No. 21. father, &c. 3*tio*, If the inquest, without incurring the hazard of perjury, might serve him heir in lands, whereof the Marquis instructed him or his authors denuded; (it is true, not indeed by a voluntary disposition, but by a legal diligence of comprising, which is not yet expired, albeit they were willing to mention it in the service.) The Lords shunning all these difficult locks, and waving the decision of these points, "declared they would sustain Strouan's general service as a sufficient title in the reduction, and in the mean time stopped the special service;" by which Athol got this advantage, that he *medio tempore* might obtain a gift of the non-entry and other casualities of that piece of land. See Craig, p. 382, sasines are not 200 or 300 years old with us; yet, in Cap. 2. of King Malcolm M'Kenneth, near 500 years before Craig wrote, charters and sasines are mentioned.

Fountainhall, *v.* 1. *p.* 104, 112, 133.

1129. *January.* LORD HALKERTON *against* DRUMMOND.

No. 22.

A GENERAL service does not carry even the personal obligement in an infeftment of annual-rent, so as to be a title to demand payment, which the heir cannot insist for until he be also infeft. See APPENDIX.

Fol. Dic. v. 2. *p.* 371.

1738. *July* 21. EDGAR *against* JOHNSTON.

No. 23.

A SERVICE as heir-male general found not to carry a provision in a contract of marriage in favour of heirs-male of the marriage.

Kilkerran, *No.* 1. *p.* 508.

*** See No. 14. p. 14015.

1742. *July* 21. ALEXANDER STIRLING *against* JOHN CAMERON.

No. 24.
Whether an heir is to make up a title to a subject by a general or special service, in order to recover from the purchaser the surplus of

THE said Alexander Stirling being charged to enter heir in general to the deceased John Stirling, for payment of the debts due by him to his creditors, and having renounced, as judging the debts did exceed the value of the estate, the creditors thereupon obtained decreets *cognitionis causa* against Alexander, and adjudged the estate of John; and having obtained possession, they raised a process of ranking and sale, and when the day of the roup came, several offerers appeared, who offered a much higher price than what was put upon it by the Lords, and far exceeding the debts due to the creditors. John Cameron was pre-

No. 24.
the price, after payment of the debts due to creditors, who had sold it judicially in consequence of the heir's renunciation?

ferred, and, upon his finding caution, a decreet of sale was exctracted in his favours. Whereupon Alexander was served and retoured heir in general to John Stirling; and, on that title, claimed a right to the superplus price of the said lands more than what was paid to the creditors; and that the bond of cautionry given for the price of the lands might be appointed to be registrated, and an extract thereof given to him, in order to his recovering the remainder price of the purchase.

Answered for the purchaser, That the bond was granted for payment of the price to the creditors of John Stirling, as found to have right thereto; and, as the purchaser has paid part of the debts, he is ready to pay the superplus price to whom the Lords shall find to have right thereto, after the extent thereof is determined by a scheme of division; and, in no event could summary diligence be used on the bond, which is only granted for payment of the price to the creditors ranked; but a previous sentence must precede any diligence, determining the extent of the balance, and what person had right thereto. *Lastly*, Alexander's title being only a general service, founds no right to the price of the lands, wherein his predecessor stood infeft at his death.

Replied: There was no need of a scheme, seeing the balance would easily appear after deduction of the debts paid to the creditors who are ranked. And as to the objection to the title, it was said, that a general service is the known method of making up titles to subjects which fall to heirs, and to the taking up of which, it is not necessary that infeftment should pass, and which indeed cannot apply to the sum in question. It would seem absurd to make up a title by infeftment to land, in order to carry a sum of money, especially when the lands are already sold, and of which no part either does, or can belong to the person making up the title; and if the purchaser were infeft, (which he may do immediately) it would be impossible for the heir to make up a title to the lands, seeing the fee would then be full.

Duplied: In making up titles from the dead to the living, the only period to be considered in judging of the state of the effects, is the time of the defunct's death; what happens afterwards, has no influence on this point; if the right was then heritable or moveable, though by any after accident it should change its nature, and become different from what it was before, yet the title must be made up according to the nature of the subject as it stood at the death of the proprietor. And, the same way in the question, Whether a general or special service is the proper title? as that depends upon the right being clothed with infeftment, or not; *tempus mortis defuncti inspiciendum est*, and no other period. For instance, suppose a defunct died infeft in a wadset-right, and after his death, an order and declarator of redemption is used; though the wadset-right is by this declarator turned into money, yet the money will belong not to the executor, but to the heir, because the right was heritable when the predecessor died; see 18th June, 1675, Laird of Leys, No. 6. p. 286. *voce* ADJUDICATION

The Lords found, That the heir must make up a real right to the lands.

Fol. Dic. v. 4. p. 271. C. Home, No. 204. p. 338.