

- No. 29. spect that the same was less than the sum of the debts due by him at the time aforesaid, after application of his separate estate: And found the pursuer was entitled to apply the price thereof in the first place towards payment of the said debt, and the remainder thereof, whatever it should amount to, to be laid out upon the purchase of lands, or heritable security, in favour of the pursuer and other heirs of tailzie called by Sir William's destination; and under the same provisions, &c. that were contained in the said tailzie, to be conjoined with the tailzied estate, and to remain inseparably therewith in all time coming; providing that the sales should not be at prices under the proved value; and providing that the sales of both estates should be with consent, and the prices applied at the sight of the three next heirs-male, majors for the time,

Act. Ferguson.

Clerk. Murray.

D. Falconer, v. 2. No. 249. p. 306.

- No. 30. 1752. July 1. M'KENZIE *against* STEWART.

The possessor of an entailed estate, in concurrence with some of the substitutes, obtained an act of Parliament to bring the estate to a sale, for payment of debts of the entailer. The act mentioned these debts specially, and ordained the price to be applied to their payment, and that the overplus should be laid out on land, to be settled on the substitutes, conform to the destination of the entail. The estate was sold, and the payment of the debts mentioned in the act exhausted the whole price. A substitute afterwards brought an action of count and reckoning against the heir of line, insisting, that all the debts in the act did not affect the entail, and ought not to have been paid. The Lords found, That as these debts were specially narrated in the act, they had no power to inquire farther.

Fol. Dic. v. 4. p. 345. Sel. Dec.

* * This judgment was reversed on appeal.—The case is No. 164. p. 7443. *voce* JURISDICTION.

1753. July 13. MAJOR ARTHUR FORBES *against* KATHARINE MAITLAND.

No. 31.
Service of an heir of entail in general, without specifying the entail in the verdict, whether effectual?

Sir Charles Maitland, younger, institute in an entail of the estate of Pittrichie made by his father, expedite a charter of resignation in terms of the tailzie, but died without infestment, and without children. His sister Jean, next heir of entail, expedite a general service, in which the deed of entail was produced before the jury, who gave their verdict finding her next heir of entail to her brother Sir Charles, but omitting to mention in their verdict the deed by which she was made heir of entail. This service was expedite 6th May, 1704; and, upon the 24th of the same month, Jean executed the precept contained in the deed of entail; which

is real evidence that her purpose was to make up a title to the lands of Pitrichie, being the subject contained in the deed of entail. No. 31.

This service was objected to by Major Forbes, a substitute in the entail, in order to cut down a gratuitous deed granted by Jean, excluding Major Forbes from the estate of Pitrichie, insisting, That a service as heir of entail in general, without condescending upon any particular deed of entail, is inept, because the jury cannot say whether the claimant be or be not an heir of entail, unless the deed be produced before them. And though an entail was *de facto* produced, as appears by the minutes, yet as no entail is mentioned in the verdict, the service comes to be, that of an heir of entail in general, which, as said is, is inept; for the service is the only subject of record, and a defect in it cannot be supplied by collateral evidence, more than a defect in a sasine.

It was urged, on the other hand, That a general service as heir of tailzie is a legal act known in practice; and, in fact, many instances of such a service in the Chancery were given. A general service as heir of line, or as heir of conquest, carries all subjects which are destined, by law, to go to such heirs. A general service as heir-male carries all subjects which are provided to the heir-male; and why not the same as to a general service as heir of tailzie? And this general service must obtain, otherwise there is a defect in law. A man may have just reason to believe that an entail was made by a certain person in his favours. The deed is abstracted, and he cannot recover it by an exhibition. He is in danger of death; has no other way to make up his titles, in case the entail be recovered, but a general service as heir of entail; and this must be effectual, otherwise his creditors will be cut out. Nor is it an objection, that, by this means, an heir may be involved in the burdens of some particular entail of which he knows nothing, and which he would be loath to acknowledge as heir; for if he choose to run the hazard, there is no hardship. Besides, that in a general service as heir-male, the validity of which is not controverted, the very same objection may occur.

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

In my apprehension, the only difficulty upon this point is, that a general service as heir of entail, without specifying any deed of entail, is not capable of any proof; and, therefore, that to call a jury in such a case is altogether nugatory, which appears a wide step, because the giving of evidence has always been reckoned the principal part of this legal act, and for that reason chiefly a jury is essential. In a special service, the subject, as well as propinquity, come under consideration of the jury. In a general service of heir of line or heir-male, the propinquity only comes under consideration. In a general service as heir of tailzie, not even the propinquity can come under consideration; for the jury cannot depone that the claimant is heir of entail, whatever the claimant's relation to the defunct be, unless they see the deed by which the claimant is made heir of entail: Therefore,

No. 31. if such a service be lawful, it must be of a singular nature. It can admit of no proof, and therefore a jury is not necessary. Such a general service can signify nothing, but to be a legal declaration of the claimant's will to take up all subjects which are provided to him by any deed of entail made by such a person; and consequently to subject himself to all burdens imposed upon him by such entails.

But it appears to me, that the true state of the question is not what is above set forth. The case is not of a general service as heir of entail, but of a special service as heir of entail to the lands of Pitrichie. It is evident, from the whole circumstances, that Jean intended to make up her titles to the lands of Pitrichie. And the proper question is, Whether the stile of the verdict neglecting to mention the entail which was produced before the jury, makes an intrinsic nullity in the retour? It is clear, from the retour itself, that the jury had a deed of entail made by Sir Charles under consideration; for, otherwise, they could not depone that Jean was heir of tailzie to her brother Sir Charles. Now, I see no heterodoxy in supplying the above omission in the verdict from the preceding minutes and subsequent infestment. Nor is there any analogy here to a sasine: A retour is not a matter of record. It is a private deed, calculated only to inform the King of certain facts; and when warrant is granted for infestment, the retour is useless. And, accordingly, retours were not regarded before the year 1633. And as to a general service, which is but a late invention, it really imports no more than a declaration of the claimant's will to be heir; and, therefore, from the nature of the thing, it may admit of collateral evidence; and the same observation applies to a special service in a subject where the defunct died not infest.

Queritur—Would not Jean's infestment, upon her service as heir of entail, even without possession, subject her to passive titles? Would she be allowed to plead the defect of her own right? It would be observed, that she had solemnly declared her intention to take up the estate of Pitrichie, which, at the same time, was declaring her consent to pay the debts. Now, the passive and active titles cannot be divided. If the service made Jean heir *passivè*, it made her also heir *activè*.

Sel. Dec. No. 47. p. 53.

1753. November 21. GORDON'S CREDITORS *against* GORDON.

No. 32.

While an entail remains a personal deed, and is made the title of possessing the estate, it will affect the creditors of the heir in possession, although it has not been recorded, and although the provisions and irritant clauses have not been repeated in the title-deeds of such heir.

Fol. Dic. v. 4. p. 331. Fac. Coll. Sel. Dec.

* * This case is No. 75. p. 10258. *voce* PERSONAL AND REAL.