

No 24. not bound to look farther back than the last investiture. It is true, John's service as heir to his father, doth evince that the father was infeft, but not that his infeftment was conceived in favour of heirs-male. Nor is it necessary to be concluded, that sasine followed on the foresaid charter; for Sir William might afterwards, changing his mind, have provided his estate to heirs whatsoever, and been infeft accordingly; which probably he did, because, had a sasine upon that charter been produced to the inquest who served his son, they would certainly have served him heir-male.

Answered for the defender; That Sir William was infeft, cannot be controverted by the pursuer, whose title depends also upon his sasine; and the serving John Maxwell, (who was both heir-male and heir of line,) lawful and nearest heir indefinitely, must be understood *applicando* to the pursuer's sasine, otherwise the inquest should be guilty of perjury, *qui jurati dicunt, &c.* Now, it is presumed, that the father's infeftment proceeded upon the charter to heirs-male, until the contrary be instructed; and though the sasine upon such a charter had been laid before the inquest, they might have served John Maxwell lawful nearest heir to his father, since that might be applied to the father's charter.

THE LORDS sustained the defender's objection against the pursuer's title, and found the charter sufficient without the sasine to instruct and prove it; no right to heirs whatsoever being *in campo*.

Forbes, p. 569.

1726. January 26.

MARQUIS of CLYDESDALE *against* EARL of DUNDONALD.

No 25.

AN apparent heir, by serving heir to another heir, and passing by an intermediate heir, maker of a gratuitous bond of tailzie, was found not obliged, by the act of Parliament 1695, to fulfil that bond.

See the particulars, No 3. p. 1274.

1743. June 10. — *against* The EARL of LAUDERDALE.

No 26.

An heir of entail, in a state of apparen-
cy, exercised a facult-
ty to contract
debt to a cer-
tain extent.
It was found
competent to
his creditors
to adjudge his

IN 1682, John Duke of Lauderdale executed a deed of entail in favour of himself, and the heirs-male of his body; whom failing, in favour of his brother Charles, in liferent, and Richard, the son of Charles, in fee, &c. The entail contained the common irritant clauses, *de non alienando, et non contrabendo*; and also, that all adjudications should be purged within seven years; the irritancy on which last clause is declared to be effectual, not only against the contravener, but against the heirs of his body. The entail gives a power to the heirs to contract debt to the extent of L. 40,000 Scots; and it likewise obliges

the heir of entail to execute certain provisions in favour of the heirs of line. Charles and Richard executed a ratification of the entail; but after the Duke's death, Charles, without regard to the entail, on which no investment had followed, made up his titles to the estate as heir male. After the death of Charles, Richard his son made up no titles, but continued in a state of apparenacy, till he died in 1695; and then John his brother served himself heir *cum beneficio* to his remoter predecessor. An adjudication having been led against the estate for the Duke's debts, some of them were purchased by the family of Lauderdale. Sir William Sharp of Scotsraig, creditor to Richard the apparent heir, adjudged his estate from him in 1692; but the adjudication did not proceed upon a charge to enter. Again, Sir William Sharp adjudged the estate upon a charge in 1694; and within year and day of the last adjudication, Sir William Binning adjudged for a debt due to him. Sir William Sharp's adjudications were purchased in by the family of Lauderdale. In the year 1734, a reduction was brought by disponees to Sir William Binning's adjudication, against the Earl of Lauderdale, who thereupon produced the foresaid writs, alleging they were sufficient to exclude; because, *1^{mo}*, The faculty of burdening to the extent of L. 40,000 Scots could not properly be exercised by Earl Richard, he never having made up titles; and therefore it could not be adjudged by his creditors; nor could a charge supply that defect; because in this case, an heir is subject to conditions and limitations which cannot be fulfilled by the creditors, charging; although, in a fee simple, where there are no conditions to fulfil, a charge may supply the defect of a service. *2^{do}*, That the adjudications above mentioned in the family of Lauderdale, were preferable and sufficient to exclude. — THE LORDS found, That it was competent to Sir William Binning, from whom the pursuers derive right as creditors to Richard Earl of Lauderdale, to adjudge his interest in the estate on a charge to enter heir; and that his adjudication in June 1694 does affect the estate, notwithstanding that Earl Richard was not served heir of entail; and found that the defender, heir by progress to the Duke of Lauderdale, maker of the entail containing the faculty exercised by Earl Richard, cannot exclude the pursuer's title by the expired adjudications in his person, led for the debts of the Duke of Lauderdale; and also found, That the defender cannot exclude the pursuers in virtue of Sir William Sharp's adjudication in 1692, in respect the same proceeded without any charge to enter heir against Earl Richard; nor could he exclude in virtue of Sir William Sharp's other adjudication in January 1694, in respect the pursuers adjudication is within year and day thereof.

No 26.

interest in the estate on a charge to enter heir.