

1698. February 2. M<sup>c</sup>INTOSH against WILLIAM M<sup>c</sup>INTOSH.

HALCRAIG reported M<sup>c</sup>Intosh, as assignee by M<sup>c</sup>Queen of Corrybrough, against Mr. William M<sup>c</sup>Intosh 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.