No. 12.

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.

1712. *November* 28.

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

No. 13.

Two competitors having taken out brieves 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.

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 whatsomever; 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 wherecy the same or any part thereof might be apprised, 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 disponed the estate of Rutherfoord 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. heir-female, she should be obliged to marry a gentleman of the name of Don, or her husband and heir should assume that name, and bear the arms of the house of Newtoun Don, or otherwise lose their right to the estate of Rutherfoord, which in that case should fall and belong to the next heir of tailzie and provision above-mentioned.

Sir Alexander Don of Rutherfoord, old Sir Alexander's second son, made a new tailzie of his estate, in favours of himself and his heirs-male and female in their order; which failing, to James Don, second son to Patrick Don his brother, and died without children.

Sir Alexander Don now of Newtoun, grandchild to old Sir Alexander by his eldest son, and the said James Don, did both take out brieves of the same form to be served heir of tailzie to Sir Alexander Don of Rutherfoord, their uncle. And the Lords having appointed the Lords Dun and Poltoun assessors to the service; Sir Alexander insisted before the macers and assessors to have his claim remitted to the inquest.

Alleged for James Don: Sir Alexander's service as heir of tailzie to Rutherfoord, could not proceed till it were determined *in jure*, which of them had best right. The inquest being only judges of fact in a service, the point of right ought to be previously determined; and the service to proceed by direction or special injunction from the Lords; seeing there cannot be two heirs or two *domini in solidum*; and there is a manifest hazard of perjury, for inquests one or more to find, that two persons, upon different grounds of claim, are nearest and lawful heirs of provision to Sir Alexander Don of Rutherfoord, who died last vest and seised of certain lands. *2do*, The point of right ought to be first determined for preventing pleas and expenses to the parties, especially where their titles, as here, are in the field. *3tio*, This is agreeable to the analogy of law in like cases, where a party compearing with a plain and positive right, will be heard to stop and exclude diligence passing of course, or writs to be expede of course: As in the case of the creditors of Dalmahoy, the Lords appointed the adjudgers to mend their libels, leaving out lands disponed by the debtor to Ronald Campbell. And if a party having disponed lands with a procuratory of resignation, resign the same, or offer a signature in favours of himself and his heir; the receiver of the disposition would be heard against that signature, and obtain the lands disponed to him to be expunged. Because though *jus ad rem* remained in the granter as to all effects concerning third parties, yet he and his heirs may be excluded *exceptione doli*, from doing any deed in relation to the subject whereof he is divested by disposition. For the same reason, the heir of the maker of a tailzie, cannot be allowed to serve, where a party appears with a disposition for resigning these lands in favours of other heirs.

Answered for Sir Alexander Don: The due and ordinary course is, to allow both parties to serve; services proceed, and brieves are expede at the chancery of course; the design of the inquiry is to try in what lands the deceased died vest and seized; if he died at the faith and peace of the queen; and if the purchaser of the brieves be his nearest and lawful heir in the lands, &c. Which cognitions proceed

summarily, that property may not lie *in pendenti*, and cannot be stopped till the discussion of the points of right, which fall in naturally before the Lords in declarators of property, and not before the macers and inquest, who with their right honourable assessors are in that capacity restricted in the verification of the heads of the brieve; for which reason it is that the brieve of mortancestrie is not a pleadable brieve. No. 13.

Replied for James Don: Albeit such services proceed summarily; yet where parties appear and except upon grounds instantly verified, to exclude the title of the claimer, they are heard; which the very form of the proclamation of the brieve, and Act 41. Parl. 6. J. 3. import. The Act 94. Parl. 6. J. 4. concerning exceptions to be proponed against brieves of inquest, hath by custom been extended to others than are there expressed, if instantly verified, as my Lord Stair and Sir George M'Kenzie observe. For though brieves of mortancestrie are not pleadable brieves, that is, ordinary summonses, (which of old were called brieves) yet by custom all exceptions instantly verified are received against them. And James Don makes this exception, that Sir Alexander Don, is not *legitimus et propinquior hæres talliæ et provisionis dictarum terrarum;* because he stands excluded by a posterior tailzie in James's favours as incompatible with the last investiture. As to the allegeance that the point of right cannot be discussed before the macers, the only judges to the service; what then? Is it not ordinary after discussing the point *in jure*, to remit to the judges of the fact? And as the macers proceed in such cases, either upon commission, or by advocation authorized by the Lords, so their Lordships do hear parties, and determine the point of right in order to direct the service.

Duplied for Sir Alexander Don: The disposition of tailzie in favours of James Don, standing yet incomplete in the terms of a personal obligement without infeftment, (whatever import it might have in a declarator of right) could not stop Sir Alexander's service vouched by the express tenor of the last investiture, without plain violence to the forms of chancery; since otherwise no special service could proceed, so long as any pretender might lay claim to the property of an estate on any account, though never so extrinsic to the forms of chancery, till the claim of right were determined, which may be tedious, and depend long. Nor is there any incompatibility for Sir Alexander Don to be heir of the investiture, while another hath an obligement from the defunct, that may force him when served to denude; as charges to enter heir, in order to complete deeds granted by a defunct without infeftment, are ordinary. Though there cannot be *dominium duorum in solidum*, yet Sir Alexander Don may claim to be served heir in special to the lands of Rutherfoord, whose service, though perfected, would never obstruct James Don from serving heir in general, to make up a right to this bond of tailzie. And Sir Alexander is willing that his service be expede, without prejudice to James Don's claim and right of property, as accords.

Triplied for James Don: However the defunct may be said, with respect to the superior or a third party, not to be denuded by the disposition of tailzie in favours of James Don, yet he hath denuded himself and his former heirs of tailzie, by that

No. 13. disposition as to the destination of his heirs; which is sufficient to exclude Sir Alexander's claim, unless he allege that the disponer was incapable to grant such a deed. For *qui actionem habet ad rem recuperandam*, as to the heir of the granter, *ipsam rem habere videtur*, *L. 15. D. De Reg. Jur.* Sir Alexander, as to the imaginary succession devolved on him, is to be held as if it were not devolved: "Quia non videtur cepisse qui per exceptionem a petitione removetur, L. 13. D. eod. et non videtur quisquam id capere, quod ei necesse est alii restiture," L. 51. D. eod. yea, James Don should be held actually infeft as to his competitor, according to the rule, "pro facto accipitur id, in quo per alium Mora fit quo minus fiat," L. 39. D. eod. Now if James be considered as infeft, it is impossible the special service can proceed in favours of Sir Alexander; because the infeftment would be drawn back to its source, and import a complete alteration of the destination of succession from the defunct and the heirs of the former tailzie, to him and the heirs of the new tailzie; and clauses *in favorem* may now be perfected after the death of the party in whose favours conceived, under whom, and in whose right, his heirs only claim. A service being intended to establish a title to some heritage, is not like a *bore-brieve*, which requires no more but an instruction of the relation and descent of the party to the office out of which it issues. A general service of an heir male without an heritage, as a foundation of the claim, is a chimera: So that it is inconsistent for both parties to be served to the estate of Rutherford; but that it may be known which of the services ought to proceed, the point of right must be determined; nor can the contradiction be avoided by alleging that the one is served heir in general, and the other heir special; for that a special service doth include a general, which is the foundation of the special. And if one be *legitimus et propinquior hæres talliæ*, the other cannot be so, and if not so, he cannot be *hæres in dictis terris*. It is a mistake to say, That the design of a service is to carry right to a disposition: For it is designed to establish a title to heritage, that is, where the heritage consists in an obligation, to carry the obligation; and where it consists in land, to carry the land; the titles are but instructions and accessories of that right. The Act 35. Sess. 4. Par. W. and M. hath changed the nature of rights to be conveyed or established by service, and dispositions containing procuratory of resignation are not, as before, bare obligations to dispone, but are *jura ad rem*, which may be completed without any further deed of the granter, or his heirs: It being a hardship upon an heir to be charged to fulfil deeds to his own prejudice, or at least where he had no benefit; and equally hard, That a creditor or assignee's right should become worse, and he put to new expense on account of his debtor's death, when nobody could reap any benefit by it. Again, it would be a great prejudice to James Don, that another should be infeft in his estate, that the very person whom he could compel by the ancient law, to enter to complete his title, should pretend to enter whether he will or not, to dispute it.

Upon the assessors' report of the above debate, The Lords stopped the service till the point of right be summarily discussed; and remitted the contending parties to be heard before the Lord Dun for that effect.

Forbes, p. 636.