1677. *June* 28. JOHN ANDERSON *against* WILLIAM ANDERSON.

No 6.
Found in conformity with the above.

IN an exhibition and delivery of evidents of several lands, which were comprised by Robert Anderson, at the instance of the said John, as heir of conquest, against William Anderson, it was *alleged* for the defender, That he being served heir of line to the said Robert, as being his immediate younger brother, he had the only right to the evidents of the said lands comprised, because the defunct, their brother, was never infeft upon his comprising.—It was *replied*, That notwithstanding there was no real right by infeftment, yet the comprising being a real diligence against the lands, whereupon infeftment may follow, the same did belong to the heir of conquest, and not to the heir of line.—— THE LORDS did repel the defence, in respect of the reply, being moved upon that consideration, that by a late pratique in a case of Falconer and Robertson, No 3. p. 5605. there being a bond granted for provision of a daughter, bearing a precept to infeft in an annualrent of the land, albeit no infeftment had followed during the father's lifetime, yet it did belong to the heir of conquest; but as it was my opinion in that case, that the subject being only an heritable bond for a provision to a daughter, whereupon no infeftment followed, so she dying, it ought to have fallen to the heir of line, for reasons therein set down; so for these same reasons there being nothing in the person of the defunct but a naked comprising, and no sasine nor charge against the superior, much might have been said for the heir of line in this cause. There was likewise a debate as to the lands in Holland, wherein their defunct brother died infeft, according to their consuetude, and so did fall by their law to all their brothers and sisters equally, if Anderson the elder brother had *jus primogeniturœ*, and might detain the whole principal evidents of that conquest?—— THE LORDS, after reasoning, did find, That, seeing by the law of Holland all successors who were *ejusdem gradus* did succeed alike, and the eldest brother had no election; so in this case there being three or four brothers and sisters, the eldest having but one interest, could not have the sole keeping of the whole evidents, but only a transumpt, such as might make faith in Holland; and the rest being the major part, should have the keeping thereof, upon security to make them furthcoming.

Fol. Dic. v. 1. *p.* 375. *Gosford, MS. p.* 666. *No* 986. & 987.

1706. *January* 23. BEGBIE *against* BEGBIE.

No 7.
Bonds secluding executors descend not to heirs of conquest, but to heirs of line.

MR ALEXANDER WEDDERBURN having granted a bond of 1000 merks to the deceased John Begbie, and his heirs (secluding executors) there falls in a competition betwixt the creditors of the immediate elder brother, who claims the sum as heir of conquest, and the younger brother, who alleges the same falls

No 7. to him as heir of line; and for whom it was *alleged*, That the heir of conquest has only right to lands and tenements; the privilege of the heir of conquest being derived from the feudal law, which is clearly expressed in the book of *Quoniam Attachiamenta*, or Baron Laws, cap. 88. and cap. 97.; and therefore heirs of line have right to heirship moveables, and to tacks and pensions, though these be conquest.

It was *answered*; That whatever be indulged to heirs of line as to moveables, which are perishable goods, or to tacks and pensions, which are hardly to be reckoned heritage, that is not to be extended to heritable bonds; and there is no difference betwixt a bond secluding executors and a bond containing a clause for infefting the creditor: And the citations adduced do not clear the point; for nothing is there expressed concerning such heritable obligations, but only that lands ascend.

"THE LORDS preferred the heir of line."

Fol. Dic. v. 1. p. 375. Dalrymple, No 73. p. 94.

*** Fountainhall reports the same case:

JOHN BEGBIE having lent 1000 merks to Mr Alexander Wedderburn, advocate, takes the bond payable to himself, his heirs and assignees, but secluding his executors. He dying, Patrick, his immediate elder brother, serves himself heir of conquest to him, and claims the sum as acquired by his second brother's industry. William, the immediate younger brother, serves as heir of line, and he claims it *eo nomine*, as falling to him by the usual course of succession. Mr Wedderburn, the debtor, suspends on double distress. *Alleged* for Patrick, the heir of conquest, That this sum was undoubtedly made up by his younger brother's frugality, and so was conquest; and the rule of law was plain, making conquest ascend, and heritage descend; and that this was heritable, was as clear, seeing, by the act of Parliament in 1641, renewed in 1661, cap. 32. not only bonds bearing obligement to infeft, but likewise bonds secluding executors, are declared heritable to all effects and purposes, and so must belong to him as the undoubted heir of conquest. *Answered* for William Begbie, the heir of line, That he did not controvert that conquest ascended, but that was only to be understood of lands and tenements, and feudal rights acquired by the defunct, but not of sums of money conceived heritably, unless that infeftment has either actually passed, or may pass thereon; for that bonds secluding executors are reputed heritable, that is only *fictione et interpretatione juris*, but not in the propriety of speech; and that our old law understood no other conquest but lands and feus, appears by the 88th and 97th chapters of *Quon. attach. et statut.* Robert III. c. 3. where this individual case of three brothers is stated, where the middle brother having died, leaving lands and tenements, it is decided that they fall to the elder as heir of conquest; from whence it appears,

No 7.

that nothing was then reputed conquest except it affected lands; which this bond secluding executors does not; and it can no more be reputed conquest than moveable heirship, tacks of lands, and pensions for years yet to run, and yet all these three fall to the heirs of line; as Craig, lib. 2. dieg. 15. observes, and was decided Ferguson, No 2. p. 5605., in the case of a tack. *Replied*, That, before the act 1641, both our lawyers and practice did fluctuate and vary, as to what bonds were moveable, and what heritable; for, by the canon law, annualrents being reprobated, to elude that prohibition, infeftments of annualrent were invented, which was the cause why our old laws speak only of rights of lands as conquest; but bonds bearing annualrent being allowed since the abolishing of Popery by the Reformation, that distinction now ceases, and a bond excluding executors, is, in construction of law, made as much heritable as a bond bearing infeftment, and the right of it is only transmissible by service and retour, which is not required in tacks or pensions. THE LORDS, by plurality, found this bond secluding executors was not properly in the law-sense conquest, and therefore it fell to William the heir of line, and preferred him thereto, as going downward and not upward.

Fountainhall, v. 2. p. 315.

*** This case is also reported by Forbes:

IN the competition betwixt Patrick Begbie, elder brother and heir of conquest to John Begbie, and William Begbie, the younger brother and heir of line, for the right to a thousand merks bond, resting by Mr Alexander Wedderburn advocate, to the said John, his heirs or assignees, secluding executors, it was *alleged* for Patrick, That he, as heir of conquest, ought to be preferred to the bond, the same being heritable, and conquest by the defunct.

Answered for William the Heir of Line; That nothing could be comprehended under conquest with respect to succession, except lands or tenements, or subjects whereupon infeftment did or might follow; as is clear from the book of *Quoniam Attachiamenta*, or Baron Laws, cap. 88. and 97. and King Robert the Third's Parliament holden at Scoon, *Craig de Feudis, lib. 2. dieg. 15.*; the distinction betwixt heritage and conquest being derived to us from the Feudal Law and Norman Custom. 2*do*, The heir of line succeeds to tacks, (The Earl of Dumbar's Heirs, No 1. p. 5605.; Fergusson against Fergusson; No 2. p. 5605.;) pensions, heirship moveables, or other rights not requiring infeftment, though acquired by the defunct, Stair, B. 3. tit. 5. And can there be no tolerable reason assigned why these should fall to the heirs of line, and a sum recluding executors to the heir of conquest? So the brocard that conquest ascends, and heritage descends, must be explained and applied according to the analogy of law and *subjecta materia*. Again, if there were any *Quæstio Voluntatis* in the case, law would favour the heir of line; because succession naturally descends, and conquest, as an exception, or deviation from the rule, is

No 7.

not to be presumed. Besides, the heir of line is more favourable, as being the tutor of law, and first subject to debts and burdens: *Et quem sequuntur incommoda, eum sequi debent commoda.*

Replied for Patrick, the Heir of Conquest; Bonds secluding executors, *fictione juris*, are like so much land, and the act of Parl. 1661 cap. 32. puts them upon the same foot with those containing an obligement to infeft; by declaring all bonds moveable except they bear an obligement to infeft, or seclude executors, both which are made heritable. 2*do*, Our custom hath determined to the heir of line heirship moveables, as things perishing that wear with the using, and tacks, pensions, &c. as being only temporary rights that expire after elapsing of a definite track of time, which therefore may be called *quasi* heritable rights. But this is not to be extended to properly heritable permanent rights, such as bonds secluding executors, which must belong to the heir of conquest, whom law still favours in dubious cases, *ob prærogativam primogenituræ*, and for the preserving of families. 3*tio*, There can be no argument adduced from our old laws against the heir of conquest's right to bonds secluding executors, since these were not then in use; and by the canon law all bonds bearing annualrent were reprobated. 4*to*, My Lord Stair, B. 3. Tit. 5. Sec. 10. says, that heirs of conquest succeed to heritable bonds bearing a clause of annualrent; and therefore *multo magis* ought they to succeed to bonds secluding executors, which are declared heritable in all cases by the foresaid act of Parliament.

THE LORDS found this bond secluding executors was not properly conquest in the sense of law, and that therefore it fell to William the heir of line, whom they preferred to Patrick as heir of conquest.

Forbes, p. 76.

No 8.

Teinds fall to the heir of line, and not to the heir of conquest.

1736. *December* 16. MARGARET GREENOCK *against* JOHN GREENOCK.

THE point controverted betwixt these parties, was, Whether teinds ascend to the heir of conquest, or go along with the land to the heir of line?

Pleaded for the latter; That he succeeds to every thing which is not specially appropriated to the heir of conquest, whose right depends allenarly upon the 88th chap. *Quoniam Attach.* by which it is provided, 'That, if there be three 'brethren, and the mid brother deceasing without heirs of his body, his eldest 'brother, first begotten, shall succeed to his land and tenement, and not the 'after born or younger brother.' And which is ratified by the statute, Robert III. c. 3. Now, as the old law mentions only lands and tenements, nothing but what were considered as rights of lands at that period can belong to the heir of conquest; teinds, therefore, which are solely a burden upon the fruits, do not fall under these statutes; more especially as they were not *in privato patrimonio* at the time, being then the peculiar patrimony of churchmen, not transmissible by succession or conveyance; and that nothing befals the heir of conquest,