

1698. February 2. M^cINTOSH against WILLIAM M^cINTOSH.

HALCRAIG reported M^cIntosh, as assignee by M^cQueen of Corrybrough, against Mr. William M^cIntosh of Aberarder, for payment of 2000 merks contained in his father's bond, upon the passive titles, as representing him, and obtains a decret before the sheriff of Inverness; whereof Aberarder raises suspension and reduction, on this reason, that your active title was null, being a general service for carrying the right of an heritable bond, and the same never retoured to the Chancery, which, though sufficient to instruct a passive title, yet was never sustained *active*, unless services within a regality, or before the year 1550, when the records were destroyed by the English. Answered, It cannot be denied but he is the nearest in blood to the creditor, and, if need be, it shall be retoured, and produced *cum processu* before sentence. Replied, The brief of mortancestry is one of the retourable brieves, and it is an incomplete act till the retour, by which only it becomes a sentence; the service being only the report of a verdict on the commission directed to them; and Hope and all our lawyers are clear on this. See Stair, L. 3. T. 5. § 41. and L. 4. T. 3. § 4 & 8. The Lords found this such a nullity as opened the decret, and turned it into a libel.

Fol. Dic. v. 2. p. 371. Fountainhall, v. 1. p. 819.

1753. August 12.

MAJOR ARTHUR FORBES against MRS. KATHARINE MAITLAND.

SIR Charles Maitland of Pitreichie, grandfather of both the parties, in the year 1700, executed an entail by procuratory, "in favours of his only son Charles, and the heirs-male of his body; which failing, to any other heirs-male to be lawfully procreated of Sir Charles the son's body, the eldest succeeding without division; which failing, to Jean Maitland his eldest daughter, and the heirs-male of her body; which failing, to Mary Maitland his second daughter, and the heirs-male of her body; which failing, to his other daughters, and their heirs-male, in their order, under certain prohibitions and irritancies."

Charles the son survived his father; and, upon the aforesaid procuratory, exped a charter of resignation, under the great seal, of the said estate, in terms of the entail; but died soon after, without taking infeftment upon the precept contained in the charter, leaving no issue of his body.

By his death, the succession opened to Mrs. Jean his eldest sister, who procured herself served nearest and lawful heir of tailzie to her brother in general, in order to carry the right of the aforesaid charter, and precept therein contained; and the service being duly retoured to Chancery, she was accordingly infeft in the lands in virtue of the precept contained in the charter.

No. 19.

A general service unre-toured is no ground of action.

No. 20.

A service bearing that a person was nearest heir on a tailzie found sufficient, though it did not mention the particular tailzie.

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Mrs. Jean Maitland, being thus infeft in the lands, disponed part thereof in favours of Mr. Charles Maitland, her only son, who expeded infeftment thereupon in his mother's life; and, after her death, he made up a title to the rest of the tailzied estate, as heir-male in special to her, supposing it to have been duly vested in her person.

Upon these titles, Mr. Charles Maitland made a new settlement of this estate, by disponing the same "to himself and the heirs whatsoever of his body; which failing, to Mrs. Katharine and Anne Maitlands, his sisters, in their order, and the heirs of their respective bodies; and failing of all these, to Major Arthur Forbes, the eldest son of Mrs. Mary Maitland, the second daughter of Sir Charles."

This deed was challenged by Major Forbes, as heir of the aforesaid entail, as proceeding *a non habente*.

And the ground of the challenge was, that the retour of the service of Mrs. Jean Maitland was defective and null, in regard it only bore, "Quod dict. Magistra Joanna Maitland est legitima et propinquior hæres talliæ dict. quondam Domini Caroli Maitland sui fratris germani," without expressing the deed of tailzie in virtue of which she was so served.

And, in support of this objection, it was pleaded for Major Forbes, That the answer or return of the jury, in the words above quoted, was utterly inept and insufficient for the purpose for which it was used; because all that was there found by the jury might have been true, and yet it might not have been true,—that Jean Maitland had right to the charter and precept of sasine granted to her brother Charles, upon the tailzie of Pitreichie: She might have been heir of tailzie to her brother by virtue of other entails, in the same or in different lands, made by the same person or by different persons, with the same or with different substitutions; and to all of which the succession might then have been open to her, and she minded to take the benefit of the one, and not of the others. And as the above general and indefinite answer in the service could not apply to one of these entails more than another, the consequence is, that it can apply to none of them.

A general service of a person as heir of line or heir of conquest to another, is finding a thing the import whereof is known and fixed in law; these characters being created, and the effect of the service of such heirs determined by the law itself. But an heir of tailzie or provision has no such character defined by the law; he is not *hæres natus*, but *factus*, by the deed of provision or tailzie that renders him such; and therefore the general answer of the inquest, "That Jean Maitland was nearest and lawful heir of tailzie to her brother Charles," without telling in what estate, or by virtue of what settlement, or by whom such settlement was made, was saying nothing at all; and therefore the retour was imperfect and null, and could establish no right in Jean Maitland. And the disposition from her in favours of her son Mr. Charles, of part of the estate, and his service as heir of tailzie to her in the remainder, were also void and null; and conse-

quently the gratuitous settlement in favours of him and his sisters falls to the ground, as proceeding *a non habente*; and the decision, Edgar against Maxwell, No. 14. p. 14015. *voce* REPRESENTATION, was quoted in support of the above objection.

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Answered for Mrs. Katharine Maitland: That it appeared from the extract of Mrs. Jean Maitland's service, the warrant of the retour, that she claimed to be served nearest and lawful heir of tailzie to her deceased brother Charles; and for instructing that claim, she produced before the Judge the deed of entail by Sir Charles Maitland her father, as also the charter in favours of her brother Charles, containing precept of sasine of the dates above mentioned; all which are fully narrated in her claim, and that her procurator craved the bailie to remit her said claim to the trial of the inquest; which being done, the inquest accordingly served her nearest and lawful heir of tailzie in general to her said brother, conform to the claim; so that the claim and service certainly referred to the tailzie and charter thereupon in favours of Charles her brother. And these being produced before the inquest, were proper legal evidences to them, that Jean Maitland was heir of tailzie to her brother in the charter and precept upon which no infestment had followed; so that the objection lay singly on this, that the retour did not mention the particular evidence upon which the inquest pronounced their verdict.

As to which it was observed, that a retour was a decree or sentence of the Judge Ordinary, proceeding upon the King's brieve to him directed; and that neither law nor reason required that a decree should specially express the evidence upon which it proceeds. And this holds in a particular manner in such sentences as proceed from the verdict of an inquest; such as in services upon the brieves of mortancestry, where, though the verdict of the inquest must proceed upon proper evidence of the relation of the claimer to the defunct, yet the retour never mentions upon what evidence the jury proceeded. And in special services, though it must be proved before the inquest that the defunct died last vest and seised in the lands, &c. by production of his infestments; and that the claimer is the nearest and lawful heir in these infestments, whether he be heir of line, heir-male, heir of conquest, or heir of tailzie; yet it is not necessary that the special retour mention the particular infestments, whereby the destination of succession was proved to the inquest. The affirmation of the inquest upon their great oath, that the defunct died last vest and seised in the lands, and that the claimer is nearest lawful heir of line, male, or of tailzie, is sufficient, without mentioning the deeds or records by which these things are proved to the jury: And if the objection above stated was good in law, it would be fatal to all special retours, and at once un-
hinge the property of the nation.

Upon these principles, the retour in question is unexceptionable: It bears, that Charles Maitland, brother of the claimant, died at the faith and peace of the Sovereign; and that the claimant is nearest lawful heir of tailzie to her said brother; that is, they find it proved, by a tailzie produced before them, that she was called

No. 20. to her brother's succession in some personal right descendable to his heirs, and consequently must carry the personal right to the estate of Pitreichie, which by the entail and charter thereon, was vested in her brother; and, failing of his issue, descendable to her as heir of tailzie; and the legal import of the retour is confirmed by the use she made of it, in obtaining herself presently infeft upon the precept contained in her brother's charter; and it cannot be doubted but that she was liable to all the burdens and conditions contained in the entail, equally as if her brother had been infeft, and she had made up her title upon a special retour and infeftment as heir to him. And, in support of this answer, a decision was quoted, Earl of Dalhousie against Lord and Lady Hally, No. 13. p. 14014. *voce* REPRESENTATION; and a number of instances were condescended upon, from the record of retours, of general services of heirs of tailzie, in the precise form of the present retour.

And more particularly, in answer to the uncertainty and want of precision in the retour in question, with respect to the right intended to be taken up, it was observed, that this will apply equally to all retours upon services of heirs in general, whether of line, heirs-male, or of conquest; none of which afford evidence of the subjects belonging to the heir so served. They are evidence of his intention *adire hæreditatem*, and do in fact vest him in all the subjects and rights devolving to him under such character; and, by the same rule, a service as heir of tailzie or provision is legal evidence of the claimant's intention to represent the defunct as heir of provision, in all heritable and personal rights provided to the claimant, and will accordingly vest such rights in him, both *actively* to claim under the provisions made in his favours, and *passively* to subject him to the burdens imposed by the granter; and where the person claiming to be served does not incline to take all the provisions made to him by the defunct, but to represent only with respect to one particular provision, in such case, it will no doubt be proper, in his general service, as heir of provision, to confine his claim and retour to the special provision which he intends to take up: But this is not peculiar to heirs of provision: It holds equally in heirs-male: Suppose one personal right is settled upon heirs-male, without any burden, and that another personal right is settled to heirs-male, but under conditions that the heir does not choose to comply with; in such case, the heir-male may limit his claim and retour to the subject that he is disposed to take up, by referring to the deed settling that subject upon the heirs-male. But where a person claiming to be served as heir-male, or heir of provision to a defunct, is disposed to take up every part of the succession provided to him by various deeds; in such case, the retour may be in general, referring to all the deeds of provision produced before the inquest, without mentioning particulars.

“The Lords repelled the objections to the general retour of the service of Mrs. Jean Maitland as heir of tailzie to the deceased Sir Charles Maitland, her brother.”

N. B. Major Forbes carried this estate upon a separate point, which is not here collected, as it turned upon the constitution of a special clause in the entail.

No. 20.

M. *Fol. Dic. v. 4. p. 271. Fac. Coll. No. 90. p. 135.*

* * This case was appealed. The House of Lords "ORDERED that the interlocutor complained of be affirmed.

 SECT. IV.

 General Service.

 1680. *June 23.*

 ROBERTSON of Strouan *against* the MARQUIS of ATHOL.

In the improbation Robertson of Strouan against the Marquis of Athol, they would not sustain process, till a full progress were produced connecting and coupling the rights together, whereof many complained.

 No. 21.
 Effect of a
 general ser-
 vice.

1680. *July 30.*—In Robertson of Strouan's improbation against the Marquis of Athol, the Lords "found the producing a charter and sasine following upon a comprising was not a sufficient title, though it was past 50 years ago; but he behoved to produce likewise the letters, executions, and decret of apprising, (for the letters and executions, it is hard *post tantum tempus*;) as also the bonds, or other grounds and warrants thereof."

1681. *February 26.*—In Strouan Robertson's service for making up his titles against the Marquis of Athol, he having served himself general heir to one of his predecessors who lived 250 years ago; and this day being to be served heir in special, the Lords, at Athol's desire, appointed three of their number to be assessors to the macers, (poor men would not get this allowance,) and the service was continued till the Lords should resolve these three points: *1mo*, If in the days of King James II. a charter be a sufficient document whereon Strouan may be served heir to that man to whom the charter is granted, though there be no sasine upon it, sasines at that time not being necessarily required, and which, by the 27th act James III. Parl. 1469, are called a new invention; and Craig, p. 143*, says, *charta sola olim sufficiebat*. See Dury, 24th June, 1625, Town of Stirling, No. 18. p. 6621. *voce* IMPROBATION. *2do*, If he could in his service pass by his father and others who were infest, and serve himself heir to his grandfather's grandfather's

* Edition 1655.