William Duff of Braco, Mr. Leſlie of Melroſe, and Others, - - - *Appellants*; Caſe 121.

The Right Honourable David Earl of Buchan, - - - - - *Reſpondent.*

15th *April* 1725.

Reduction Improbation.—*Union.*—The defenders in a reduction improbation having objected to the purſuer's infeftment, which was taken at the Caſtle of Banff, by diſpenſation in a charter of 1625, that by a poſterior charter that caſtle was disjoined from the barony; the Court found that objection not relevant to hinder the taking of terms for production, reſerving this matter after production: but their judgment is reverſed.

The defenders made enother objection, that the purſuer claimed under a charter to heirs male, whereas a ſubſequent charter, as they offered to prove, had been granted to heirs general. The Court gave the ſame judgment on this objection as on the former, but their judgment is alſo reverſed:

And it is ordered, that in the further progreſs of the cauſe the Court do not oblige the appellants to take a term for production until the purſuer make out his title upon which he founds his ſuit.

Saſine.—The Court having repelled an objection made to a ſaſine written roukways, that the witneſſes had only ſigned the laſt page; the judgment is reverſed.

IN 1722 the reſpondent brought an action againſt the appellants, before the Court of Seſſion, of reduction improbation, and declarator of the titles by which the appellants held certain lands, the fee of which the reſpondent claimed as veſted in him. In this action the reſpondent ſtated, that in 1625, upon the reſignation of Mary Counteſs of Buchan, and James Areſkine, ſon of John Earl of Mar, her huſband, a charter from the crown was granted to them of the eſtate of the family of Buchan, in life-rent, and to James Lord Auchterhouſe, their ſon, and the heirs male of his body, whom failing to the heirs male of their marriagé, whom failing to the heirs male of the ſaid James Areſkine the huſband:

That James Lord Auchterhouſe, then Earl of Buchan, when he ſucceeded to the eſtate, charged the ſame with ſeveral wadſets, granted divers truſt-rights, and having contracted debts, his creditors obtained appriſings of great part of his eſtate for ſmall and inconſiderable ſums: and that the creditors, and others, having or pretending to have rights upon the ſaid eſtate, entered into poſſeſſion of a great part of it, and taking advantage of the difficulties in which the family was involved, continued in poſſeſſion, though their debts were conſiderably overpaid by receipt of the rents and profits:

That this James Earl of Buchan died in 1664, and none of the heirs of the family made up titles to the eſtate, till it had devolved upon the reſpondent, and after the act 1695, c. 24. had been paſſed, allowing heirs to enter *cum beneficio inventarii*, but that the reſpondent having been beyond ſeas when the ſucceſſion

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devolved upon him, and the *annus deliberandi* having expired before his return, he in 1705 applied for and obtained an act of parliament, allowing him to ſerve himſelf heir male *cum beneficio inventarii* to his predeceſſor laſt infeft; and thereupon he was, on the 27th of Auguſt 1706, duly ſerved heir male to the ſaid James Lord Auchterhouſe, afterwards Earl of Buchan, who died in 1664, *cum beneficio inventarii*; and that in virtue of this ſervice the reſpondent took infeftment at the Caſtle of Banff, by virtue of a diſpenſation contained in the ſaid charter 1625, of all the lands contained in that charter: and, in ſupport of his action, the reſpondent produced the retour of his ſervice, and the inſtrument of ſaſine taken thereafter in his favour.

The appellants at firſt contended, in this action, that the title produced by the reſpondent was not ſufficient to entitle him to maintain the action, but that he ſhould alſo produce the ſaid charter 1625, under which he claimed, together with the act of parliament allowing him to ſerve heir *cum beneficio inventarii*. The Lord Ordinary, on the 8th of January 1724, "Repelled the "objection and ſuſtained the reſpondent's title:" and to this interlocutor his lordſhip adhered on the 28th of January and 4th of February following. The appellants having, however, obtained a ſtay of proceedings, on the 23d of June 1724, they were ordered to proceed in the cauſe.

They now brought forward two objections to the inſtrument of ſaſine, that the witneſſes had only ſigned the laſt page, and that it was therefore void: and that it was alſo void, having been taken at the Caſtle of Banff, which was no part of the earldom of Buchan, nor of the lands claimed by the reſpondent; for though the caſtle in 1625 was part of the earldom, and ſaſine taken at the caſtle was then ſufficient, yet it had been conveyed by Earl James (under whom the reſpondent claimed) to one Sharp, who in 1662 had procured a crown charter of the Caſtle of Banff and certain lands to him and his heirs, and who had ever ſince been in poſſeſſion of the premiſes: they objected further that the reſpondent could have no title under the ſaid charter 1625, by which, he ſtated, the eſtate had been limited to the heirs male of James Earl of Buchan, formerly James Lord Auchterhouſe; for that by this charter a power was reſerved to James Areſkine, the father of Lord Auchterhouſe, to ſell all or any part of the ſaid eſtate; and he, in 1636, conveyed all his eſtate to truſtees for payment of debts, upon which they were duly infeft: and that after this James the father's death, the truſtees entered into a contract with James then Earl of Buchan, formerly Lord Auchterhouſe, for a reconveyance of the eſtate; and accordingly upon the marriage of this Earl James, a procuratory of reſignation was executed by the truſtees with his conſent, upon which a crown charter was obtained in 1652, ſettling the ſaid lands and eſtate to the ſaid James Earl of Buchan, and the heirs male of his then marriage, whom failing to the heirs male of his body of any other marriage, whom failing to the heirs female of his body, upon which charter ſaſine was duly taken and recorded; of which ſaſine

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the appellants produced a copy: and that this Earl James ſold various parts of the eſtate, and the appellants poſſeſſed under titles which had not been challenged for 70 years, ſome parts of the lands having in that period been ſold five or ſix times over.

The reſpondent made anſwers upon theſe points, and the Lord Ordinary, on the 28th of November 1724, "Found the "objection againſt the reſpondent's title, that though ſaſine is "taken at the Caſtle of Banff, by virtue of a diſpenſation in his "predeceſſor's charter, yet by a charter of a poſterior date, and "before his taking of the ſaſine, the ſaid Caſtle of Banff was diſ-"joined from the barony, not competent in this ſtate of the "proceſs to hinder the taking of terms, reſerving to the appel-"lants to be heard thereupon after the production is ſatisfied; "and repelled the objection that by a charter poſterior to that "whereby the eſtate ſtands provided to heirs male, the deſtina-"tion of ſucceſſion was altered to heirs female, reſerving to the "appellants to be heard thereupon after production, in caſe it "ſhall then appear, that their rights flow from theſe heirs female; "and repelled the objection formerly taken to aviſandum that "each page of the ſaſine is not ſigned by the witneſſes but only "the laſt." The appellants having reclaimed, the Court, on the 5th and 15th of January 1725, adhered to the ſaid interlocutor of the Lord Ordinary, and aſſigned a term for production.

The appeal was brought from "ſeveral interlocutory ſentences "of the Lords of Seſſion of the 8th and 28th of January, and "4th of February, the 23d of June and 28th of November 1724, "and the 5th and 15th of January thereafter." Entered, 28 Jan. 1724-5.

Heads of the Appellant's Argument.

When objections were made to the reſpondent's title, a ſuppoſition that ſuch title might be good was not a ſufficient reaſon to decree the appellants to produce the ſeveral titles under which they claimed: it would, in their opinion, have been much more juſt, to have conſidered the objections made to the reſpondent's title in the firſt place; for if upon theſe points judgment were given for the appellants, there would be an end of this ſuit. To what purpoſe would it be for the appellants to enter into an expenſive ſuit, and produce their title deeds, when it plainly appears from the charter 1652, which the appellants inſiſted upon, that the reſpondent, the purſuer in the Court below, has no title at all? That queſtion ought therefore to have been determined firſt.

The Court of Seſſion were ſo far of opinion, that the objections to the reſpondent's title were of weight, that they have reſerved to the appellants the benefit of being heard upon them after the production is ſatisfied; but the appellants conceive that ſince the reſpondent is attempting as heir *cum beneficio inventarii*, upon a charter granted 100 years ſince, to diſturb the poſſeſſion of purchaſers for full and valuable conſiderations, and who have been in quiet poſſeſſion for 70 years, great care ought to have been taken, that the title under which the reſpondent claims ſhould be produced,

produced, and appear clear and subject to no exception before purchasers should be obliged to produce their title deeds.

The argument against the respondent's sasine is a plain bar to the action, and puts an end to the cause: when that matter was fully laid before the Court, it ought to have been determined before any further proceedings were had, because, if well founded, it overturned the respondent's title.

If the estate in question be limited to the heirs general of Earl James, under whom the respondent claims, which the appellants offered to prove, the respondent has no interest, as he claims in the character of heir male. The right under which the respondent claims was cut off by the limitation to the heirs general contained in the charter 1652, none of whom are parties to this action. After the present action is disposed of, the appellants may be sued in another action by the heirs general; whereas all those inconveniences would have been obviated had the judges obliged the respondent to make out his title in the first place.

An action of a similar kind with the present was brought by the Earl of Caithness against the Earl of Breadalbane and others, in which the defenders made several objections to the then pursuer's title: the judges, without determining those points, directed the defenders to produce their title deeds, reserving to them, as in this case, the benefit of their objections after pro-
20 March 1723-4. duction: but upon appeal, this House "reversed the interlocu-
"tors complained of, and ordered that the Lords of Session,
"upon the further progress of the cause, should not oblige the
"appellants to take a further term for production, until the
"respondent should have made out his title, upon which he
"founded his suit."

Heads of the Respondent's Argument.

Though the act of parliament, allowing sasines to be written bookways, founded on by the appellants, contains the proviso that the witnesses should sign every page; yet by a posterior act 1696, c. 15., it is enacted, that where any security or title deed is written bookways, it shall be signed by the witnesses on the last page only; and the respondent's sasine being a security, and signed according to the directions of the latter statute, the notary having signed each page, and the witnesses the last, in the same manner that almost all the sasines posterior to the said statute are signed, the objection was without any foundation.

It is the known right and prerogative of the crown to appoint one particular place for taking sasine in lands, however discontiguous; and the Castle of Banff having been appointed the place at which sasine for the whole earldom of Buchan was to be taken, the proprietor's aliening, and the crown's of course granting the said lands to another person without declaring the union to be dissolved, did not defeat the effect of the prior appointment; and the respondent could not be seised in any other manner upon his retour to James Earl of Buchan, than agreeable to the directions of the

crown in his inveſtiture, and which inveſtiture upon record did notify to all parties intereſted that ſuch ſaſine was ſufficient and perfect. Beſides, this pretended alienation of the Caſtle of Banff is one of the deeds which the reſpondent is to reduce and declare void by this action; and, conſequently, in making up his title he was to pay no regard to it.

No ſuch charter, as was ſuggeſted by the appellants, altering the ſettlement made in the year 1625, appeared, or was ſo much as pretended to be extant in the records: their allegation, therefore, of ſuch charter could not be regarded, as being without any manner of proof. The copy of the ſaſine which the appellants gave in evidence afforded no proof at all, for it was no more than a copy; and though the principal ſaſine itſelf had been produced, yet it being no more than the aſſertion of a notary, without the charter, its foundation and warrant, it could ſignify nothing. If the appellants imagined they could produce ſuch charter, or any other writing which could ſerve for their defence, the reſpondent was willing to agree that a term ſhould be aſſigned them for that purpoſe, yet ſo as they ſhould have the ſame term aſſigned for production of their rights called for. Beſides, though ſuch deed had been produced under which the heirs general might have claimed, as after the ſtricteſt ſearch into the records none did appear; yet theſe heirs general being no parties to this action, having at no time claimed this eſtate, nor made any conveyances to the appellants, the appellants could not found any plea on ſuch charter, nor force the reſpondent to debate the validity or import of it; becauſe, ſhould the reſpondent prevail, he might be again ſued at the inſtance of theſe heirs general, ſo that he could have no advantage of a judgment in the preſent queſtion.

The reſpondent conceives it is improper to take any notice here of the pretended long poſſeſſion of the appellants, in conſequence of their title deeds, if they any have, no evidence having been brought of ſuch poſſeſſion, or ſo much as offered or founded on in the Court below. Beſides, length of poſſeſſion upon redeemable rights can never bar the right of reverſion, nor can it appear whether the rights of the appellants are ſubject to a right of reverſion or are irredeemable, but by a diſcovery of their title deeds, which is the ſcope of the preſent action.

The caſe of the Earl of Caithneſs againſt the Earl of Breadalbane is no ways the ſame with the preſent. The Earl of Breadalbane and other appellants there pleaded, that the right under which the Earl of Caithneſs the reſpondent claimed, which was no more than an ancient appriſing for a pretended debt of very ſmall value, was preſcribed, no poſſeſſion having been had of any of the lands therein contained in 40 years after the date of it, and conſequently that it was utterly void. That the 40 years were elapſed, appeared upon the face of Lord Caithneſs's title, and the only anſwer given was, that he ſaid he could prove that ſeveral ſteps had been taken to interrupt that preſcription. Whereas in the preſent caſe, the reſpondent, as heir male, being legally veſted in this eſtate by the retour and ſaſine in his favour, the

allegation, without any preſent proof offered to the Court below, *that by a ſubſequent charter the eſtate ſtood limited to the heirs general of James Earl of Buchan*, did require a term for proving, and conſequently could not afford a pretence to the appellants to avoid taking a term for production of their title deeds.

The interlocutors appealed from are ſo plainly founded on the uniform practice of the Court below in the like caſes, that the whole judges were unanimous in them, which never happens but in the cleareſt caſes.

Judgement, 25 April 1725.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutory ſentences complained of in the appeal be reverſed: And it is further ordered, that the Lords of Seſſion in the further progreſs of this cauſe, do not oblige the appellants to take a term for production, until the reſpondent, the purſuer below, have made out his title upon which he founds his ſuit.*

For Appellants, *C. Wearg. C. Talbot. Will. Hamilton.*
For Reſpondent, *P. Yorke. Dun. Forbes. Ch. Areſkine.*

On the point of the union, the interlocutor of the Court of Seſſion here reverſed, is ſtated as an exiſting precedent in the Dictionary, Vol. II. p. 496.

With regard to the witneſſes ſigning only the firſt page of the ſaſine Lord Bankton B. 2. Tit. 3. § 40. rightly ſtates that the judgment of the Court was reverſed: Erſkine on the contrary, B. 3. Tit. 2. § 16. mentions this as an exiſting deciſion.