

No 4.

1633. March 22. The KING *against* EARL of STRATHEARN.

THOUGH a retour be reduced as proceeding upon mistake, yet the jurors on the inquest may be acquitted as having been under probable cause of error.

\*.\* This case is No 116. p. 669I, *voce* IMPROBATION.

No 5.

A retour found a sufficient title, where no other party had appeared, and alleged a right.

1634. February 17. MAXWELLS *against* M'BRAIR.

IN an action pursued by Maxwells, who were infeft in certain lands upon a retour as heirs to their father, against Robert M'Brair, for the mails and duties of the lands, both since the date of the retour and infeftments, and also of certain other years preceding the retour, since the decease of their father, to whom they were served and retoured as heirs; the LORDS sustained the action upon the said sasine, proceeding upon a retour, for the years also since the decease of their said predecessor, and before the retour; albeit it was *alleged* for the defenders, That they could not pursue for these years, seeing there was no right standing in their person to the same of these years: Which allegiance was repelled, in respect the right proceeded upon a retour, which was sufficient to sustain the pursuit for these years, seeing there was no other party compared to allege any right thereto in the person of any other; and for these years, albeit they might be in non-entry, yet being in feu lands, the superior could have no right but to the retoured duty, and not the full mails, before declarator.

Act. Belshes.

Alt. Cunninghame.

Clerk, Gibson.

*Durie, p. 110.*

No 6.

Exceptions to a retour received without reduction.

1636. February 10. MURRAY *against* SINCLAIR and MEIKLE.

ONE named Murray, being served and retoured heir to umquhile \_\_\_\_\_ Murray, whereby he claimed right to certain bonds and obligations made to the defunct, to whom he was retoured heir, and pursuing the haver of the writs, for exhibition and delivery of the same writs, as belonging to him as heir, and having made another Murray assignee thereto, which assignee pursuing for the same; the defender *alleged*, That this retour could not furnish this action to the cedent himself, and consequently not to this assignee; because he referred to the cedent's own oath, that he was not attingent in no manner of degree of blood, by no kind of distance, to the defunct, to whom he was served heir, and referred also to the assignee's oath, that he knew the same to be true; and it being *answered*, That this ought not to be received so summarily, by way of exception against a retour past the Chancel-

lory, which is a sentence past upon the oaths and consciences of 15 sworn assisers, but ought to be tried by a legal and ordinary way of action and process of error;—the LORDS found the allegiance relevant, and received the same in this place, to be tried by the parties' own oath, which they found to be such a manner of trial, as the party served could not decline himself; and that there was no necessity, in respect thereof, to intent another process of reduction, or error, where the party himself was judge.

No 5.

Act. ———.

Alt Gibson.

Clerk, Hay.

*Durie, p. 793.*

1663. *January 16.* SWORD *against* SWORD.

ONE SWORD as heir served and retoured to Baillie Sword of St Andrews, pursues for intromission with the moveable heirship for delivery of the same, and produces his service done at St Andrews, and retoured, whereby he is served as oye to the defunct Baillie, his father's brother. Compears another party, who is likewise served heir to that same Bailie, at Edinburgh, and produces his service retoured, by which he is served heir to Bailie Sword, as his father's brother's son; whereupon he hath raised a reduction, in Latin, under the quarter seal, of the other service, which was prior; and alleges, that he being in a nearer degree of blood than the other, in so far as he is a father brother's son, and the other service bears him to be but a father brother's oye;

No 6.  
In a competition of retours the Lords preferred neither till the merits were tried.

“ THE LORDS having considered both the retours, and that they were not contradictory, inferring manifest error of the assize, because it was sufficient for the assize to serve the father brother's oye, if they knew of no near degree; and also because the defunct Bailie might have had two father brothers, one elder than his father, and the other younger, and thereby two heirs, one of line and another of conquest, which not being clear by the retours, the LORDS will not prefer the first retour as standing, but would hear the parties upon the reduction.”

*Stair, v. I. p. 159.*

See APPENDIX.

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