1629. *June* 30. LA. DUMFERMLINE *against* The EARL.

No 15.
Lands were sold to a vassal, but the feu never confirmed. The superior was bound to infeft his wife in conquest, in which this feu, which returned to him, was found not excluded.

IN this case, the Earl of Dumfermline having suspended the charges given him, for infefting the Lady his mother in the lands conquest by her husband after their marriage, it was found, that the lands, wherein the umquhile Earl was infeft before the marriage, being thereafter, or before, to a vassal, whose feu was never confirmed, and so whose right, being of kirk-lands, was null, and would not have excluded the umquhile Earl's right; the acquiring of this feu by the Earl, after the marriage, from the said feuer, was not found to be a conquest, whereby the heir of her husband might be holden in law to give her infeftment, or wherein the clause of that contract could strick, as if it had been conquest, seeing he being infeft in the property of that feu, whether it preceded or had been after the Earl's right, not being confirmed, took not away the right subsisting in the Earl before the marriage; and that right was not found to be of the naked superiority, except that the Lady would say that the feu was confirmed; and albeit, the Earl had satisfied the feuer to the full avail of these lands, yet that made it not to be a conquest of any such right and security of lands as might fall under the clause of the contract in favours of the Lady; neither was that satisfaction, or the umquhile Earl his receiving of the feu-duty diverse years from the feuer, and giving acquittances thereon conform to the feu, found to be an approbation of that feu; and that thereby he might not quarrel the same, the said feu being set by himself, when he was abbot, and having after the feu acquired an heritable right upon the annexation, whereby the Lady *alleged*, that he could never quarrel the feu set by himself, for not confirmation, it being his own deed. Likeas she *alleged*, that that supervenient right of the Earl's, who set the feu, viz. of his erection, whereby the necessity of confirmation ceased, behoved to accresce to the feuer, *quia jus venditori superveniens emptori prodest*, and therefore she alleged, that the feuer's infeftment was good against the setter and his heirs, and they could not quarrel the same for not confirmation, both in respect of the superveniency of the right to himself, and also in respect of the said tacit ratification; which answer for the Lady was repelled; for it was found, that albeit the Earl set the feu, yet though he could not quarrel it by any deed done by himself to the prejudice thereof, yet he might quarrel it upon the nullity of the law and statute of Parliament for not confirmation, which was the feuer's own deed; so that as any other, having received a valid right of these lands, might quarrel the said feu, so might the setter thereof, having received a right which another might have received; and the acquittances of the feu-duties, conform to the feu, were not found a ratification thereof, and this was the rather so found against this charger, where the dispute was not betwixt the granter of the feu and the feuer, but by the Lady claiming conquest by the purchasing of that feu by her hus-

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.

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

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.

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