No. 27. no other person than John Haldane, who was served *propinquior et legitimus hæres* to his father, which could not have been without his being the eldest son and heir male.

"The Lord Auchinleck Ordinary found, that, as Patrick did not expede a sasine on the precept contained in the disposition of 1675, John Haldane his son, upon the father's death, made up a proper and legal title to the personal right which was in his father, by obtaining himself served and retoured heir in general to his deceased father, whereby he is cognosced *legitimus et propinquior hæres dict. Patricii Haldane ejus patris*, which ascertained upon record, not only his universal right, but also, that he was heir-male of the body of Patrick, and superseded the necessity of a service as heir-male."

"And to this interlocutor the Court, 27th November, 1766, adhered, upon advising a petition for Mr. Haldane, with answers for Anne, &c. Haldanes."

For P. Haldane, *Henry Dundas* et alii. For Anne, &c. Haldane, *David Graeme* et alii.

A. E. *Fol. Dic. v.* 4. *p.* 274. *Fac. Coll. No.* 111. *p.* 379.

1783. *December* 4.

The CREDITORS of ROBERT CUMING *against* JEAN MACONOCHIE.

No. 28.
Necessity of a general service, in order to transmit personal rights in burgage tenements.

ROBERT CUMING disponed a house in the town of Edinburgh, with an unexecuted procuratory from the person last infeft, "to James Beveridge, and Grizel Chiesly, his spouse, and longest liver of them two, in conjunct fee and liferent, for the said Grizel Chiesly her liferent-use allenarly; and at and after the decease of the longest liver of them two, in favour of Jean Maconochie, the grandchild of James Beveridge, in fee."

After the death of James Beveridge, who never was infeft, Jean Maconochie, his grandchild, did not expede a service as heir of provision to him, but obtained an infeftment from the bailies as disponee, by executing in her own favour the procuratory which had been assigned by Robert Cuming.

The creditors of Robert Cuming the disponer, who had attached this subject by adjudication, followed with infeftment, objected, that Mrs. Maconochie's infeftment, from the want of a service to her grandfather, was altogether inept and ineffectual. And in support of this objection,

Pleaded: Feudal rights of every denomination require in their transmission a document in writing. In those which had been vested in a person deceased, it being necessary at the same time to ascertain the death of the predecessor, and the devolution of the right to the heir, a service is indispensably requisite, as the proper and only legal voucher of transference; Stair, B. 3. Tit. 5. § 25; Erskine, B. 3. Tit. 8. § 63.

It is true, that in rights already constituted by infeftment in the person of the ancestor, the superior in land, and the bailie in burgage tenements, from their supposed knowledge of their vassal or fellow burgess, have been permitted, by precept of *clare constat*, or by cognition by hasp and staple, to make up for the want of a service, and to give infeftment directly to the heir. But this power, which is the creature of usage alone, and a deviation from the general rules of feudal conveyance, has never been extended to personal rights. An investiture in these must be altogether incomplete without a service, which connects the warrant for infeftment in favour of the predecessor with the infeftment in favour of the heir. Indeed, an extension of the powers of the bailies would not aid Mrs. Maconochie, by whom, from a misconception of the nature of her rights, titles have been made up, not in the character of heir of provision, but as a disponee or singular successor. No. 28.

Answered: The form of a general service, for the purpose of establishing personal or incomplete real rights in the heir, is only necessary in the case of a land-estate. In burgage tenements, where the charter and sasine are contained in one writing, it is seldom or never used; the bailies, upon their knowledge of the fact, giving infeftment at once to the heir. In this case, Mrs. Maconochie's title, upon the decease of her grandfather, was equally clear, as it would have been if his right had been clothed with infeftment.

The Court in general, were of opinion, that the power of the bailies to give infeftments to heirs without a regular service, was confined to rights in which the ancestor had died infeft. It was however unnecessary to decide on that ground; because the infeftment to Mrs. Maconochie had proceeded on an erroneous idea, that she was fiar by the terms of the disposition from Robert Cuming.

The Lords "sustained the objection to Jean Maconochie's right, and found, That the creditors of Robert Cuming have a preferable right to the subject, by their adjudication and infeftment."

Lord Ordinary, *Alva*. For the Creditors of Cuming, *Mat. Ross*.
For Mrs. Maconochie, *Ilay Campbell*. Clerk, *Orme*.

Fol. Dic. v. 4. *p.* 272. *Fac. Coll. No.* 134. *p.* 210.

1802. *November* 16.

Sir Andrew Cathcart's Trustee *against* Earl of Cassillis.

No. 29.
An estate, specially destined by family settlements, having been resigned of new, and a charter taken *hæredibus et assignatis quibuscunque*; a general ser-

Sir John Kennedy of Cullean, Baronet, stood seised in an estate under investitures to heirs-male. At his death, in 1742, he left three sons, John, afterwards Sir John, Thomas, and David, both of whom were successively Earls of Cassillis; and three daughters, the eldest of whom was the mother of Sir Andrew Cathcart of Carleton, Baronet.

His son, John, completed a proper feudal title to such parts of the estate as were held of the Crown and Prince of Scotland; but he made up no feudal title to that part of it which was then holden of the family of Cassillis.