

Nevertheless, it was in this case found, that the general service to the apparent heir, against whom the adjudication was led, was a sufficient title to quarrel not only the decree of constitution, but also the adjudication, upon whatever ground.—
Vide 19th January, 1669, Johnston *contra* Sir Charles Erskine, No. 10. p. 213.

Kilkerran, (TITLE TO PURSUE) No. 2. p. 579.

No. 65.

1746. November 6. HORNS *against* STEVENSON.

The defender in a reduction and improbation having produced an adjudication, with a sasine thereon, objected to the pursuer's title, which was only a general service, as not a sufficient title to carry on a reduction of an adjudication on which infestment had followed.

The Lords repelled the objection.

A general service has always been sustained as a sufficient title to reduce all right to whatever subjects belonged to the predecessor, although the predecessor was thereon infest, not only because it has been thought unreasonable to put one to the expense of a special service and infestment, till it should appear whether he was to have any benefit by it, but that the objection to the title would otherwise be a circle; for it is a good objection to a special service, that another deriving right from the predecessor stands infest in the subject: The heir served in general must therefore be allowed to have a good title to reduce, else the heir cannot have a title at all.

Kilkerran, No. 3. p. 579.

No. 66.

If a general service is a sufficient title in reduction of rights on which infestment has followed?

1747. February 28.

MAGISTRATES OF KILMARNOCK *against* WILSON and CAMPBELL.

James Wilson and Margaret Campbell being charged upon a decree of the Baron-bailie of Kilmarnock, to make payment to the Magistrates and their tacksmen of the rate and duty of twelve pennies Scots for each boll of salt-retailed by them within the said burgh, from Martinmas 1744 to Martinmas 1745, liquidated to £.3 7s. Scots due by Wilson, and to £.5 2s. Scots due by Margaret Campbell; and, at the same time, sundry of the other burgesses being pursued for certain rates and duties upon lint-seed, bear, barley, and meal, sold by them within the burgh, Wilson and Campbell suspended, and the others advocated.

At discussing the suspension, the only reason insisted on was, That no right or title whatever to the duty claimed was given out by the chargers, nor had been produced in the decree. But in regard use and wont of uplifting the duty upon salt was acknowledged by the suspenders' procurator to be proved, and that the

No. 67.

Use of uplifting a small duty by a body corporate, a sufficient title *in possessoria*.

No. 67. Town and their tacksman are *in possessorio*, the Ordinary “repelled the reason of suspension; reserving reduction or declarator as accords”

The suspenders reclaimed, on this ground, That a possessory judgment cannot be pleaded without a title: That mere possession, especially of exactions derogatory from the freedom of commerce, and which can only proceed from the authority of Parliament, cannot be the foundation of any claim or judgment: That such exaction, without a title, was oppression, which no continuance could sanctify.

The petition was refused. The chargers being a body corporate, their being in possession of a small duty was thought enough *in possessorio*.

Kilkerran, No. 4. p. 580.

1747. December 1.

ELIZABETH COLQUHOUN, and SIR GEORGE COLQUHOUN, Petitioners.

No. 68.

A sale begun by an apparent heir may, after his death, be carried on by the purchaser or next heir.

By the death of Sir Humphry Colquhoun of Tillihewn, the estate of Tillihewn devolved on the now deceased Sir James Colquhoun, eldest son to Elizabeth the petitioner and the deceased Captain James Colquhoun. And the estate being overburdened with debt, a process of sale was pursued at the instance of the said Sir James, as apparent heir; and the lands being exposed to sale, Elizabeth, his mother, was preferred as highest offerer. Thereafter, the ranking proceeded upon the price; and after divers steps made therein, but before it was concluded, Sir James the pursuer died.

Application was now made by Elizabeth, who, beside being purchaser and sole debtor in the price, was also a creditor adjudger, and Sir George Colquhoun, the now apparent heir, that the process of ranking might be allowed to proceed in the name of one or other of them.

The doubt was, that before the act of sederunt 1711, the pursuer of a sale on the act 1681, dying before the conclusion of the process, the process of ranking and sale fell, till a title was made up by the heir; and the provision made by that act, that in the event of the pursuer's death, the process may be taken up by any other real creditor, concerns only sales pursued on the statute 1681.

But the Lords were of opinion, That this process might be carried on upon the footing of common law, either by the purchaser, who has an interest to have the price taken off her hand, or by the now apparent heir, who is entitled to the balance, if any be, without any service to the last apparent heir, the original pursuer, in whom there was nothing to be carried by a service; and, therefore “Found,” in general, “the petitioners entitled to carry on the process.”

Kilkerran, No. 5. p. 580.