

No. 11. tried, that he died at the faith of the king reigning. *Item*, They found, that the party desiring to be served ought to qualify and be special, upon the descent and persons intervening betwixt him and the defunct, to whom he craved to be served; and also, that he ought to instruct and verify the descent, the instruction whereof ought to be made to the assize, and not to the judge, and ought to be produced before the assizers; and also, that the party compearing against the service, ought to see the writs produced, to verify the same, to the effect he may oppone what he may in law, wherefore the same cannot verify the claimer to be heir.

Fol. Dic. v. 2. p. 370, 371. Durie, p. 466.

* * Auchinleck also reports this case :

IN a service of general heir to one's predecessor, the time of whose death is uncertain, it is sufficient to retour him to have died at the faith and peace of our sovereign lord for the time indefinite.

Questions resolved by the Lords of Session in the service of the Earl of Cassillis, and proponed by the judges and their assessors as general heir to Gilbert Lord Kennedy, his fore-grandfather's grandfather, against which service the Earl of Wigton made opposition. In the said service, it was resolved by the Lords, that the Earl of Cassillis should be special in his claim in reckoning the special descent from the said Gilbert, and verify the same in writ before the judge, and the party who was called for his interest. The Earl of Cassillis contended, that this only should be shown to the assize, and the Lords advised the assessors to cause the Earl condescend upon his claim, and to let the party see the verification in judgement, before the matter should be put to any inquest.

Auchinleck MS. p. 21.

1665. February 24.

SIR JAMES MERCER of Aldie against WILLIAM ROUAN.

No. 12.
What warrant
sufficient.

SIR JAMES MERCER of Aldie, as donatar to the gift of *ultimus heres*, of unquhile John Rouan, pursues a reduction of the retour and service of William Rouan, served heir to the defunct, as his goodsir's brother's oye; and having obtained certification *contra non producta*, there being nothing produced but the retour, service, brieve, and executions, but no warrant of the service, either bearing the testimony of witnesses, adduced to prove the propinquity of blood, or bearing, that the inquest of proper knowledge knew the same. The pursuer now insists in his reason of reduction, that the service is without warrant, and without probation by writ or witnesses. It was answered, *non relevat*, as it is libelled, bearing only that it is without probation by writ or witnesses, whereas it might proceed upon the proper knowledge of the inquest, or any two of them. The pursuer answered,

That neither were there any probation by writ or witnesses, nor by the minutes of process, bearing that the persons of inquest of their proper knowledge did serve.

The Lords considering, that the minutes of this process upon service for serving general heirs, which may be before any judicature, use not to be exactly kept, would not instantly reduce for want of the warrants, but ordained the persons of inquest to be produced, to condescend whether they proceeded upon proper knowledge, and what was the reason of their knowledge.

Stair, v. 1. p. 276.

No. 12.

1712. *November 28.*

SIR ALEXANDER DON of Newtoun, *against* JAMES DON, second Son to the deceased Patrick Don of Ottenburn.

SIR Alexander Don of Newtoun, in the year 1681, settled his estate of Newtoun in favours of himself in liferent, and Sir James Don his eldest son and the heirs-male to be procreated betwixt him and Marion Scot his then spouse in fee; which failing to return to Sir Alexander himself; which failing to Alexander Don his second son and the heirs-male of his body; which failing to Patrick Don of Aldtounburn, his third son, and the heirs-male of his body; which failing to the other heirs-male to be procreated by Sir Alexander; which failing to the eldest heir-female to be procreated betwixt the said James Don and Marion Scot, without division; which failing to the eldest heir-female of Alexander Don's body, without division; which failing to the eldest heir-female of Patrick Don without division; all which failing to Sir Alexander Don his nearest lawful heirs and assignees whatsoever; with and under the provisions, reservations, restrictions, and limitations after-specified, viz. That it shall not be lawful to James Don, and his heirs-male, nor to any other of the heirs of tailzie and provision above mentioned, to sell, anailzie, and dispone the lands, &c. redeemably or irredeemably; nor to contract debts, or to do any deed wheremy the same or any part thereof might be appraised, adjudged, or evicted from James Don, or any of the aforesaid heirs of tailzie and provision; the deeds of contravention were declared null, and the transgressor to lose his right, and the same to pertain to the next heir of tailzie, who, though served heir to the contravener, should not be obliged to perform his deeds, or pay his debts. In the year 1685, Sir Francis Scot of Thirlestane, for the sum of 99000 merks paid and delivered to him, by Sir Alexander Don of Newtoun, for himself and in name and behalf of Alexander Don his second son, sold and disposed the estate of Rutherford to Sir Alexander Don in liferent, and after his decease to the said Alexander Don his son and the heirs-male of his body; which failing to the eldest heir-female of his body without division; which failing to Sir Alexander Don and his heirs-male of tailzie and provision contained in the infeftments of the lands of Newtoun; under the express provisions, limitations, and conditions, contained in his said infeftments; and also under this express provision and condition, that if the estate should fall to an

No. 13.

Two competitors having taken out briefes to be served heirs of tailzie to a defunct in certain lands, being heard on their claims and titles produced before the macers and their assessors, and the debate reported to the Lords, the service was stopped till it was summarily determined *in jure* who had best right to be served heir.