

APPENDIX.

PART I.

ADJUDICATION.

1756. *March 3.* EARL OF SELKIRK *against* JOHN DALRYMPLE OF STAIR:

ON the 21st May 1739, John late Earl of Stair executed a settlement of his honours and estate, in form of a strict entail, in favour of Captain John Dalrymple his nephew, and of certain other heirs therein named, with a proviso that the Earl should have power to alter the settlement at any time in his life.

On the 2d June 1739, he also executed a disposition of the lands of Drummuckloch and others, "in favour of the Captain, and heirs-male to be procreate of his body; whom failing, of the other heirs of entail contained in, and conform to a bond of tailzie of the Earl's lands and estate, made and subscribed by him upon the 21st May last past." And, upon the 4th of February, 1740, he executed another disposition of the lands of Breistmiln and others, "in favour of the Captain, and the heirs-male of his body; whom failing, of the other heirs of tailzie specified in a bond of tailzie of the Earl's lands and estate of Stair, made and granted by him upon the 21st of May last past; but with and under the conditions, provisions, declarations, and clauses irritant and resolute contained in the said bond of tailzie."

Upon both the dispositions last mentioned, Captain Dalrymple was publicly infeft, and his seisin thereon duly registrated.

Captain Dalrymple contracted considerable debts, particularly the sum of £1600 Sterling by bond, to the deceased Basil Hamilton, dated 12th January 1740, to whom the Earl of Selkirk, the pursuer, had right by progress. Captain Dalrymple died in the beginning of the year 1742.

On the 31st March 1747, the Earl of Stair, upon a recital of the settlement 1739, and of the alterations that happened among the heirs of entail thereby.

No. 1.

An adjudication proceeding upon a charge against persons who were heirs of line or conquest, but not heirs of investiture, found null.

No. 1. nominated, made a further settlement of his honours and estate; and which he declares "was not intended to hurt or derogate from the foresaid entail, "but rather to explain, corroborate, and make the same complete." And as in this last settlement he grants a procuratory for resigning his whole estate, so particularly, for resigning the lands of Drummuckloch and Briestmiln, formerly conveyed to Captain John Dalrymple by the two dispositions before mentioned, in favour of John Dalrymple the defender, and the other heirs therein named; and Mr. Dalrymple was thereupon duly infest. The Earl died in the following year 1748.

In the year 1749, the Earl of Selkirk brought an action of constitution against William Earl of Dumfries and James Earl of Stair, as lawfully charged to enter heirs of conquest and of line to the said deceased Captain John Dalrymple their brother, for payment of the foresaid bond for £1600. Sterling. And the defenders having renounced, decree *cognitionis causa* went against the Captain's *hereditas jacens*; and thereupon the Earl of Selkirk, in February 1750, obtained a decree of adjudication *cognitionis causa*, adjudging the lands of Drummuckloch and Briestmiln as belonging to the deceased Captain John Dalrymple.

Upon this adjudication the Earl of Selkirk brought an action of mails and duties against John Dalrymple of Stair, and the tenants of these lands.

Compearance was made for Mr. Dalrymple of Stair the defender; who *objected* to the Earl of Selkirk's title, That the adjudication was erroneously led, in so far as it proceeded upon a charge to enter heir against the Earl of Dumfries and the present Earl of Stair; whereas, by both the dispositions, the destination of the lands is to the same heirs, who were called by the settlement or tailzie made in the year 1739; by which neither the Earl of Dumfries nor the Earl of Stair were at all called, but Mr. Dalrymple the defender, who is the nearest heir now in life that was called in that tailzie; and consequently the person who ought to have been charged: That as these lands were not descendible to Captain Dalrymple's heir of conquest, or heir of line, but by the investitures of the estate to the defender his heir of tailzie, it is undeniable that the Earl of Dumfries, by entering heir of conquest to the Captain, or the Earl of Stair by entering heir of line to him, could not have taken the lands in question, which were devised to his heirs of tailzie; and consequently that they could not be carried by this adjudication. An adjudication *cognitionis causa* goes against the defunct's estate descending to the heir renouncing, in the same manner as it would have been competent to have adjudged the lands from the heir renouncing if he had entered; and this very adjudication adjudges these lands and the rights thereof, "which might have been competent to the Earls "of Dumfries and Stair if they had entered heirs respectively to their brother, "and not renounced;" and therefore can never carry these lands, which were not descendible to the Earls of Dumfries and Stair, who were not the Cap-

tain's apparent heirs therein, and to whom no right was competent, supposing they had not renounced, Stair, B. 3. Tit. 2. § 46. No. 1.

Answered for the pursuer: *1mo*, That as the property of these lands were, by the charters and infeftments before mentioned, vested in the pursuer's debtor, it was no doubt competent to his creditors to adjudge the same for payment of their debts; and, if no other destination appeared by the investiture, the only heirs from whom they could adjudge were the heirs at law, viz. the heir of line and the heir of conquest, who by the law were entitled to every heritable subject belonging to the defunct, where no other particular heirs appeared from the investitures to exclude them.

2do, Though in the dispositions of the above lands, granted by the Earl of Stair to his nephew, there is a substitution, failing heirs-male of his body, to the other heirs of entail contained in a bond of tailzie of his estate dated 21st May 1739; yet as no infeftment was ever taken upon that tailzie, so as it could be no title of possession of any lands whatsoever, it could not be incumbent on Captain Dalrymple's creditors to search after a personal deed, and go through a course of processes, exhibitions, &c. to recover it, before they could adjudge their debtor's estate. They were entitled to adjudge the same from his heirs at law, when there appeared no other destination in favour of any particular heir that could be known, either from the investiture of the defunct's lands to be adjudged, or from the investiture of any other estate whatsoever that could be found upon record.

3tio, The defender can have no interest to propone this objection, which will only serve to put the pursuer to the trouble of bringing a new process against him, upon the passive titles, to which his present allegation would subject him.

Was he to accept of the succession, in virtue of the destination to him as heir of tailzie, called by the deed 1739, he behoved to pay the debts due by his cousin Captain Dalrymple: Nay, his possession of the lands in question is an universal passive title, which must subject him to all his cousin's debts, in the precise terms of the statute 1695, if he is to be held the nearest apparent heir of these lands in terms of the investitures.

“ The Lords sustained the objection to the pursuer's title, that the persons charged to enter heir were not the heirs of investiture.”

Act. Ferguson.

Alt. G. Brown.

B.

Fac. Coll. No. 196. p. 289.

1770. February 7.

JOHN MACNEIL of Rosebank, *against* JOHN BUCHANAN, Writer in Glasgow.

HUGH MACLAUHLAN had adjudged the estate of Campbell of Torry for £159. 5s. and soon thereafter died in Jamaica, leaving an only daughter Mar-

No. 2.
Formality
and regu-
larity of a