1667. *January* 3. SMEATON *against* CRAWFORD.

No. 7.
Who to be understood heir of line? Who, of conquest?

Umquhile Peter Smeaton granted a disposition to Crawford his wife, and her heirs, of a tenement of land, whereupon nothing following during her lifetime. Her younger brother James Crawford served himself heir-general to her, and obtained a decreet of implement against John Smeaton as heir to his father, and having used horning thereon, obtained adjudication against Smeaton, and his superior, and thereupon was infeft; which right was disponed by him, with consent of William Crawford, elder brother to the wife. The said John Smeaton dispones the same tenement to Alexander Smeaton, and he is infeft, and thereupon pursues a reduction of James Crawford's retour, and of all that followed thereupon in consequence, on this reason, that the disposition to the wife belonged not to James Crawford her younger brother, who was heir of line, but to William Crawford, her elder brother, as heir of conquest, and so the service was null, following thereupon; and the pursuer being first infeft from Smeaton, he hath the only right, because any infeftment to William, the heir of conquest, will be posterior. It was answered, that it was *jus tertii* to the pursuer, whether the heir of line was served or infeft, or the heir of conquest; likeas the heir of conquest did concur, and had consented to the disposition.

The Lords found not the defences relevant, but considering the case as calumnious, seeing it was but of late cleared by decisions, whether the heirs of line had right to dispositions without infeftment, they did supersede to give answer, but ordained the defender to give in what evidences he could give of the onerous cause of his disposition.

Stair, v. 1. *p.* 424.

1675. *July* 7. ROBERTSON *against* The LORD HALKERTOUN.

No. 8.
A father granted bond to his daughter, obliging himself to infeft her in an annual rent out of certain lands. The bond contained a power to her to call for the principal sum upon requisition. Found, that the bond being principal-

The said Robertson being assignee, constituted by Sir Patrick Falconer, as heir of line to Margaret Falconer his sister, in and to a bond made by the deceased Lord Halkertoun, her father, containing precept for infefting her in his lands in an annual-rent, effeiring to the sum of 1,000 merks, upon which it was redeemable, did intent action against Halkertoun as heir to his father, for payment of the foresaid sum. It was alleged for the defender, That the pursuer could have no right as assignee by the heir of line, because the said sum being secured by an obligement to infeft in an annual-rent, did belong to the heir of conquest and not to the heir of line. It was replied, That there being no heir of conquest compearing, it was *jus tertii* to the defender. 2*do*, The disposition of the said annual-rent being only for security of the daughter's portion, payable upon requisition, and no infeftment following thereupon, it cannot belong to the heir of conquest but to the heir of line, which hath been the constant custom and law of this kingdom; seeing

No. 8.
ly conceived as an annual-rent right, though having a clause of requisition, fell to the heir of conquest.

there never was nor can be a general heir of conquest served to give him right to any heritable obligement or real right, whereupon no infeftment followed; whereas apparent heirs of line being served general heirs by a retour, have right to all real rights, such as reversions, tacks, and others, *et multo magis* to heritable obligements for granting infeftments for security of a sum of money whereupon no infeftment followed; and the pursuer having taken assignation, not only from the heir of line, but likewise having the consent and concurrence of Sir John Falconer, who was apparent heir of conquest who did renounce all right or claim, he could pretend he was *in optima fide* to rely upon the said assignation as an undoubted right. It was duplied for the defender, That the apparent heir of conquest had good interest to compear and allege, that the said disposition and obligement could only belong to the heir of conquest, and in effect it was acknowleged by the pursuer, who did take a renunciation from Sir John; but he having died before he was served heir of conquest, his eldest son is now the only apparent heir; neither is it *jus tertii* to the defender, to whom the now apparent heir is debtor, and from whom he may comprise, if he will not serve himself heir to the deceased Margaret who granted the assignation. 2*do*, Whereas, it is alleged, that there being no sasine nor infeftment, by our law and custom the same pertains to the heir of line, it is *gratis dictum*, for the on the contrary by a practique, and decision betwixt Craigie and Craigie *in anno* 1617*, it was clearly decided, and is the opinion of Hope in his title of Succession; likeas the distinction of Succession betwixt heirs of line and conquest was long before sasines were in use, which was only in King James the First's time; whereas in King Robert the Third's days, there is a statute appointing conquest to ascend, and heritage to descend; as also in the 88th Chapter, *Quoniam Attachiamenta:* And whereas, it is alleged, that there cannot be a general heir of conquest, there is no reason for the same, seeing it is ordinary, because there may be services of general heirs of provision where no infeftment hath followed, as in the case where there is an obligement to infeft a party in an annual-rent, and failing of him by decease to another designed by name and sirname, and his heirs; the first heirs-substitute dying before infeftment, the next person may be served general heir of provision, without which this general right of succession cannot be transmitted; and the reasons of the law and practique is, that an obligement to infeft being the destination of the disponer, he can only have right thereto who is to succeed, if the infeftment had followed.—The Lords having seriously considerthis case, and debated long amongst themselves, Whether the heir of line or conquest should be preferred, did at last, by plurality of votes, prefer the heir of conquest, upon these grounds especially, that a disposition bearing an obligement to infeft in an annual-rent, should belong to that person to whom it would belong if infeftment had followed, as being a destination of the granter of the disposition, and as being the opinion of Hope in his Practiques*, where a reversion of lands belonging to Robert Pitcairn, Abbot of Dunfermline, was decerned to belong to his heir of conquest and not to the heir of line; as likewise, there being a practique

* See APPENDIX.

No. 8. in that same case betwixt the heirs of line and conquest of Dr. Craig, as also upon that ground, that sasines before King James the First were not in use, and that if there had been a declarator at the heir of conquest's instance as being heir of provision, it would have been so declared; and upon that same reason, if there were a brieve raised for serving at the heir of conquest's instance as being heir of provision, it would have been so declared, and upon that same reason for serving the heir of conquest, it could not be refused, that never having been controverted heretofore, seeing before sasine our law and statute did make a distinction betwixt heirs of line and heirs of conquest; but some others were of a contrary opinion and judgment, whereof I was one, upon these grounds; That this disposition never having taken effect by sasine, and bearing only an obligement to infeft a daughter in an annual-rent of a thousand merks as her provision, with an express clause, that she might premonish, and that the father might redeem by payment of the said sum, it resolved into a security for her provision, and as if an heritable bond, so that the heir of line would undoubtedly have right by a general service, seeing he is liable to the defunct's whole debts, and is successor *in universum jus*, where there is no infeftment, *quia quem sequitur incommodum eundem et commodum;* and albeit, before King James's time, we had no sasines under notaries' hands, as hath been since in use, yet these ancient statutes did still make a distinction betwixt the heirs of line and heirs of conquest, and their difference is only in feus and lands, as they were then conveyed and settled by real and corporal tradition, such as were then in use, and perfected *per traditionem et actualem possessionem*, there being nothing more necessary in the case of heritage than conquest; so that the argument from sasines are of no weight; and for the practique, it was only in the English time, which ought not now to be respected, as to regulate all the subjects hereafter in a matter of so great importance, whereby all young children, who have but small and inconsiderable portions and provisions from their father, burdening the apparent heir, albeit no sasine given, the same will fall to the heir and eldest brother by the death of the second child, which cannot be presumed to have been the will of the defunct, who did never grant any thing but an heritable obligement, which never took effect by sasine. And for that old practique cited, it does not meet this case, seeing the question there was, that a second brother having disponed his lands and estate upon a reversion, it was found, that the reversion belonged to the heir of conquest to whom the estate had belonged, if he had never disponed the same; and for Hope's opinion in his treatise and compound of our law in succession, all he says is, that heritable bonds bearing an obligement of annual-rent, but not to infeft in lands, it may be doubted whether the same belong to the heir of line or heir of conquest; and yet he makes it his opinion, that all reversions or assignations to reversions belong to the heir of line, except it be reversions of conquest lands; so that neither his practique nor his opinion can meet this case, where the only question is, if an obligement for security for a sum of money, and not any reversion of conquest lands, or any right belonging thereto as the ground of the decision, the daughter never having any right but a naked obligement to infeft in

the ancient heritage, which undoubtedly did belong to his eldest son and apparent heir, and to which neither the daughter, nor her elder nor younger brother could pretend any right. And farther, Skene *De verborum significatione*, upon that title of conquest, is more clear that *conquestus* signifies lands which any person acquires *privato jure et singulari titulo*, and is express, that "De jure hujus regni conquestus cujuslibet hominis qui moritur de ipso sasitus hæreditarie sine hærede de corpore suo gradatim ascendit; so that all the ancientest laws and statutes of King William, Robert the Third, and *Leges Burgorum*, are only to be understood in that case where the acquirer *obiit sasitus;* and likewise *Craig De feudis*, in his titles "De successione collaterali, et conquestu, si plures sint apud nos fratres veluti quatuor, et tertius feudum acquiserit," is express, that the question of conquest and succession thereto by the death of a third brother, is only si feudum acquiserit et decesserit, &c. where he declares, that the law as to conquest doth flow to us from the English law, who had it derived to them from the Normans when they were conquerors; and is clear, that by the law of England that question anent succession to conquest, is only where tertius aut quartus frater feudum acquisivit; wherein their law differs from ours, because the eldest brother succeeds to the third or fourth brother, passing by the intervening brothers; and therefore it seems to be most founded in law that conquest can never be the question, but *in feudis*, and not where the subject in question is an obligement to infeft for security of a sum of money; albeit it is granted, that if a second brother should acquire an absolute and irredeemable right of lands, but happen to die before infeftment, or, if being infeft, he should resign, reserving a reversion to him and his heirs, which might be said for the heir of conquest; but as to the subject now in question, seeing the lands out of which the deceased Margaret Falconer should have gotten infeftment, and no sasine followed, nor had she any right to a reversion, and that it was in her father's power to infeft her or not, to interpret that right to be *feudum*, or *de natura feudi*, seeing it was impossible she could succeed to the land, it is thought that there was much reason against that decision. No. 8.

Gosford MS. Nos. 773, 776. *p.* 481.

*** Stair and Dirleton's reports of this case are No. 3. p. 5605. *voce* HERITAGE AND CONQUEST.

1681. *December* 15. JOHNSTON *against* WATSON. No. 9.

In the mutual reduction pursued by Johnston against Watson, and Watson against Johnson of two services, the one being of the eldest brother's son, as heir to the youngest brother's son, and the other service being of the mid-brother's eye as heir to the youngest brother's son, the Lords found that the subject matter in debate, being heritage in the person of the defunct, who was the youngest brother's son, his right being a disposition from his father, and so was *præcep-*