whom and Charles Campbell, deriving right from Balquan, the question now comes.

The Lords found, That, as there was no claim given in to the trustees, in terms of the Act of Parliament, the benefit of the clan-act could not here be claimed; and therefore this superiority fell under the Viscount's forfeiture, and was in the person of the king, not *jure coronæ*, but as trustee for the public; for which reason the Barons of Exchequer were authorised to sell it, by the foresaid Act 1726, as well as the rest of the forfeited estates that remained unsold; and therefore preferred the purchaser from them, Gabriel Napier.

N.B. It was supposed, in this debate, that, if Kincaid had used the benefit of the clan-act, as he might have done, then the superiority in question would have been no part of Kilsyth's forfeiture, and so could not have been sold by the barons.

1740. *January* 8. DUKE of HAMILTON *against* EARL of SELKIRK.

[Elch., No. 3, *Heritage and Conquest;* Kilk., *ibid.* No. 2.]

THIS was a question about the succession of the late Earl of Selkirk, betwixt the Duke of Hamilton, his heir of conquest, and the Earl of Selkirk, his heir of line, and successor in the honours and titles. As the subject of this controversy was very valuable, and the question itself of great importance and general concern, the Lords ordained a hearing in presence, which lasted three days. The debate was branched out into several heads. The first consisted of three questions, which, by reason of their connexion, were pled on and decided altogether, *viz.*:—

Whether incomplete rights to lands, heritable bonds whereon infeftment had followed, and those whereon infeftment had not followed, went to the heir of line or the heir of conquest?

1*mo*, For the heir of line it was pled, That, by the rules of the law of Scotland, succession in heritable subjects always descends, either by order of generation, as from father to son, or by order of birth, as from the elder brother to the younger: that, contrary to these rules, another kind of succession was introduced in conquest, by which, instead of descending, it ascended, and went to the elder brother in place of the younger. This novelty was introduced by a particular statute made mention of in the *Quoniam Attachiamenta*, where it is said *statutum est, &c.;* and referred to in the statutes of Robert III., in these words, *prout in dicto statuto continetur.* By this statute the heir of conquest gets only *terræ et tenementa in quibus defunctus obiit sasitus.* Now, all statutes correctory of ancient custom, and introducing any thing contrary to the common rules of law, ought to be strictly interpreted; *quod enim contra rationem juris introductum, ad consequentias non producendum. l.* 16, *de Leg.;* so that *terræ et tenementa* can never be understood to compre-

hend rights to lands not completed by infeftment, or securities for money, whether completed by infeftment or not.

2do, The reason of the law wont admit this interpretation no more than the words. Before this statute there was no collateral succession in *feuda nova* or conquest. This was according to the common rule of the feudal law, by which a *feudum novum*, failing descendants of the vassal's body, reverted to the superior, who was supposed to have chosen him and his children, but not his collaterals, who were strangers with respect to the superior, *lib.* 1, *tit.* 1, *De Feud.* This, in process of time, was thought hard, and was at length amended by this statute, creating a new species of heir, *viz.* the heir of conquest, to whom the succession in a *feudum novum* might go, failing descendants of the first vassal's body. From this account of the origin of the heir of conquest, it is manifest that he can only succeed in those subjects which before went to the superior, and by consequence not in rights to lands not completed by infeftment, for, in that case, there was no feu constituted, there was neither subject nor superior; nor in securities for sums, for, in that case, it would be absurd to suppose that a right, for which the creditor had paid money, could ever have returned to the superior upon the failure of his issue.

3tio, Though it must be confessed there are both the authority of decisions and lawyers in this question, against the Earl; yet it is to be observed, first, with respect to the decisions, that the oldest of them is in the year 1675, *Robertson* against *Lord Halkerton*, (reported by Lord Stair, 7th July 1675;) two others followed immediately upon the back of it; and another, in consequence of these three, within these few years. Though decisions have no doubt great weight, yet they cannot prevail against the *jus scriptum*. Custom may interpret law, as Craig has said, *lib.* 1, *dieg.* 8, *in fin.*, but not overturn it. Accordingly the Lords, in several instances, have altered what had been established by a continued tract of decisions, when they judged it contrary to law; as in the question, whether an adjudication without infeftment excluded the terce? The affirmative had been found by three consecutive decisions, the oldest of them a hundred years back, without one contrary decision intervening: notwithstanding which, the Lords have found of late that it did not. The same happened in the case of an heir entered *cum beneficio inventarii*. It had been established by a course decisions, that he could prevent the sale of his predecessor's estate, and keep it to himself, paying the proven value to the creditors; but the Lords very lately, in the case of *Glenkindie*, found that he could not. The decisions in this case ought to have the less weight, that they were pronounced contrary to the opinion of two of the most learned judges who sate on the bench at that time, Dirleton and Gosford; the last of whom, in reporting the above mentioned decision of Robertson, has given his reasons against it at large. As to the authority of lawyers, there are for the Earl the oldest lawyers, such as Balfour, Dirleton, Gosford, and Craig;* which, in a point of antiquity, *viz.* the explication of an old statute, ought to preponderate the authority of our modern lawyers, such as Stair and Sir George Mackenzie.

* And Skene, *ad Regiam Magist.*, calls the heir of conquest an *hæres particularis*.

4to, That supposing the conquest heir were the legal heir, yet this is not the case of a simple succession *ab intestato*, whereby an estate, without any deed of the proprietor, is carried to the heir-at-law: there is here a deed of the proprietor, whereby he has devised the subjects in question to his heirs *whatsomever*; so that here, besides the force of the law, there is the *voluntas defuncti*. Now, by these words, heirs whatsomever, must be meant indeed the legal heirs, not that particular species of heirs called heirs of conquest, but the true genuine heir, the heir of line,—the universal representative of the defunct,—the heir that is liable for all his debts, and that only has title to tacks, pensions, and heirship moveables; in a word, that heir who is only, properly speaking, *heir*, and not the heir of conquest, who is only heir in a particular subject, and therefore can no more be called under the general denomination of heirs *whatsomever* than an heir of tailyie or provision.

It was answered for the Duke,—1*mo*, That there was no necessity to suppose that the succession of the heir of conquest was introduced by special statute; the words, *statutum est*, mean no more than that it was then established law. It is more likely that the succession of conquest, as well as every other kind of succession in the law of Scotland, came in by custom; and that, if there was a statute in this case, it was only declaratory of what was law before. As to the words, *terræ et tenementa*, they are not so narrow as imagined. *Terræ* may very well comprehend land which a person has for security of a sum; and by *tenementa* may be meant any sort of holding. And though, at the time this was written, these words might not comprehend either rights in security of money, or incomplete rights to land, because at that time there was hardly any debts or borrowing, and all rights to lands were immediately perfected by sasine or livery of possession; yet, when credit was established, and incomplete rights to lands came in fashion, there was no reason why succession in conquest should not be extended, to both rights in security of money and rights to lands not completed by infeftment.

2do, As to the reason of the law, that it was made in order to qualify the rigour of the feudal law, which gave a *feudum novum* to the superior, in case the vassal died without children, what evidence is there that an heir of conquest was not known in Scotland before the feudal law was heard of there? There must have been succession in land rights, and, by consequence, some heir or other, and why not an heir of conquest as well as an heir of line? Again, how does it appear ever to have been the practice of Scotland that a *feudum novum* should revert to the superior, if there was no heir of the vassal's body? It appears indeed by the book, *de Feudis*, that such was the custom of Italy; but, as the feudal law is altogether local and consuetudinary, that is no argument that it was so in Scotland. But, supposing it had been so, and that the heir of conquest was introduced to amend the law in this particular; why not rather make choice of the younger brother, the heir of line, an heir that was known before in the law, than create a new line? From which it appears that this account of the origin of the heir of conquest is a mere conjecture, upon which no solid reasoning can be built.

3tio, As to authorities; there is, besides the authority of Lord Stair and Mackenzie, the authority of Sir Thomas Hope, who gives all to the heir of

conquest, upon which infeftment hath followed or may follow. And, as to decisions, there is a continued tract of four of them, the oldest upwards of sixty years back; so that if any thing be established by decisions, this must be. Add to this, the general consent of the nation, which appears from the general services of heirs of conquest, to be found in the Chancery even farther back than the 1675. Now, what could be the meaning of these general services, if incomplete real rights did not belong to the heir of conquest?

4*to*, Heirs of conquest are as much heirs of law as the heirs of line: See Stair, p. 456, § 10; heirs whatsoever apply equally to both, and sometimes to neither, according to the nature of the subject.

5*to*, Lastly, there is no reason can be given why the completing or not completing a right should make any alteration upon a man's succession; nor is there any example in law where it does. A man's succession is regulated by his own destination; and if, before infeftment, he destines it for his heirs of line, why should the livery of earth and stone make it go to the heirs of conquest? So that, in matters of succession, whatsoever may be said with respect to the rights when completed, may be said of them before they are completed.

The Lords found, That the above mentioned subjects went to the heir of conquest, and not to the heir of line.

Most of their Lordships seemed to be chiefly moved by the authority of the decisions; others thought the thing in itself reasonable, and according to law.

1740. *January* 22. STOTT *against* MAXWELL.

[Kilk.; No. 3, *Thirlage.*]

THE question here was, Whether use and wont for forty years, of paying insucken multures, and performing services to the mill, will, of itself, infer an astriction of thirlage, without any title or evidence of the constitution of the thirlage? The Lords found that it did; in respect the mill was a church mill, and the lands, said to be thirled, church lands; and churchmen *non tenentur docere de titulo*, for which reason, with respect to them, long possession hath been sustained as sufficient to instruct even the property. This is the opinion of Stair, p. 291, but contrary to the opinion of Craig, and an express decision, 17*th July* 1677, *Ross* against *M'Kenzie*, reported by Lord Stair. It was objected, that there was no evidence of any possession while the mill was in the hands of churchmen; but that the forty years' possession was after both mill and lands were in the hands of private persons. To which it was answered, That the possession was presumed *retro* to have been the same while the lands were in the hands of churchmen: Which the Lords sustained.

N.B.—It seems yet to be pretty much undetermined, what title is requisite in prescription of thirlage.