

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 infeft 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 _____

she noways, as yet being relaxed. THE LORDS allegiance the nullity of the gift of liferent, found the act of Parliament, and simulation; and found not the the comptroller, treasurer, or advocate, but only competent to a creditor to whom the rebel was addebted, or to any other donatar. As to the allegiance of the Earl Gowrie's possession by the space of five years, it was *answered*, That it was not relevant, because the possession was not peaceable, but lawfully interrupted by my Lady Gowrie, by pursuits against Bogie and Mr John Moncrieff for contravening of lawburrows in troubling her in possession of the said lands; likeas, Andrew Henderson, chamberlain to the said Earl, had made him count and payment to several creditors to whom she was addebted, at her command, of the farms and duties of the said lands *anno* 1599. Which *replies* were found relevant. It was farther *alleged*, That the said Sir Hugh could be in no better case than the sometime Earl, and the said Earl could never have intromitted with my Lady upon the mails and farms of her third, because she being served and kened thereto in *anno* 1587, her service and kenning standing by the space of three years unquarrelled, could not thereafter be impugned by way of action, nor yet by exception, in respect of the 57th act of King James IV. It was *answered*, She could never clothe herself with that service or kenning, because her umquhile husband, in *anno* 1570, infest her in the lands of Dirleton, Cousland, and Halyburton, in full contentation of her terce of all lands that pertained, or could pertain, to her by his decease; which infestment she had accepted, and possessed the said lands conform thereto; and, as to the prescription, it had no place but in retours, and could not run against minors or persons furth of the country, nor against the Prince. Which answer was found relevant. Thereafter Mr William Reid *alleged*, That he should be answered of the duties of such lands disponed to him in pension. It was *answered*, That her pension was null, because it was given to him by the sometime Earl of Gowrie in June 1600, immediately before the committing his treason, and the entry thereto appointed to be at Candlemas *anno* 1601, long before the which time, the said Earl committed treason and was forfeit, and therefore the pension was null. It was *answered* for Mr William, That it was provided by act of Parliament, *anno* 1594, that all bonds, contracts, tacks, pensions, and others, made, granted, or disponed by persons that should thereafter commit treason, should be null, if the same were neither clad with possession nor authorised by decreet of some ordinary judge before committing of treason by the granter thereof; and thereafter, he having obtained letters conform to his gift in July, before the treason committed by the Earl, his pension was valid. It was *answered*, That it was null, because in tacks and pensions *paria sunt indebite fieri et in indebitum tempus conferri*, and this pension was not appointed to have possession while Candlemas 1601, which was long after the Earl's treason and forfeiture, and so was null.—THE LORDS found the pension null, because it was given of the teinds of the Abbacy of Scone, and dis-

No 53. poned by Gowrie as Abbot, and that tacks or pensions granted by prelates and conferred *in indebitum tempus*, were null.

Fol. Dic. v. I. p. 521. Haddington, MS. No 647.

* * * The blanks in this case are obliterated in the MS.

1605. May 30.

DOUGLAS against SPALDING.

No 54.
Nullity of a gift of escheat as taken for the rebel's behoof, was sustained at the instance of a posterior donatar against a prior.

ALEXANDER DOUGLAS obtained the gift of escheat of umquhile Hugh Weir of Clowburn, and intented declarator thereupon; thereafter, Spalding in Dakkeith, obtained a gift of the said escheat, and sought declarator. Alexander Douglas *alleged* he should be preferred, in respect of the first gift and first declarator intented. Spalding *alleged* Alexander Douglas's gift to be null, in respect it was simulate taken to the behoof of the rebel upon his expenses *retentatione possessione*, and offered to prove the same by the treasurer, clerk, and writers to the seals and keepers thereof. It was *answered* by Alexander Douglas, That he was not a conjunct person, and offered to him to prove, that he had paid the hail expenses with his own private money, and he not getting possession was for want of a declarator, while now he ought, and now the rebel was relaxed, so that he might not intromit. THE LORDS found the allegiance upon the last gift and simulation of the first donatar to the behoof of the rebel, relevant to be proven by writ or oath of party.

Fol. Dic. v. I. p. 521. Haddington, MS. No 781.

1608. February 9.

STRAITON against JERVISWOOD.

No 55.

IN an action betwixt Straiton and the Laird Jerviswood, the LORDS found that an assignation made by a rebel *stante rebellione* was null, and that the nullity was competent to any man, albeit he were neither creditor nor donatar *sed quilibet e populo*.

Fol. Dic. v. I. p. 523. Haddington, MS. No 1437.

1611. February 21.

EARL OF GLENCAIRN against BOYD.

No 56.

AN assignation made to a man being at the horn, found null by way of suspension, albeit he who quarrelled it, was not donatar nor denunciator.

Fol. Dic. v. I. p. 523. Haddington, MS. No 2169.