1740. *January* 8.

DUKE of HAMILTON *against* EARL of SELKIRK and RUGLEN.

No 10.

IN the competition betwixt the Duke of Hamilton, heir of conquest of the deceast Earl of Selkirk, and the Earl of Ruglen heir of line; the LORDS determined the following points, 1*mo*, That the heir of conquest succeeds to dispositions and adjudications of land purchased and acquired by the defunct, and which were descendible to his heirs and assignees, although he was never thereupon infeft. 2*do*, That the heir of conquest has right to all heritable bonds acquired by the defunct whereupon he stood infeft at the time of his decease, and were descendible to his heirs and assignees whatsoever. 3*tio*, That the heir of conquest has right to heritable bonds conveyed to the defunct, though he was never infeft upon the conveyances. 4*to*, That the right of succession to bonds secluding executors, and containing no obligement to infeft in lands, descends to the heir of line. 5*to*, With regard to subjects where the annualrents of heritable bonds were accumulated with the principal sums in personal bonds of corroboration, making the whole payable to the creditor's heirs secluding executors, found that the bonds of corroboration do not alter the right of succession as to the principal sums contained in the original bonds which devolved to the heir of conquest; but, that all the further sums accumulated in the bonds of corroboration descend to the heir of line. 6*to*, Several heritable subjects being purchased by the Earl's doers for his behoof, but taken in their own name, and the trust being acknowledged by them, found that the right to the lands and heritable bonds being in the person of Mr Bogle and Mr Hamilton, in trust for the use and behoof of the Earl of Selkirk, the succession devolves to the heir of conquest.

Fol. Dic. v. 1. *p.* 376.

*** See Kilkerran's report of this case, No 112. p. 5554.

1771. *February* 13.

JAMES SHORT, Nephew of the deceased JAMES SHORT, Optician in London, *against* THOMAS SHORT, Brother of the deceased JAMES SHORT.

No 11.
A brother executed a disposition in favour of his immediate elder brother, his heirs and assignees. Both brothers died without issue. The eldest son of a brother elder than either, as heir of conquest,

JOHN, Alexander, James, and Thomas Shorts were brothers; John died, leaving James his eldest son and several children; Alexander died unmarried, 5th May 1768, without making any will; James died unmarried in June 1768, and left behind funds to a very considerable extent; and in particular, certain heritable bonds over the estate of Montgomery of Broomlands, upon which he had been infeft.

James, before his death, had executed a disposition, by which he conveyed these heritable bonds in favour of his immediate elder brother Alexander, his heirs and assignees; reserving, however, power to alter the deed without the

No 11. was preferred to the youngest brother, heir of line.

consent of Alexander; but declaring, that if he did not otherwise dispose of the subject, the deed should have all the force and effect of a delivered evident.

A competition ensued for these bonds betwixt James Short, the eldest son of the eldest brother, who claimed as heir of conquest, and Thomas Short, the immediate younger brother of James, who claimed as heir of line.

James the heir of conquest maintained, That in whatever light the question was viewed it must be in his favour. If the disposition by James to his brother Alexander was understood to be vacated by the predecease of Alexander the disponee, in that case, it was plain that he, as heir of conquest to his uncle, would be entitled to take up the heritable bond as *in hæreditate jacente* of him. If, on the other hand, a right was vested in the person of Alexander by the above disposition, as there truly seemed to have been, that right was not heritage, but conquest in him; and being so, it must, according to the rule of law, as explained *secundum subjectam materiam*, fall to James the son of his elder brother, who was his proper heir of conquest. That the subjects were conquest in him was unquestionable. The deed was a conveyance *de presenti*; and at the date thereof the disponee was not *alioqui successurus*, the granter having *hæredes propinquiores in spe*; so he could be considered only as a singular successor, taking the estate by singular titles, and not as universal representative of the deceased.

The plea maintained, that as Alexander had taken these subjects *præceptione hereditatis*, they could not be conquest in him, was unfounded. That argument was reared upon the supposition that Alexander fell to be considered as an heir called to the succession, failing the granter's own issue. But although such a condition had been expressed, whereas it was only implied, still the right of Alexander would have been by a singular title. The rule of law was *positus in conditione non censetur positus in institutione*; so that suppose an heir had existed of the disponer's body, he could not have taken up the estate upon that disposition; and of course Alexander, though such condition had been expressed, could only be considered as a conditional disponee, taking upon a singular title, and not *præceptione hereditatis*. Craig, L. 2. Deig. 15. § 17.; Bankton, v. 2. p. 297. § 21.; Erskine, B. 2. T. 8. § 6.; Dict. *voce* PASSIVE TITLE.

Thomas the heir of line maintained, As the disposition was a deed *inter vivos* granted to the heirs of Alexander, as well as to himself, these heirs, upon the supposition that there was no right even established in the person of Alexander, fell to be considered as the immediate disponees; and as by *these* heirs must be understood his heirs at law or of line, who were always held to be called to a succession, where it did not appear they were expressly excluded, the subjects must, by the conception of the deed, now fall to him as the proper heir of line to his brother Alexander.

Upon the supposition, again, that in this case there was a right established in the person of Alexander, yet as that right could be understood as having fallen

to him only by succession, it must consequently devolve upon his heir of line. The deed in question related to subjects which, upon the granter's death without heirs of his own body, fell to him as heir of conquest in the legal course of succession. That deed never was delivered, but remained in the granter's hand; and as it must be understood to have been conditional, in case only the heirs of the granter should fail, it was plainly a right in Alexander *tanquam alioqui successurus;* and must therefore be considered, not as conquest, but as a *præceptio hereditatis*, and consequently descend from him to his heir of line, l. 112. ff. *de conditionibus et demonstrationibus*. Craig, l. 2. Deig. 15. No 11.

THE LORD ORDINARY preferred 'James Short the heir of conquest to the heritable debts in question;' which interlocutor the LORDS adopted as their own judgment, 13th February 1771.

Lord Ordinary, *Kennet*. For James Short, *Macqueen*. For Thomas Short, *D. Græme*.

R. H. *Fac. Col. No. 74. p. 215.*

A right affecting an estate conquest by the defunct goes to the heir of the investitures. *See* SUCCESSION.

See SUCCESSION.

See APPENDIX.