

1726. *January 26.*MARQUIS of CLYDESDALE *against* EARL of DUNDONALD.

No 393.

THE estate of Paisley, &c. stood vested in the person of Lord Cochrane, tailzied to himself and heirs-male. After his decease, his grandfather, the Earl of Dundonald, who had no right in his person, granted a disposition of the same estate to the Lord Cochrane's son and his heirs-male; one of whom, above 40 years thereafter, altered the destination, and conveyed the estate to his daughter. The disposition granted by the Earl of Dundonald being null, as *a non habente potestatem*, the estate, in consequence, was found to be all the while *in hereditate jacente* of the Lord Cochrane; upon which the heir-male, who had access to make up his titles to the Lord Cochrane, after the decease of him who conveyed the subject, as mentioned, to his daughter, quarrelled the conveyance, as being a gratuitous deed by an apparent heir; and the 40 years positive prescription, in consequence of the Earl of Dundonald's disposition, being pleaded in support thereof, the prescription was not found to run, in respect that no man can prescribe against himself.

*Fol. Dic. v. 2. p. 126.** * * This case is No 2. p. 1262. *voce* BASE INFERTMENT.1802. *November 24.*DURHAM *against* DURHAM.

No 394.

When two unlimited rights are in the same person, prescription cannot be pleaded upon the one against the other.

THOMAS HAMILTON of Boghead executed a disposition of the lands of Foulshiells, (29th August 1699.) in favour of his sister-uterine, 'Jean Bruce, in liferent, and Robert Durham, eldest lawful son of Adolphus Durham, and to the heirs lawfully to be procreated of his body, in fee; which failing, to the other heirs, male or female, without division, procreated or to be procreated between the said Adolphus Durham and Jean Bruce;' which failing, to other substitutes.

Robert Durham (9th July 1702) obtained a crown-charter, in terms of this description, on which he was infest.

He died without issue; and his brother Thomas made up titles to him in these lands by a special service, (6th September 1729,) 'as nearest and lawful heir of line to his brother.' In order to ascertain the old and new extent, and retoured duties, the retour narrates the different charters which had passed of these lands, concluding with the crown charter in 1702, but does not mention on what title the deceased had been infest. They are not narrated in the precept for infestment. Infestment was taken, (4th November 1729,) in terms of the retour of service.

Thomas died in 1744; and his son Robert made up titles to him by special service, as nearest and lawful heir of line to his father.