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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.

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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,

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but what can be brought under the description of these ancient laws, is founded upon the practice of the Court; seeing it is from this principle it has been found, That tacks, pensions, and bonds excluding executors, fall to the heir of line.

Besides the general point, it was *urged;* That the particular circumstances of the case behoved to determine the question the same way, in so far as the proprietor of the land, the same day that he took a precept of *clare constat* from the superior, whereby he and his heirs are obliged to appear at the superior's courts, and are subjected to be judged there, for any bloodwits which may happen amongst their tenants, did likewise obtain a disposition to the teinds from the superior, who was also titular; by which the proprietor, his heirs, tenants and cottars, are bound to answer to courts, and perform other services, as at length is specified in the precept of *clare constat*, or other rights and securities of the land; whereby it is plain the heirs in the disposition were intended to be the same as the heirs in the precept; because, if the parties had it in their eye, that the teinds were to devolve to another heir than he that was to succeed in the lands, it was very irregular, instead of mentioning the particular duties and services to be paid and performed for the teinds, to make a general reference to the rights that were to go into other hands, and which could not at all times be readily brought out to ascertain the services demanded from the vassals of the teinds. Besides, the proprietor and his heirs, with their tenants and cottars, being bound to answer to courts, shews plainly, that the heirs therein mentioned can be none other than the heir of line to whom the lands were to descend; seeing he could only have tenants and cottars liable to prestations.

Pleaded for the Heir of Conquest; The distinction betwixt heritage and conquest is of equal standing with the feudal law amongst us; for, whether we had that law immediately from the Normans or from England, where it was introduced by them, it is highly presumable that this noted distinction came along with that law; seeing at this day it obtains in both countries; and, though it is mentioned in our old statutes, this does not prove that the same was not the common law *ab ante*. The law of death-bed, which is acknowledged to have arisen from custom, occurs likewise in the book of Majesty; and therefore the determination of succession in conquest cannot be looked upon as an exception from a general rule of succession in heritage to the heir of line; but both of them ought to be deemed different rules of succession coeval among us with the feudal law.

It is true, that our ancient statutes only mention lands and tenements, conquest and acquired; but these words are sufficient to comprehend every heritable right: The law of death-bed says, *Nemo potest alienare terras suas;* but yet, *de praxi*, every heritable right falls under the prohibition; and therefore there can be no doubt, that, where lands and tenements are mentioned, teinds are comprehended, which, both by our law and stile, pass under the denomi-

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nation of *separata tenementa*, the rights thereof being established and carried down in the same manner as lands by charter and sasine. Indeed, before the Reformation, they were not *in commercio*, and so could not be deemed to fall under the statute; but thereafter, when they became commercial, of course they behoved to be comprehended under the old law.

As to the specialty arising from the particular circumstances of the case, it was *answered*; The succession settled by law is not to be varied and over-ruled by so slight presumptions of the intention of the purchaser, where with certainty it cannot be affirmed what his intentions were, touching his succession, failing issue of his own body. By neglecting to make any substitution to these, it is presumable, he left the succession to be governed by the rules of law; and it is of no import that the 'heirs whatsoever,' mentioned in the right of the teinds, were to answer to courts, &c. seeing these could be performed by the heir of conquest, if he succeeded to the teinds, as well as by the successor in the lands; and, if both could perform the services according to the tenor of their several rights, no necessary consequence can be drawn from the reference in the disposition to the precept; that tending to no other purpose than to ascertain the services by the heir and successors in the right to the teinds.

Replied for the Heir of Line; It is not to the purpose that teinds are called *tenementa* or *feuda*, since these are none of the *tenementa* denoted in the statute. Were it necessary, it could easily be shewn that teinds are in no legal sense *tenementa*; as a disposition of lands, or of lands and tenements, was never supposed to comprehend teinds; and, if they do not fall under a general description of lands and tenements at this day, How is it possible to maintain it could be otherwise, when they were the peculiar property of churchmen?

As to the argument drawn from the extension of the law of death-bed, it does not apply, because that law is extremely useful to the nation; therefore, when the subjects of succession came to multiply, the Court justly extended the same; but there is no advantage by extending the succession of an heir of conquest. Besides, if the argument proves any thing, it proves too much; for, according to that reasoning, tacks or bonds, (secluding executors) which have been adjudged to the heir of line, ought to go to the heir of conquest; since the law of death-bed militates against conveyances of these *in lecto*.

THE LORDS found that the succession to the teinds devolved upon the heir of line, and not the heir of conquest.

C. Home, No 44. *p.* 78.

1738. *December.* 8. The CREDITORS of MENZIES *against* MENZIES.

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A BOND containing an obligation to infeft, though no infeftment had followed upon it, found to belong to the heir of conquest, and not to the heir of line.

Kilkerran, (HERITAGE and CONQUEST.) *No* 1. *p.* 251.

*** This case is reported by C. Home, No 81. p. 5519.