SECT. V.

Special Service.

1676. *February.* RICARTON DRUMMOND *against* ——————

No. 30.

THE Lords found, That a special service in an annual-rent doth give right to heritable bonds, and all other heritable estate, whereupon infeftment did not follow; and includes a general retour, as *homo* doth include *animal*.

Reporter, *Newbyth*. Clerk, *Hamilton*.

Fol. Dic. v. 2. *p.* 372. *Dirleton, No.* 323. *p.* 157.

1733. *July* 20. SIR JAMES SUTTIE *against* DUKE of GORDON.

No. 31.

THE service of an heir cannot be stopped by a disponee deriving right from the defunct, without infeftment, upon the pretext, that it was *frustra*, unless the heir could quarrel the disposition, though the disponee was willing instantly to debate the point of right; for if an apparent heir were pretending to quarrel his predecessor's disposition, it would be a good objection, that he could not insist in the reduction without being served; therefore *e contrario*, a disposition cannot afford a sufficient objection to stop a special service. See APPENDIX.

Fol. Dic. v. 2. *p.* 371.

1761. *November* 25.

ARCHIBALD DOUGLAS of Douglas, Esq. and his TUTORS, *against* GEORGE JAMES DUKE of HAMILTON, and his TUTORS, and DUNBAR EARL of SELKIRK.

No. 32.
Special service of the heir of investiture cannot be stopped by an heir of provision under a personal deed, to which he has made up titles by a general service.

ARCHIBALD Duke of Douglas was infeft in his estate upon a charter from the Crown, in 1707, in favour of himself and the heirs-male of his body, whom failing, to the heirs called by deeds executed by his father.

In 1759, the Duke became bound to settle his estate upon his heirs-male of that or any subsequent marriage; whom failing, upon the heirs-female of the marriage; whom failing, to such heirs as he had named, or should name, in the settlements made, or to be made, by him; and failing thereof, to his own nearest heirs and assignees whatsoever.

Upon the 11th July, 1761, the Duke executed an entail, in which he granted procuratory for resigning his estate in favour of himself and the heirs whatsoever

No. 32. of his body; whom failing, the heirs whatsoever of the body of the deceased James Marquis of Douglas, his father; whom failing, Lord Douglas Hamilton, second son of the deceased James Duke of Hamilton; whom failing, other substitutes.

The Duke, of the same date, having no heirs of his body, nor prospect of any, made a deed of appointment of certain tutors and curators to Archibald Stewart, a minor, son of Lady Jane Douglas, his Grace's sister, as the person who was to succeed to him, failing issue of himself.

The Duke died before the end of that month; and the said Archibald Stewart, now Douglas, took out a brieve from the Chancery, in order to be served heir of provision in general to him upon the deed 11th July, 1761. This service having come before the macers in September, said year, a proof was led of his propinquity; and compearance was made for the Duke of Hamilton and the Earl of Selkirk, the former of whom had purchased a brieve for being served heir-male and of provision to the Duke in his lands of the earldom of Angus, barony of Dudhope or Dundee, and Bothwell, and Wandell, as devised to heirs-male by the feudal investitures of the estate. The other competitor, Lord Selkirk, had also taken out a brieve for being served heir of tailzie and provision to the Duke of Douglas in the estate of the earldom of Angus, and in the barony of Dudhope, which he maintained were devised in his favour, in the event which had happened, by the investitures.

Mr. Douglas having been served by the inquest as heir of provision under the tailzie 1761, a protestation was entered, on the part of the Earl of Selkirk, that the service should not be retoured by the macers to the Chancery, till the Earl should be heard upon his claim to the estate. The counsel, however, for Mr. Douglas, moved, that his service should be retoured to Chancery in common form; which was accordingly done; and Archibald Douglas having thereby acquired right to the procuratory in the tailzie 1761, put up a signature in the Exchequer for a charter of resignation of the estate, in order that he might complete a feudal title thereto.

The Duke of Hamilton and Earl of Selkirk raised actions of reduction and declarator before the Court of Session, for ascertaining their rights to the above mentioned parts of the estate; and having likewise brought forward their brieves to be served in special upon the investitures as above, the same came before the macers, on the 13th of November, 1761; when compearance was made for Archibald Douglas, who objected, That these services could not go on, because, supposing the claimants were truly heirs of the investitures, (which in due time he would dispute), yet the Duke of Douglas having, by his entail 1761, granted procuratory for resigning his estate in favour of himself, and a certain series of heirs, and Mr. Douglas having already been served and retoured heir of provision under that deed, whereby he had carried that procuratory, and was *in cursu* of executing the same, and thereby establishing the feudal right in his person, the claimants could not insist to be served heirs in special in an estate which substantially belonged to

him, and which, at any rate, would fall to be restored to him as soon as his title was completed by infeftment. No. 32.

On the other hand, it was contended for the claimants, That the deed 1761 being only personal, the lands remained *in hæreditate jacente* of the Duke of Douglas; and the heirs of the former investitures were entitled to vest the feudal right in their persons by special service and infeftment, even though they should afterwards be obliged to denude of that right; but they were hopeful they would not be obliged to denude, as they contended, that the deed 1761 was *ultra vires*, and executed on death-bed; and that their right upon the former settlements of the family was preferable.

The Lords assessors having taken the debate to report to the Court of Session, it was there taken for granted in the argument, that the Duke of Hamilton and the Earl of Selkirk were the heirs-apparent of the investiture; and the question debated was, Whether or not Mr. Douglas, upon his general service and retour, as heir of provision, under the last deed 1761, not yet completed by charter and sasine, had a title to stop the special services of the heirs-apparent of the investitures.

Argued for Mr. Douglas: By the deed 1761, and service following thereon, he has a personal right to the lands, which he can at pleasure establish into a feudal right, by executing the procuratory; and it is of no consequence, whether this deed was granted on death-bed or not; for still it is a good deed, and confers a valid and effectual right to the estate, till it be taken out of the way by reduction, which cannot be done without a regular process for that purpose; neither can the Duke's powers to execute this deed be challenged *in hoc statu*. The deed is *ex facie* good, and must be so held till set aside by reduction.

Had Mr. Douglas's right under this deed been completed by infeftment, this would have taken the lands out of the *hæreditas jacens* of the late Duke, and must therefore have effectually barred any person from serving heir in special in these lands; and, if so, it ought not to make any difference that the charter and infeftment are not yet expede, as he is *in cursu* of obtaining them. Nothing remains *in hæreditate jacente* of the Duke, but the form of an infeftment, or nominal fee of the estate. The substantial right is already in the person of Mr. Douglas, and he can complete his feudal title without any aid or intervention of the heir; so that no reason occurs why the heir of former investitures should be allowed to incumber the estate with taking an infeftment, by which he can carry nothing real, and of which he must denude the next moment: *Frustra petit qui mox est restituturus*.

A personal right to lands is a good title against the granter and his heir. Suppose the Duke of Douglas had sold his estate to an onerous purchaser, and granted a disposition, with procuratory and precept, and that the disponee had not taken infeftment during the Duke's life, the Duke's heir would not have been allowed to compete with the disponee. The heir, in such case, is no doubt in condition to verify the heads of his brieve, and to carry a nominal fee by service;

No. 32. but, where he is opposed by the person having the substantial right, and with whom he could not compete in an action of mails and duties, it would be unjust to allow him to be served, and to take infeftment in an estate in which he has no real interest. The disponee may, without infeftment, pursue a removing against the disponer, who cannot object to the want of an infeftment in the person of him whom he is bound to put in possession: And as the heir can never have a stronger right in the subject than the predecessor to whom he claims to be served, so neither can he be allowed to object to the want of an infeftment in the person of him who has right by a disposition from the predecessor. See the case of Sir Alexander Don, No. 13. p. 14425. and the case of the Earl of Crawford and Hugh Crawford against Mary Ure, No. 3. p. 3818. *voce* EXECUTOR.

Neither is it necessary that the claimants should be served in order to give them a title to carry on their actions of declarator and reduction. For, in the *first* place, Mr. Douglas is willing to debate the point of right with them upon the title of apparency. *2dly*, An apparent heir may reduce upon the head of death-bed; and the claimants may also, without any service, insist upon their challenge of the Duke's want of powers, upon account of his being under fetters and limitations in their favour. This gives them *jus crediti*, by which they may challenge all acts of contravention in their own right; and a service to the predecessor who contravened, so far from being of any use, would rather bar them from challenging; Douglas of Kirkness, No. 38. p. 4350. *voce* FIAR ABSOLUTE, LIMITED, and No. 173. p. 10955. *voce* PRESCRIPTION.

Answered for the claimants: A disposition executed by the late Duke remaining at his death a personal uncompleted right, cannot have the effect to stop their services as heirs in special under the investitures by which the Duke held his estate, and died last vest and seised therein. Such personal right could not divest the Duke of his infeftment; the fee remained in him till his death, and is now *in hæreditate jacente* of him; and the claimants are undoubtedly entitled to have their brieves for serving them heirs in that fee cognosced and tried, whatever right the heir of provision under the personal right may afterwards have to make them denude thereof in terms of the disposition. If the claimants offer to verify the heads of their brieve, their service cannot be stopped upon the pretence of a third party's right, unless that right is sufficient to disprove one or other of the heads of the brieve. The right under the personal disposition, and the right of the claimants to be served as nearest and lawful heirs in the fee, are not inconsistent; and therefore the disposition can be no obstacle to the service.

It is no good objection to an heir's service, that it is *frustra*, and that he will reap no benefit from it. The heir must judge of that himself. If he shall afterwards be obliged to denude in favour of the disponee, the law must have its course; but that is no reason why he may not serve, if he think fit so to do. It may be also vain for an heir to serve to an estate that is exhausted with debt, or which his predecessor has become bound to alienate. But neither of these are objections

against the service, if he thinks fit to carry it on. Besides, the service may be useful for other purposes. A man may need it to enable him to make settlements. A special service includes a general one *ejusdem generis*; the heir will thereby have right to all subjects falling to him as general heir; and though he may not be able, at the time, to point out other subjects or rights which will fall to him as general heir, yet that can be no objection to his service: such subjects or rights may afterwards be discovered. And as it is of the greatest importance for every man to vest in him the rights and subjects of his predecessor *quamprimum*, the law will not allow his service to be impeached by a third party, who pretends no sort of title to compete with him in his service. To stop the services of heirs is a matter of very great delicacy. No. 32.

Further, the claimants are not bound *in hoc statu* to debate, whether they will be obliged to denude or not. When they are served, and the proper action is brought against them for that purpose, it will then be time enough to give reasons why they are under no obligation to denude: But surely it is preposterous to enter into that debate at present. It is enough to say, that the fee is not full, and that they are entitled to fill it. *Frustra petit*, &c. is a maxim of equity, rather than of law. And it is a good answer, if the claimant can say, "I will not restore;" or this is not the proper time and shape for discussing the question, Whether he is bound to restore or not? Case of Sir James Suttie *contra* Duke of Gordon, No. 31. p. 14457.

Neither is it sufficient to say, that Mr. Douglas is *in cursu diligentiæ* in order to complete his titles. The claimants are also *in cursu*; and there can be no justice in stopping the course of their services, in order to give him an opportunity of getting the start of them. His title must be taken as it stands, not as it hereafter may be improved by further diligence.

"The Lords repelled the objection, and remitted to the macers to proceed in the services of the Duke of Hamilton and Earl of Selkirk."

For Mr. Douglas, *Hamilton Gordon, Burnet, Montgomery, Garden, M'Queen, Rae, Ilay Campbell, Alexander Murray.*

For the Duke of Hamilton, *Lockhart, Sir John Stewart, John Campbell, junior, Walter Stewart, William Johnstone, Sir Adam Ferguson.*

For the Earl of Selkirk, *Advocatus, Sir David Dalrymple, Patrick Murray, Wight, Crosbie.*

Fol. Dic. v. 4. p. 275. Fac. Coll. No. 58. p. 153.

1784. *February* 20. JOHN SPALDING *against* MARGARET LAURIE.

No. 33.
How far the service of one, as heir of tailzie and provision, is suffi-

WALTER LAURIE executed an entail, by charter and infeftment, of his lands of Bargattan, with the usual restrictions, *de non alienando, vel contrahendo debita.* He afterwards purchased the teinds, which were disponed "to him and his successors in the lands." But on this disposition no infeftment followed.