might be pretended, if the procuratory were solely *in rem mandantis*, this *in rem mandatarii*, is valid unquestionably.

No 23.
of the kingdom, heir to her, when the succession fell due to him by her death.

Answered for Isobel Brown; She had good interest to make the objection, being the next heir of line to the defunct, and presumed to be so, till a nearer appear, or a valid procuratory from him. *2do*, It is against law and good manners, for a presumptive heir to grant warrant to serve him, when the event of his succession should happen, by the death of a person, at the time not out of hopes of children; which pactions *de hæreditate viventis*, as *Vota captandæ mortis alienæ*, are reprobated in law.

Duplied for David Smith; The Roman subtlety against *pactum de hæreditate viventis*, was peculiar to that jealous people; contrary to the rule of nature, by which every interest present or future, is the subject of agreement; and rejected by the universal custom of Europe, particularly of Scotland, July 6. 1630, Aikenhead *contra* Bothwell, *voce* PACTUM ILLICITUM. *2do*, It is plainly *jus tertii* for Isobel Brown, who proves not her claim, to object against the service, which proceeds upon what is instantly verified; and, by the act 113. Parl. 9. Ja. I., no exceptions are to be proponed against the brieve of inquest, as if it were a brieve of plea, if it have the ordinary forms of execution therein mentioned.

THE LORDS sustained the procuratory.

Forbes, p. 276.

1712. *January* 3.

ROBERT FERGUSSON Writer in Edinburgh, *against* THOMAS IRVING of Gribton.

No 24.
A person served heir, and infeft in general terms, was not presumed to be heir of line, but heir male, conform to his predecessor's charter produced, without the sasine.

WILLIAM LORD HERRIES having disponed the lands of Gribton to Sir William Maxwell his son, and to his heirs-male, as appeared by a charter of confirmation granted by the Sovereign to Sir William in the year 1609; which Thomas Irvine apprized the lands from John Maxwell, who was served *legitimus et propinquior hæres* to Sir William his father, and infeft, and upon this apprising Thomas Irvine got possession. Robert Fergusson, adjudger of the same lands from James Charters, as charged to enter heir to John Maxwell, his mother's father, pursued mails and duties. Thomas Irvine compeared and objected against the pursuer's title, That his adjudication is null, being led against the heir of line; whereas it appeared from the charter 1609. and a precept of sasine thereon in the same year, that the lands were tailzied to heirs-male.

Alleged for the pursuer; John Maxwell being served heir, and infeft in general terms, is presumed heir of line, as the most natural title of succession; unless it could be proved, that Sir William was infeft upon the precept and charter in favour of heirs-male. Consequently John's service and infeftment was a sufficient warrant for the pursuer to adjudge from his heir of line; seeing an adjudger, (who cannot know the private conveyances of his debtor's estate,) is

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 guity 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 apparency, exercised a faculty to contract debt to a certain 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 contrahendo*; 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