

No 50. titular who can demand nine. The LORDS sustained the pursuer's title in the same way as if the action had been a reduction and improbation of land rights.

Fol. Dic. v. 1. p. 519.

No 51.

1731. December 7. LORD DUN *against* TOWN of MONTROSE.

AGAINST a declarator of the jurisdiction of constabulary, the negative prescription being objected, the LORDS found it was not *jus tertii* for the defenders to object the same; for though it is not competent to plead an exemption from the jurisdiction of the Crown, to which every one is subjected by his allegiance, it is otherwise with regard to a private jurisdiction, which is a burden upon the lieges, and the worst of servitudes. See APPENDIX.

Fol. Dic. v. 1. p. 521.

No 52.

A person objected to a service, that there was a nearer heir than the claimant, and craved a proof of the fact. Answered, the objector himself having no title to serve, it is *jus tertii* to him to found on the right of another. The Court refused to allow a proof, reserving the objections as accords.

1766. February 18. ANDREW BURNET *against* ALEXANDER BANNERMAN.

THOMSON BURNET of Kirkhill disposed those lands, and certain salmon-fishings on the river Dee, to trustees, for the behoof of Alexander Bannerman, his nephew.

Andrew Burnet writer to the signet, brother to Thomas, in the view of bringing a reduction of the settlement, so far as respected the fishings, which he considered as limited to heirs-male, took out brieves for serving heir-male in general to Thomas, before the Bailies of Edinburgh.

Alexander Bannerman objected to the service, upon the ground that there was a nearer heir-male in existence, the son of another brother, elder than Andrew; and the Bailies allowed him a proof, and granted commission.

Andrew Burnet advocated the brief; and, upon a remit to the macers, *pleaded, imo*, No more was necessary for him, but to prove that he was habit and repute nearest and lawful heir-male. That being proved, his service must proceed, and cannot be interrupted by a person who has neither taken out brieves to serve, nor so much as pretends to be heir-male. Upon the existence of a nearer heir, the claimant's service may indeed be set aside by reduction; but it is no reason to stop the service, that the objector has right to the subjects by disposition. It is still *jus tertii* for him to found upon the right of another; and, were that allowed, every service might be stopped upon allegations of the same kind.

2d^o, All objections to a service must be instantly verified, and no terms can be allowed for proving exceptions; Stair, III. 5. 33.; Bankton, III. 5. 24. and 39.

Answered for the objector to the 1st, The declared purpose of the claimant's service is, to bring a reduction of the disposition of the fishings in favour of the objector, who, therefore, has a clear interest to oppose the service. And he has a legal interest to oppose it, as was found, 19th June 1746, *Kennedy contra Erskine*, observed by Falconer, No 6. p. 7782. where one, in possession of an estate, which was attempted to be evicted from him upon titles made up by adjudication on a trust-bond, was allowed to object that the person, against whom the adjudication was led, was not the nearest heir; and that there was a nearer heir existing.

To the 2d, The design of the brieve of mortancestry is to discover who is the nearest heir. Should it happen to consist with the knowledge of the jury that there is a nearer heir than the claimant, they would be bound in duty not to serve. In like manner, if, upon reading the brief, any person should give evidence of the existence of a nearer heir, they could not proceed; and this is precisely the present case, with this material difference, that the objector has a clear interest to object to the service, since otherwise he might be obliged to enter into a litigation with the claimant; and, after prevailing over him, would have the battle to renew with the true heir, who could not be barred by any former proceedings, to which he was no party.

The authorities referred to, prove no more than that no exception can be admitted against the form of the brief, but those specified in the statute 1503, c. 94. so as to prevent the jury from proceeding to take cognisance of it. But still it is incumbent on the claimant to instruct his propinquity, which he cannot do, if the existence of a nearer heir be proved. It is impossible that the objector should be debarred from leading that proof; and Lord Stair plainly supposes the competency of it, III. 5. 30. & 35.

In the first of those passages, he mentions a case where the Lords granted warrant to the Director of Chancery to delay issuing brieves, unless they contained a clause for citing the party having interest.

Replied upon the 1st point, The brief of mortancestry is granted at the suit of the claimant, and cannot be adjourned without his consent; Balf. p. 419: c. 3.* In special services, indeed, parties having interest have, from reasons of expediency, been allowed to object, though they had not taken out brieves in their own names, as in the case mentioned by Lord Stair, III. 5. 30.; and, in that of *Kennedy contra Erskine*, No 6. p. 7782. where titles were attempted to be made up by an adjudication on a special charge, which is equivalent to a special service.

But the present question relates to a general service, where no person is admitted to object, unless he has actually taken out brieves. The distinction is clearly laid down in a decision, 26th February 1681, *Laird of Strowan contra the Marquis of Athole*, *vce* SERVICE OF HEIRS. Strowan had taken out brieves to serve heir general and special to his predecessors. The Marquis objected, on the ground that the service was intended to disturb him in the possession of the

* See APPENDIX

No 52. lands. 'The Lords allowed him to be heard as to the special service, but not as to the general service.'

Replied upon the 2d point, Were there here a competition of brieves, there might be some ground for allowing time to prove. But, if it was competent for third parties to step in, and, upon pretence of the existence of a nearer heir, to offer a proof, no service ever could proceed within any reasonable compass of time. By these delays, the claimant might be essentially hurt; but neither the nearer heir, nor any other person having interest, can suffer any prejudice from allowing the service to proceed, which may be set aside by reduction, so soon as the nearer heir appears.

'THE LORDS refused to allow a proof to stop the service; reserving the objections as accords.'

G. F. Reporter, Coalston. Act. Rae, Wight. Alt. Lockhart.
Fac. Col. No 32. p. 253.

* * See Lord Kames's report of this case, *voce* SERVICE OF HEIRS.

SECT. IV.

Objections, &c. competent to some and not to others.

1601. February 19.

TENANTS of SCONE *against* Sir HUGH HERRIES.

No 53.
Not competent to the Officers of State to allege that a gift of escheat was taken for behoof of the rebel.

IN an action of sextuple-pounding, pursued by certain tenants of Scone, against the comptroller Sir Hugh Herries, my Lady Gowrie, Mr Alexander Kinross, Mr William Reid and others. It was *alleged* by Mr Alexander Kinross, That he should be answered and object, because he had the escheat and liferent of my Lady Gowrie and declarator thereupon, which Lady Gowrie was served and kenned to a sum a third of the lands of Scone, and in possession thereof. It was *answered* by Sir Hugh Herries, with concurrence of the comptroller, That the said Sir Hugh should be answered, because he having, by gift of our Sovereign Lord, the forfeiture of the Earl of Gowrie's said lands, which Earl Gowrie was infest heritably in the said lands, and also was five years in peaceable possession of the said lands immediately before his treason and forfeiture; which possession, by act of Parliament, was _____, he should be answered, especially in respect that the said gift of liferent was null, being simulately taken by the _____ to the behoof of his mistress *retenta possessione*, and that _____