SECT. VII.

Effect of Civil Rebellion.

1626. *November* 21. SEATON, Supplicant.

No. 34.

ONE may be served heir to a rebel, who died at the horn, notwithstanding the clause in the brieve, requiring to cognosce that the defunct died in the faith and peace of our Sovereign Lord, which was found only to respect forfeiture, and not civil rebellion.

Fol. Dic. v. 2. *p.* 371. *Durie.*

*** This case is No. 65. p. 2208. *voce* CITATION.

SECT. VIII.

Service by Adjudication on a Trust-bond.—Effect of a supervening Alteration on the State of the Right.

1781. *July* 25. HEPBURN *against* SCOTTS.

No. 35.
An adjudication on a trust-bond, vests an active right in the truster, and transmits it to his heirs.

UPON the death of Patrick Hepburn, of Kingston, in 1748, that estate devolved on Patrick Scott, his sister's son. Instead of making up titles, by service to his uncle, he was advised to grant a trust-bond; upon which, after a special charge, adjudication was led; and, upon that adjudication, assigned by the trustee, he possessed the estate till 1779, and then died without issue.

A competition ensued between his heirs-at-law, Elizabeth and Katharine Scotts, his father's sisters, and Patrick Hepburn, who was ninth cousin, and had, by service, entered heir to the person last in the fee of the estate.

Pleaded for Mr. Hepburn: When the statute 1621 substituted a charge against the heir in the place of a service, it was by no means in the view of the legislature to impinge upon the legal succession, nor to vest, in the apparent heir, an active right to the property of the estate. An adjudication, warranted by this act, differs not in matter nor in form from others, and its effects are to be regulated by the same principles. Unless secured by a declarator of expired legal, or by the

No. 35. positive prescription, it cannot convey the absolute property. That must remain *in hæreditate jacente* of the ancestor, till taken up by the service of the heir of the investitures.

Considered merely as a right in security, it is extinguishable either by a discharge from the creditor, upon payment of the debt truly due, or by any relevant exception against the obligation which the right is intended to secure. In this case, there is the clearest evidence, from the adjudger's back-bond, that no debt was, in truth, due to him. By the assignment of the adjudication to the person against whom it was led, the debt, if any had ever really existed, must have been at an end.

Adjudications on trust-bonds, considered as tentative processes, are useful to apparent heirs, uncertain of the situation of their predecessors funds; but no heir ought to rest satisfied with that title. Nor would any person purchase an estate held under it, but would require the heir to enter by service or precept of *clare*, which are the established modes of acquiring property by succession in Scotland.

Answered: This mode of acquiring right to an estate belonging to an ancestor, without service, although not in the view of the legislature, was a natural consequence of the act 1621. The heir, by the charge, *fictione juris*, enters to the estate of his predecessor, so far as respects the sums for which the diligence is used. When, therefore, an apparent heir granted bond for a sum exceeding the value of the estate, and on the bond, qualified by a separate deed containing a power of defeasance in favour of the truster, the trustee led an adjudication in terms of the statute 1621, this adjudication, assigned by the trustee to the heir, effectually vested him in the absolute property of the estate; and, upon his death, before assignment, the right of obliging the trustee to re-convey, descended to his representatives.

Apparent heirs, by means of this contrivance, were enabled to possess the estate of their ancestor, upon a singular title, and without representing the ancestor in his debts. This abuse was obviated, first, by an act of sederunt in 1662, and thereafter, more completely by 1695, Cap. 24. But an adjudication upon a trust-bond is, by the enactment, declared to be a mode by which apparent heirs succeed to their ancestors, and is viewed in that light by every lawyer who writes upon the subject; Stair, B. 3. T. 6. p. 14.; Sir George M'Kenzie, T. Succession in Heritable Rights; Bankton, B. 3. T. 5. p. 101, 102.; Erskine, B. 3. T. 8. p. 172.

The practice of granting trust-bonds, for the purpose of facilitating the transmission of feudal rights, without producing the investitures, and without the consent of the superior, was an early invention of our law. But it would have been a very unavailing one, and little followed, could the superior elude it by the objection here made. And to admit the exception in this competition, would render insecure most of the land-rights in this country, which, at one period or another, have been conveyed by the form which has been adopted in this case.

"The Lord Ordinary found, That an adjudication upon a trust-bond is a me-

thod of making up titles to an estate known and established in the law of Scotland; that it vests an active right in the truster, and transmits to his heirs." And to this decision the Lords adhered. No. 35.

Observed on the bench: Mr Hepburn did not insist to be allowed to redeem upon payment of the sums in the adjudication; neither, in the present case, was it competent, as the legal was expired; and the equity of redemption could not operate in his favour against the representatives of the apparent heir.

Lord Ordinary, *Monboddo.* Act. *Geo. Wallace.* Alt. *Geo. Buchan Hepburn.*

C. *Fol. Dic. v.* 4. *p.* 276. *Fac. Coll. No.* 76. *p.* 130.

1789. *December* 13.

ELIZABETH and JEAN SINCLAIR *against* ROBERT SINCLAIR.

No. 36.
A service once sufficient, not rendered invalid by a supervening alteration in the state of the right.

THE lands of Duncansbay, Warse, and others, were purchased in the year 1741, by William Sinclair of Freswick, from Malcolm Groat, the apparent heir, who became bound to make up a proper feudal title in his person, and then to convey. The minute of sale also contained an assignation to the maills and duties; and "for the farther security of the purchaser," a precept of sasine was inserted, and Freswick was immediately infeft.

After this, however, several creditors of Malcolm Groat, and among others Mr. Sinclair of Freswick himself, led adjudications against the lands. These adjudications were preceded by special charges. And the whole being vested in Mr. Sinclair, he, in 1755, obtained a decreet of declarator of the expiration of the legal. Mr. Sinclair died in 1769, after having conveyed to his only son John Sinclair the whole debts due to him, and the adjudications following on them.

Immediately after his father's death, John Sinclair obtained from Malcolm Groat, from whom the lands of Duncansbay, &c. had been purchased, a new conveyance, which contained, as formerly, an obligation to make up titles. This conveyance was accompanied with a precept of sasine, but no infeftment followed. Mr. Sinclair also expede a special service as heir to his father for carrying the estate of Freswick, and was infeft. In 1775, he executed an entail of his whole estates, including the lands which had been purchased from Malcolm Groat, in favour of Robert Sinclair, his cousin, to the exclusion of Elizabeth and Jean Sinclairs, his sisters, and heirs at law.

John Sinclair, the maker of this settlement, having died in 1784, it was brought under challenge, so far as related to the lands of Duncansbay, &c. by his sisters. In support of this challenge, it was

Pleaded: William Sinclair having been infeft in the lands purchased by him from Malcolm Groat, it was necessary for authorising his son to make any alteration in the succession, that they should be duly transmitted to him by service and infeftment.