1740.

EARL OF SELKIRK *v.* DUKE OF HAMILTON.

JOHN, Earl of SELKIRK, - - - *Appellant;*
JAMES, Duke of HAMILTON and BRANDON, - - - - - - *Respondent.*

et e contra.

3d April 1740.

SUCCESSION.—HERITAGE.—CONQUEST.—What held to fall under conquest.

[Elchies, *voce* Heritage and Conquest, No. 3.—Brown's Supp. V. p. 684.]

WILLIAM, Duke of HAMILTON, had issue by Anne No. 54.
his duchess—James, (afterwards Duke); Charles, created Earl of Selkirk; John, his third son, and several other children.

Charles, Earl of Selkirk, died in March 1739 leaving considerable heritable property. His moveable estate was carried by his last will and testament. The heritable property was of various kinds. It embraced,

1. Lands which he had purchased, taken to himself, and his heirs and assignees whatsoever. In some of these lands he had been infeft, in others not.

2. Adjudications, (with the same destination) in which he was not infeft.

3. Heritable bonds, on which infeftment had followed.

4. Heritable bonds, on which infeftment had not followed.

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5. Bonds secluding executors.

6. Bonds of corroboration (secluding executors). of two kinds. 1st, Bonds corroborating the debts contained in the heritable bonds and accumulating the arrears of interest into principal sums; and, 2dly, Bonds corroborating the debts contained in the moveable bonds, and accumulating the arrears contained in these into principal sums.

7. Lands conveyed in trust for the said Earl, upon which infeftment had followed in the name of the trustee; and heritable bonds also in trust, and in which the trustee had likewise been infeft in his own name.

8. The superiorities of the lands of Balgray and Mosscastle. The property of these lands had been contained in an entail made by Duke William and his Duchess, in favour of the Earl, and the heirs male of his body, whom failing; to John the entailer's third son. This deed contained a power of revocation, and had not been delivered. The Earl had purchased the property of these lands from the vassal and subvassals, and obtained procuratories for resigning them to himself, *ad perpetuam remanentiam*. The procuratory for resigning Balgray was not executed, but that for resigning Mosscastle was executed.

9. The teinds of the lands of Crawford Lyndsay, of which he had obtained a grant from the crown to himself, and his heirs and assignees whatsoever, and in which he was infeft. The lands themselves had been contained in the entail of Duke William above referred to.

Upon the death of Earl Charles, a competition arose between his younger brother, John, then Earl of Selkirk, (the appellant) and his nephew, James,

Duke of Hamilton, (the respondent) son and representative of his elder brother. The former was served and retoured *heir male general of line* to the said Earl. The latter was served and retoured *general heir of conquest.*

The Lord Ordinary (Elchies) pronounced an interlocutor, (July 27, 1739,) containing substantially the following findings.

'1. That the lands, which the late Earl had 'purchased and in which he had been infeft, de- 'volved to the Duke of Hamilton, as heir of con- 'quest.

'2. That the Duke as heir of conquest had 'also right to the dispositions and adjudications of 'lands acquired by the deceased, although infeft- 'ment had not followed on them.

'3. That he had right to the heritable bonds 'acquired by the deceased, upon which infeftment 'had followed.

'4. That he had also right to those which con- 'tained a clause of infeftment, although infeftment 'had not followed.

'5. That the right of succession to the bonds 'secluding executors, and which contained no 'clause of infeftment, descended to the Earl of 'Selkirk, as heir of line.

'6. That the bonds of corroboration (secluding 'executors) did not alter the right of succession to 'the original bonds as to the principal sums, and 'that therefore those corroborating the debts con- 'tained in the heritable bonds, devolved to the 'Duke, as heir of conquest, but that the bonds 'accumulating the arrears due on these into prin- 'cipal sums, and also those corroborating the 'debts contained in the moveable bonds, descend- ed to the Earl of Selkirk, as heir of line.

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'7. That the succession to the lands and heri-
'table bonds conveyed in trust fell to the Duke,
'as heir of conquest.

'8. That the right of succession to the lands of
'Balgray, descended to the Earl of Selkirk, as heir
'of investiture of the superiority.

'9. That the succession to Moss Castle devolved
'to the same heir.

'10. That the right of succession to the teinds
'of the lands of Crawford Lyndsay descended to the
'Earl of Selkirk, as heir to the lands themselves.'

The Lords adhered, (10 January, 1740.)

Entered 15th January 1740.

An appeal was brought by the Earl of Selkirk from the 1st, 2d, 3d, 4th, and 7th findings above recited, and from that part of the 6th finding, which determines that the bonds of corroboration do not alter the right of succession to the original bonds, as to the principal sum therein contained, and that the same fall to the heir of conquest.

Entered 25th January 1740.

A cross appeal was brought by the Duke of Hamilton, from the 5th finding, from part of the 6th, and from the 8th, 9th, and 10th findings.

ON THE ORIGINAL APPEAL.

Pleaded for the Appellant:—As to the first finding,—heirs of conquest can only come in where no other provision is made for the succession. In the present case, they are cut out by the destination to the "heirs whomsoever of the granter."

As to the second finding,—where no infeftment has been taken, there is no room for the heir of conquest. By the 88th chapter of *Quoniam attachiamenta*, by which the law of conquest was introduced, he is only entitled to lands in which the ancestor died seized.

As to the third finding,—heritable bonds cannot be assimilated to lands or tenements, even where infeftment has followed on them: neither, *a fortiori*, can they be so assimilated where there has been no infeftment. In this case they are mere personal securities for money lent. The cases referred to do not apply, there having been there no destination to heirs whatsoever.

As to the 7th finding, with regard to the lands and heritable bonds which were vested in the person of trustees,—there was a bare right of action against the trustees in the Earl of Selkirk; and this cannot in any shape be considered as conquest.

As to that part of the 6th finding, which determines that the bonds of corroboration do not alter the right of succession to the original bond,—it was argued, 1st, that the terms of these bonds of corroboration, being the last destination, must regulate the succession, and, therefore, although the original bonds might go to the heir of conquest, the latter bonds (secluding executors) must go to the heir of line, and, as they include the heritable bonds, they must also regulate the succession of these; and, 2dly, that the same words cannot in the same destination imply two different meanings, which would be the case here, if the destination were to carry the arrears of interest, and the principal sums contained in the moveable bonds to the heir of line, and the principal sums of the heritable bonds to the heir of conquest. It was clearly intended to give the former to the heir of line, and the same intention is to be presumed with regard to the latter. 3dly, The words, "without prejudice to the

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former bonds," (which had been used) are words of common style, and are only employed to prevent the former security from being impaired.

Pleaded for the Respondent:—As to the first finding,—there is nothing more certain in the law of Scotland, than that lands purchased by a person in which he has died infeft, and which contain no particular destination, devolve to the heir of conquest.

The 2d, 3d, and 4th findings, proceed upon the same principles. By the law of Scotland, the elder brother, as heir of conquest, succeeds to his immediate younger brother in all real and heritable estate which the younger brother has acquired or purchased—not only in lands, but in all such other rights, whereupon infeftment has followed or may follow. This is the opinion of Craig, Hope, Stair, Mackenzie, and others, and there are various decisions to the same effect, Robertson *v.* Lord Halkertoun, 7th July 1675, (Mor. 5605) A. *v.* B. 21st July 1676, (5608) A. *v.* B. 29th Feb. 1677, (5608) Andersons, 28th June 1677, (5609) Creditors of Menzies, 8th Dec. 1738, (5614.)

It is a mistake to say that this distinction between heirs of line and heirs of conquest was introduced by *Quon. attach.* It was introduced by custom, and not by statute; and indeed it is so stated in a former part of that work; but the book itself was never considered as authentic, or entitled to legal authority. It was never received as a collection of Scots statutes, and has only been regarded as containing notices of some ancient customs.

There are a variety of instances where the brieves issuing out of the chancery of Scotland, direct the Sheriffs or Bailies to serve the persons

heirs of conquest in general, and they are so retoured. This shows that the heir of conquest is entitled to heritable rights on which infeftment has not followed.

With regard to the lands and heritable bonds conveyed in trust,—the beneficial interest in these must go to the same person to whom the lands, if directly conveyed, would have gone. Had the Earl taken these rights in his own name, they must have gone to the Duke as heir of conquest, and taking them in the name of trustees does not alter the nature of the estate; and as the estate goes to the heir of conquest, he, and he only, is entitled to bring an action to have them conveyed to him.

With regard to that part of the 6th finding which determines that the bonds of corroboration do not alter the nature of the original heritable bond,—although the late Earl thought fit to take a new bond for payment of all the money due, this by no means altered the nature of the original bonds, which are heritable, and contain clauses of infeftment, and undoubtedly go to the heir of conquest. The only design of taking such new bonds was to convert the interest into a principal sum. The bonds accordingly bear to be 'without *prejudice* 'or *innovation* of the former securities,' and it would therefore be contrary to the express words, as well as to the plain intention of the parties, to make these bonds alter the succession of the original heritable bonds.

ON THE CROSS APPEAL.

Pleaded for the Appellant, (the Duke of Hamilton):—As to the last part of the sixth finding,—as

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the bonds secluding executors, were purchased by the late Earl, and are made heritable by *statute*, they ought to go to the proper heir in acquired heritable rights, the heir of conquest. The bonds of corroboration are also in the same way conquest and heritable, and moreover the sums in them are made accessory to the original capital sums, which have been found to devolve to the heir of conquest, and these ought also to have been found to devolve upon the same heir.

As to the objection that the heir of conquest is only entitled to lands and such heritable subjects, upon which infeftment either has followed or may follow,—it is answered, that in the cases of heir-ship moveables, tacks, &c. which are either generally moveable, or not of a permanent nature, these have not been held to fall under conquest, being taken up without service; whereas in the case of bonds secluding executors—these being rendered heritable by statute—a service is necessary, in the same manner as in the case of bonds bearing a clause of infeftment, and of consequence go likewise to the heir of conquest.

As to the 8th and 9th findings, with regard to the lands of Balgray and Moss Castle,—those being purchased by the late Earl, and the destination to them to his heirs and assignees, ought, as well as the other conquest estate, to descend to the heir of conquest.

The superiority, (the entailed estate,) and the property of those lands, were, by the feus and sub-feus which had been made, completely separate estates. They were as much separated from the entailed estate as any other lands could be; and as such, the Earl took the rights to himself, his heirs,

and assignees, and not to the heirs of the entailed estate.—As to the property of the lands of Balgray, this was not united to the superiority at the time of the Earl's death, the procuratory of resignation not having been executed, and therefore must descend as a new purchase to the heir of conquest.

With regard to the property of Moss Castle, although resignation had followed, there is a difference between the case of the property returning to the superior by any feudal casualty, and the case of a voluntary agreement like the present, where the superior purchases back the feu. In the first case, the union is absolute, and the property (the subaltern right) must descend according to the destination of the superiority; but, in the other case, although the superior has united the property with the superiority, he retains the same power over his purchase as before the union, and having taken the purchase to his heirs and assignees, and not to the heir of the superiority, it must also descend to the heir of conquest.

With regard to the tithes of the entailed estates, similar arguments apply, viz. that as tithes of lands are, by the law, deemed a separate estate from the lands themselves, and carried by separate titles, and as the tithes in question were purchased by the late Earl, and taken to him and his heirs male whatsoever, and not to the heir of the entailed estate, they must descend to the heir of conquest.

Pleaded for the Respondent, (the Earl of Selkirk):—Bonds secluding executors, as they contain no obligation to infeft, are only heritable by the destination of the proprietor: the succession to them is well known and ascertained in the law

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of Scotland, and they cannot, in any shape, fall under the denomination of conquest.

As to the last part of the sixth finding,—if no bond of corroboration had been taken, the arrears of interest would, without doubt, have gone to the executors; and it appears absurd to say, that they are made descendible to the heirs of conquest, by being included in a bond which has always been held as descendible to the heir of line.

As to the fifth and ninth finding,—it was clearly the Earl's intention to consolidate the property with the superiority; and, in the case of Balgray, this was formally done. The procuratories of resignation are not in the usual form, but are taken in such terms that the lands should remain with, and be merged in the superiority, and of consequence descend to the heirs of the superiority.

As to the tenth finding,—the estate of Crawford Lyndsay being limited by settlement to the heirs male of the late Earl, whereby it was admitted that the present Earl must inherit the same; and the teinds being in like manner limited to the late Earl's heirs male, it must be the same heir male who succeeds to both.

Judgment, 2d April, 1740.

After hearing counsel, "it is ordered and adjudged, that the several interlocutors complained of be affirmed."

For Appellants, *Ch. Areskine, W. Murray.*
For Respondents, *W. Hamilton, Alex. Lockhart.*