No 15. band, as of a lawful right of the lands, which could not be quarrelled by him or his heirs, for the causes foresaid, which was repelled by the LORDS.

Act. *Stuart et Aiton.* Alt. *Advocatus, Nicolson, et Burnet.* Clerk, *Hay.*

Fol. Dic. v. 1. *p.* 198. *Durie, p.* 453.

No 16.
New rights acquired during the marriage, to lands, which the purchaser had some right to before the marriage, are not to be reputed conquest.

1683. *February* 6. WAUCHOPE *against* L. of NIDDRIE.

IN an action of declarator pursued by James Wauchope, son and apparent heir of the second marriage, betwixt the Laird of Niddrie and Ker his second spouse, founded upon a clause in the said Niddrie's second contract of marriage, wherein he was obliged to provide the children of that marriage, to 10,000 merks, together with the hail conquest lands during the marriage, and subsumed, That the lands of Lochtouer were conquest during the marriage, and that this Niddrie, as heir to his father, ought to denude himself thereof in favours of the said James;—it being *alleged* for Niddrie, That he could not be liable to denude himself of the saids lands, because the same could not fall under the clause of conquest, in regard his father had both a right of wadset thereupon, and two comprisings, and an irredeemable disposition from the apparent heir of the said lands;—and it being *replied*, That after the marriage, he had acquired preferable rights to these lands, and so *in tantum* the value of these rights were conquest:——THE LORDS sustained the defence for the Laird of Niddrie, that his father had either right by expired apprisings, or by an irredeemable disposition; and found, That any right acquired during the marriage, although preferable, did accresce to the former rights, and was but a completing of the conquest formerly begun before the marriage.

Fol. Dic. v. 1. *p.* 198. *P. Falconer, No* 47. *p.* 26.

1707. *November* 12.

FERGUS *against* BIRREL and ALEXANDER SWINTON.

No 17.
By a clause in a contract of marriage, conquest was to be divided, in case of no children, between the husband's and wife's heirs. The wife in the contract disponed her lands to her husband in

BY contract of marriage in 1674, betwixt William Fergus and Agnes Birrel, one of the heirs portioners of Freuchie, she dispones her lands to him in liferent, and the heirs of the marriage in fee; which failing, to the said Agnes, her heirs and assignees whatsomever. In 1682, she grants a disposition of her lands to her husband, on this narrative, that he had paid several debts which affected her land, and that now all their children of the marriage were dead, and for the nuptial love she bore to him, &c. The husband being the first deceaser, she is told that her disposition being *stante matrimonio*, it was *donatio inter virum et uxorem*, and so revocable in law, she is advised to revoke it, and so dies; whereupon Isobel Birrel, her sister, and nearest heir, raises a reduction of that disposition against Mary Fergus, sister and heir to the husband, and insisted on

No 17.
liferent; thereafter, during the marriage, for onerous causes she disponed them to him absolutely. This acquisition was found to fall under the clause of conquest.

that reason, that it was a donation made by a wife to her husband, and so revocable, and actually *de facto* revocked.——THE LORDS reduced it.—Then 2*do*, *alleged* for the husband's heir, That the disposition was not a *donatio*, but onerous, for it bore that he had paid debts affecting her estate.——THE LORDS found the narrative being *inter personas conjunctas*, could not prove *per se*.—Then 3*tio*, It was *alleged* for the said Mary Fergus, That in fortification of her brother's disposition, she offered to prove that her brother had paid debts to the value of the land, it being only 200 merks a-year.——THE LORDS, before answer, allowed her to instruct the onerous cause of the disposition made to her brother; and accordingly, she adduced the creditors and others, who deponed that he paid off debts, affecting Agnes Birrel and her father, to the value of upwards of 2500 merks; and this probation coming to be advised, it was *objected* by the wife's heir, That it was no legal proof, seeing witnesses had deponed on the receipt of money, which could not be; that they were single witnesses, and not two concurring to one thing; that some of them deponed *super facto alieno*; and that he charged annualrents of these sums, whereas he was bound *jure mariti* to pay the current annualrents.—*Answered*, The disposition was sufficiently supported by the contract of marriage, where in the procuratory and precept of sasine the last termination was on his heirs. Next, in such a circumstantiate case as this, *semi plena probatio* was enough, and the Lords required not a rigorous probation, but such as would convince them that he had truly paid debts for her, though he was so simple as not to take assignation thereto.—*Replied*, The contract afforded no support; for the dispositive clause is evidently to her heirs, and that must regulate the whole subsequent clauses, though they have been tampering with the precept of sasine, and turned the word 'her' heirs to 'his' heirs; but *non refert* how it runs, when the dispositive part is clear. Likewise, his disposition does not so much as relate to the contract of marriage, nor found on it, but bears a quite distinct narrative; and they cannot repudiate or alter what their own writ bears.——THE LORDS thought the contract could not support the disposition, if bearing no relation thereto; and that the dispositive clause behoved to rule, where there was any varieney or discrepancy in the writ; but found a *talis qualis probatio* of the onerous cause; and the debts paid by him for his wife were sufficient in this case; and, considering that the value of the heritage was but small, and little more than a competent tocher with a wife, therefore they found the onerous cause of the disposition sufficiently proven *ad victoriam causæ*; and preferred Mary Fergus, the husband's heir, to the lands.——Then Isobel Birrel, the wife's heir, recurred to this fourth allegeance, that she must have the half of this heritage, notwithstanding of his disposition to the whole; because the contract of marriage bore an express clause of conquest, that whatever lands, tenements, moveable goods or gear, he should purchase and acquire during the standing of the marriage, it should divide equally betwixt his and her heirs, failing bairns of the marriage; *ita est*, this is acquired by him *stante matrimonio*, and falls precisely under the clause of

No 17. conquest.—*Answered*, This cannot be called a *feudum novum*, seeing the wife has renounced all right she had in favour of her husband; and her heir can claim no more than she; all right she had to the subject being conveyed, this must also extinguish and carry along with it the right she had by the clause of conquest.—*Replied*, Where one renounces and transmits any right they had at the time, a supervenient posterior right will not accresce thereto, as Stair observes, *lib.* 3. *tit.* 2. § 2.; and she had no right to the conquest at the time she disponed to her husband, but it existed after; and though an heir shall expressly renounce his father's heritage, yet when his father dies without making any right, his son succeeds as heir, notwithstanding his renunciation. Likeas it is clearly conquest; for after this disposition founded on, he caused his wife make a new one to one Smith, and he took a re-disposition to him.——THE LORDS found this right fell under the clause of conquest, and so the half of the lands disponed devolved on her; but thought she could not claim them as heir to her sister, but as heir of provision to her husband.

Fol. Dic. v. 1. *p.* 198. *Fountainhall, v.* 2. *p.* 402.

*** Forbes reports the same case:

BY contract of marriage betwixt William Fergus and Agnes Birrel, heiress of Freuchie, she disponed her land to him and herself in liferent, and to the heirs betwixt them; which failing, to her own heirs and assignees whatsoever. And it was agreed, that what happened to be conquest during the marriage, should go to the longest liver, and the heirs betwixt them; and failing these, should be equally divided betwixt both their heirs and assignees whatsoever. Thereafter, *stante matrimonio*, Agnes Birrel having, for onerous causes, disponed her land to the said William Fergus, his heirs and assignees whatsoever, failing heirs of the marriage, reserving her own liferent; and he being infeft, there arose after the death of both a competition for the land, betwixt Mary Fergus, who claimed it by the disposition as heir to the husband, and Isobel Birrel, who, as heir to the wife, pretended to the half of the subject thereby disponed, as being conquest during the marriage.

Alleged for Mary Fergus; The disposition made *stante matrimonio*, could not be called conquest or *feudum novum;* in respect William Fergus was liferenter by the contract of marriage, and the disposition gave him only a remote *spes successionis*, or a right of substitution to the heirs of the marriage, who, had there been any, would have got the lands as heritage, and not as conquest; so that the substitution of William Fergus's heirs whatsoever, to the heirs to be procreated betwixt him and Agnes Birrel, is but a completing of his former liferent right; like an heritor purchasing apprisings affecting his lands, in order to complete his former right, which the Lords found to be no conquest betwixt Wauchope of Niddrie and his brothers, No 16. p. 3062. and betwixt the Lady Castlehaven and the Lord Collingtoun, No 22. p. 3068.

Answered for Isobel Birrel; It is absurd to pretend that the disposition to the husband in fee, whereby he might have disponed the land to any other at pleasure, did only make him an heir of provision, who needed no service; nor doth it follow, that because the husband had a liferent, the supervenient fee was not conquest. The decisions cited are not to the purpose, where acquisitions of fee for securing and completing former rights of fee, were not interpreted to be conquest; but how can a fee be accessory to a liferent which it absorbs, or property be accessory to servitude? And it is not strange in our law, to see a right made over one way, come back to the granter in whole or in part another way. No 17.

THE LORDS found, That by the clause of conquest in the contract of marriage, the lands disponed by the wife to the husband during the marriage, are conquest to him, and that the fee of the one half thereof falls to the heirs of the wife.

Forbes, p. 208.

SECT. IV.

Rights conquest, but taken in favour of younger children.—Lands conquest, and again sold.—Liferent of conquest over and above the liferent of a certain sum.—Sums conquest, but applied for purging incumbrances.—Who heir of conquest?

1625. *July* 16. KNOX *against* BROWN.

No 18.
A provision to a wife in a contract of marriage, of her liferent of all sums 'to be acquired by the husband, and taken to himself, and to his heirs,' was found to comprehend the liferent of sums, the fee of which was provided to the second son.

KNOX, relict of James Brown chirurgeon, having charged her son, as heir to her husband, conform to her contract of marriage, to fulfil the same to her, upon that clause thereof, whereby the husband obliged him and his heirs, to provide her to her liferent of all sums which he should conquish, and employ the same upon lands or annualrent, to himself and his heirs, during the time of their marriage; this clause the LORDS found obligatory against the heir of the defunct, to bind him to employ and give the relict her liferent of all sums of money, which the husband had conquished during his lifetime, after the date of that contract, and which he had given out in heritable manner, and remained in that case, and of that nature, the time of his decease; and found, That the relict, by virtue of that clause, had right to seek her liferent of the heritable sums conquished by her husband, which were provided by him to his second son; albeit the clause of the contract was conceived in these terms, viz. 'Obliging him and his heirs, to provide her to the liferent of the sums which he should 'conquish to himself or to his heirs;' which clause they found extended also