being great reasons that even lands and tenements should rather have descended to the heir of line, who hath the whole burden; but seeing that statute is made, it is to be considered what is the import thereof, and what by consequence and analogy is suitable thereto, and to the decisions of the Lord heretofore; by which it is evident that in the time of that statute, sasine was not requisite, but the disposition or charter, with possession, was sufficient; and therefore the superveniency of a statute requiring sasine cannot alter the case, seeing the disposition of this annualrent hath attained possession by frequent payment thereof. 2*do*, It were most incongruous and inconsistent that an absolute disposition of lands acquired by a middle brother or sister, having a clear destination for infeftment, should not befall to the heir of conquest; as if the infeftment had been obtained for the chief ground of the succession of heirs, being the will and destination of the fiar, it is always esteemed to have the same effect as if it were complete; and upon that ground obligements for borrowed money were ever esteemed heritable, if there were but an obligment to pay annualrent, till the year 1641, and are yet heritable, if they have but a general clause of infeftment for annualrent; and therefore the right of conquest lands by disposition, though it be incomplete, must ascend to the heir of conquest, which must also necessarily hold in annualrents acquired, and likewise in apprisings; whereunto Sir Thomas Hope gives his opinion; and though the case of reversions be much more doubtful, being but personal

* Stat. Robert 3d, cap. 3.

No 3.

obligements *de retro vendendo*, yet seeing by statute they are made real rights to affect the ground against singular successors when registrated, the Lords have found reversions acquired by mid-brothers to ascend to the elder brother; as it is observed in the case of Pitcairns, where there being three brothers, Henry, Robert, and Mr John, Mr John the younger brother gave a right of reversion of certain lands to Robert the mid-brother, who dying without issue, in a competition betwixt Henry his eldest brother, and Mr John his youngest brother, both claiming the reversion to be delivered to them as having best right, the LORDS found that the reversion did belong to Henry, Robert's elder brother, and not to Mr John his younger brother, albeit he was most favourable, as having granted the reversion himself, neither had Robert the mid-brother acquired the lands before the wadset*.—It was *duplied* for the pursuer, That whatever might be pretended in dispositions of lands or annualrents, though not complete, yet it can have no consequence as to bonds of borrowed money, wherein parties for their further security adject clauses of infeftment in an annualrent generally or particularly, yet do seldom make use thereof; and it cannot be thought that thereby they intended to make their sums ascend to an elder brother in prejudice of the younger brother, who is heir general, and must bear the debt and the burdens of succession as tutors, &c.

THE LORDS found, That this bond in question having principally disponed an annualrent, albeit there was subjoined a clause of requisition and reversion, that it did belong to the heir of conquest, and that the pursuer, as having assignation from the heir of line, had no right thereto.

Fol. Dic. v. 1. p. 375. Stair. v. 2. p. 338.

*** Dirleton reports the same case:

THE deceased Lord Halkerton being obliged, by contract betwixt him and his deceased father, to infeft Mrs Margaret Falconer his sister in an annualrent of the principal sum of 1000 merks out of the lands of Halkerton, redeemable upon 1000 merks, and to pay the principal sum upon requisition, Sir Patrick Falconer, immediate younger brother and heir of line to the said Mrs Margaret, assigned the said sum and contract in favour of Robert Robertson; and the said Robert having intented action against the now Lord Halkerton, as representing his father, it was *alleged*, That the said sum being conquest in the person of the said Mrs Margaret, did not belong to the heir of line, but to the immediate elder brother as heir of conquest.

THE LORDS having heard the cause *in presentia*, and being resolved to decide the question betwixt the heir of line and the heir of conquest, as to heritable bonds, bearing such obligments to infeft, which had been often before in agitation, but never decided but in the time of the English, did find, That the said bond and sum did belong to the heir of conquest, who would have succeeded in case the right had been perfected by an infeftment.

* See SUCCESSION.

No 3.

Some of the LORDS were of the opinion, That bonds of that nature should belong to the heirs of line, for these reasons, *1mo*, That the heir of line is general heir and successor *in universum jus, tam active quam passive*, and is liable to the *onus tutelæ*, and other burdens; and *penes quem onus, penes eundem emolumentum;* unless the benefit of succession be provided otherwise, either *provisione hominis*, in the case of tailzies, or *legis*; and there is no law settling upon the heir of conquest the right of succession as to heritable bonds, whereupon no infeftment has followed. And the law of the Majesty, (*Quon attach.* c. 88.) is only in the case of *terræ et tenementa et feuda*, as appears by the very words of the said ancient laws, and by Craig, and Skeen *de verborum significatione, in verbo conquestus*, and *verbo breve de morte antecessoris*. *2do*, As bonds cannot be called heritage, so they cannot be esteemed to be conquest; heritage being properly lands, wherein a person succeeds as heir to his predecessor; and if the heir of conquest, who is now found to have right to such bonds, should decease, though the same would descend and belong to the heir of line, yet such bonds cannot be called heritage; and minors *qui non tenentur placitare de hæreditate paterna*, could not plead the same privilege in the case of heritable bonds.

3tio, Lands and *feuda* can only be said to be heritage, or to be conquest, when parties have a real right to the same by infeftment; but as to bonds, they do not settle *jus in re*, but at the most a *jus ad rem*.

4to, Comprisings, dispositions, and reversions, being more of the nature of conquest, especially reversions, which are real rights, and do militate, not only against the granters, but singular successors, do descend and pertain to the heir of line, and not to the heir of conquest. See No 6. *infra*.

Dirleton, No 295. *p.* 144.

*** See this case by Gosford, *voce* SUCCESSION.

1676. *July* 21. A. *against* B.

No 4.

THIS day the Lord Craigie reported a competition between an elder and a younger brother, as to the right of an heritable bond due to the middle brother, bearing a clause of infeftment, but no infeftments following; which the LORDS found to belong to the elder brother as heir of conquest.

Fol. Dic. v. 1. *p.* 375. *Stair, v.* 2. *p.* 456.

1675. *February* 23. A. *against* B.

No 5.

A COMPRISING, on which no infeftment had followed, was found to belong to the elder brother.

Fol. Dic. v. 1. *p.* 375. *Dirleton.*

*** See this case, No 3. p. 2448.