

No 16.

mons of error was requisite. Found that a retour may be simply reduced, unless the question depend on propinquity of blood.

as last vest and seased, whereas they produced the infeftments of their uncle and father, as heirs to their grand-sire in these lands; and therefore instructed that her grand-sire died not as last invest and seased, as of fee, but her father their author. It was *answered* for the charger, That the retour could not be taken away, *hoc ordine*, by reduction, but behoved to be by a summons of error, for reducing the service by an inquest of error, to be pursued in Latin, by a precept out of the Chancellery. It was *replied*, That there needed no service of error, but the retour and infeftment might be reduced, unless there had been the question of propinquity of blood, of a nearer heir, which might have made the inquest an assize of error, which could not be in this case, seeing the inquest had done their duty, who produced one of the grandsire's sasines, found him to have died last vest and seased, as of fee, and neither could know, nor was obliged to know, that there was a posterior infeftment to the defender's uncle or father.

THE LORDS found the reduction receivable *hoc ordine*.

Fol. Dic. v. 1. p. 170. Stair, v. 1. p. 196.

No 17.

A retour of a forfeited person was found not reducible unless by summons of error.

1667. June 28. SIR ALEXANDER HUME *against* CREDITORS of KELLO.

SIR ALEXANDER HUME being donatar to the forefaulture of John Hume of Kello, did obtain a warrant for retouring the said John, five years in possession of certain lands, before the forefaulture, but the inquest served negative; and now he pursues a reduction of the retour, on this reason, that it is contrary to the testimonies of the witnesses adduced. It was alleged no process, because the reduction of retours is only competent by a summons of error, in Latin, under the quarter seal. It was *answered*, That is only in the case where the assizers are insisted against for their error; and the constant custom of the Lords has been to sustain a summons of reduction before themselves of this method.

THE LORDS sustained the defence, and refused process, albeit it was known to them, that the custom has been contrary of a long time before.

Fol. Dic. v. 1. p. 170. Stair, v. 1. p. 466.

No 18.

A service of a younger brother, to which the elder was not made a party, found not to interrupt the service of the latter, altho' not reduced.

1677. January 4.

MITCHELSON *against* MITCHELSON.

A YOUNGER brother being served, before the Bailies of Kirkcaldie, heir of line to the immediate elder brother; thereafter the eldest brother did desire to be served heir of conquest to the same person; and the Bailies not being clear to proceed, in respect of the former service, unless it had been reduced; THE LORDS thought, That, upon their refusal, the elder brother may advocate for iniquity; and that the brieves may be served before the macers, and that the eldest brother being wronged by the foresaid service, to which he was not cal-

led, so that it was *res inter alios acta*, he ought not to be prejudged thereby, nor put to the trouble and charges of a reduction. No 18.

Clerk, *Gibson*.

Fol. Dic. v. 1. p. 171. Dirleton, No 416. p. 204.

1680. July 20.

A. against B.

No 19.

THE LORDS found a reduction of a retour might now be by an ordinary summons, and not by a precept furth of the Chancellery, in Latin, under the quarter seal; and, that the act of sederunt, mentioned by Durie 1633, was in desuetude. See APPENDIX.

Fol. Dic. v. 1. p. 170. Fountainball, MS.

1688. July 26. Captain JOHN RAMSAY against GEORGE RAMSAY.

No 20.

CAPTAIN JOHN RAMSAY, immediate younger brother to the late Earl of Dalhousie, being abroad, his younger brother, George, serves himself tutor of law to the Earl's children. John returning home, and claiming his right, took out a brieve for serving himself tutor; whereon there is first an advocation presented; and, being refused, a petition was given in to the Lords for George, the present tutor; whereon the Lords stopt the service, till both parties should be heard. And at a calling, it being *alleged, tutorem habenti tutor dari nequit*; and that George's gift standing, and being clad with long possession, it behoved to be reduced, and Captain John to prove that he was elder brother; the LORDS, considering that this was *notorium quod non eget probatione*, and that the tutory was *ipso jure* null, and needed no reduction, they summarily annulled it, and ordained John's brieve to go on.

Found that an erroneous service of a tutor at law might be summarily annulled without reduction.

On a new bill and hearing, it was *alleged*, That the Earl, in his testament, had made a nomination of tutors, and three a *quorum*; and there were three who actually now accepted, viz. Sir George M'Kenzie, Sir John Ramsay, and John Johnston of Poltoun; and Mr Moor, the Lady's brother, would also accept; though it was objected against him, that being an English-Irish he was uncapable. But the act of the *post nati* made by King James VI. habilitated him. The Chancellor was so offended with Sir George, that it moved him to say, that when the King had ado with him, he always pretended either conscience or prior engagements. *Answered*, They could not accept now after six years cessation and negligence, and suffering one to enter tutor of law who had no right; and Sir John Ramsay had virtually renounced the office by acting as factor under him, and never making his compts yet, and so could not recur now. *Replied*, No prescription runs against tutors nominate, neither by the common law, *l. 11. D. de testamentar, tutel.* nor by our decisions; 17th December 1631,