No. 7. first, where all are *nominatim* called, and nothing falls to be cognosced but the failure. And there is no reason why the failure of fourteen must be cognosced more than the failure of one; besides, That the service is a solemnity, and *modus adeundi*, which law has fixed upon; and there is something more to be cognosced than the propinquity and failure.

The Lords found, That the estate disponed by Walkingshaw was not, after the decease of Sir James Hamilton, fully vested and settled in the person of the deceased William Hamilton, without the necessity of a service; and therefore allowed James Hamilton the pursuer his service to be retoured, with this provision, that, before retouring, the said James Hamilton give an obligation, to the following import, viz. " That notwithstanding of his said service, the estate of Orbiston, and what else he can succeed to by virtue of the said service, shall be liable and subject, according to the extent and value thereof, to all the true and lawful debts and deeds of William Hamilton his brother elder of Orbiston, and James Hamilton younger thereof, his nephew, and to the diligence thereon, except the gratuitous or death-bed debts, debts or writs granted in favour of James Hamilton of Dalziel."

Act. *Robert Dundas.* Alt. *Boswel.* Clerk, *Roberton.*

Fol. Dic. v. 2. *p.* 367. *Bruce, v.* 1. *No.* 38. *p.* 47.

1728. *January.* SIR JOHN SINCLAIR *against* HELEN GIBSON.

No. 8.
Bonds heritable by destination, not confirmable by an executor-creditor.

THE now deceased Sir Edward Gibson was fiar of several bonds, " devised to him and his heirs-male; which failing, to his sister Helen Gibson and her heirs-male; which failing," &c. anent which bonds the question occurred, " If they were confirmable by an executor-creditor of the defunct.

Sir John Sinclair, the executor-creditor, pleaded upon the act 32. Parl. 1661, in which sums lent out upon bond, containing clauses for payment of annual-rent and profit, were ordained to be holden and interpreted, moveable bonds, excepting the cases following, viz. that they bear an express obligement to infeft; or that they be conceived in favours of heirs and assignees, secluding executors; so that however these bonds be destinated, they continue moveable *quoad creditorem*, as coming under neither of the exceptions in the act. If a subject be otherwise moveable, a destination alters not its nature, being only intended to point out the successor; and though that successor is preferred to the executor of the defunct, that flows from the will of parties, not from the nature of the subject, which remains moveable, insomuch that the creditor-fiar may test upon it; and consequently it is confirmable by his executors-creditors. This seems to be Lord Dirleton's opinion, and is expressly Sir James Stewart's upon the article, Bond heritable, p. 17, where he lays down the rule, " That a substitution does not so far alter the nature of a bond, as to make it heritable, but that the marks of a bond's being

heritable or moveable, should be taken from the act of Parliament; that is, where there is no clause for infeftment, or expressly secluding executors, such bond should be esteemed moveable and testable, and consequently confirmable by the executor-creditor." No. 8.

On the other hand, it was contended for Helen Gibson the substitute, No good reason can be assigned, why this case should not be brought under the exception in the act, of bonds "conceived to heirs and assignees, secluding executors:" For are not the bonds in question conceived to heirs and assignees, secluding executors, truly as much as these very words, were expressed in the bonds? There is no charm in the words "secluding executors;" and it is not to be imagined, that the Legislators designed to put the difference of a subject's being heritable or moveable, upon the form of using certain indifferent words, neglecting the true state of the conveyance, which is the thing that falls naturally to determine the point. But, 2*do*, There is another medium upon which this question falls to be determined, viz. That these bonds can only be carried by service, which is contended to be incompatible with confirmation of any sort, whether of nearest of kin, or creditors. There are two methods known in our law of making up titles to a defunct's effects, confirmation and service. The last is necessary in all cases where the person claiming is to represent the defunct, where he derives his right from him, and has no title but as coming in his place; there being no other form known in our law of representation, but by service; so that service is not only necessary in the conveyance of heritable subjects, but in all subjects heritable or moveable, where a succession is established, and where of consequence the right can only be carried by representation. There are other subjects which are claimed, not by any right derived from the defunct, but *jure proprio;* which is the wife's and children's case, with relation to the moveables: For even the nearest of kin take not the defunct's third, as representing him, but *qua* nearest of kin, and in their own title; the law having established, "That the dead's part belongs to the nearest of kin *qua* such, unless otherwise disposed upon by the defunct." And this according to the well-known principle, "That there is no *representation* in moveables." Now in all these confirmation takes place, which has no relation to a succession by representation, but belongs to the office of executry: For since it is inconvenient, where so many have different interests in a perishable subject, that each be allowed to put forth his hand, the law has prudently introduced, for the benefit of all, a common trustee, who alone is to intromit and be accountable. If this be a just view of the affair, it was even an extension to allow a creditor to confirm, who has no special interest in his debtor's moveables, more than his heritage; indeed a necessary extension, where there is not another executor, because in these circumstances no other form of diligence has been devised whereby creditors can affect the defunct's moveables. But since the effect of a destination is to establish a succession, a representation, were the destination even of a medal, jewel, or other simple moveable subject, it must go by a service, and is incapable of confirmation; since nobody can have an interest in it *jure proprio*, but only as coming

No. 8.

in place of the defunct proprietor; and if not confirmable at the instance of the nearest of kin, far less by a creditor, who in these circumstances wants not a habile diligence to affect the subject; for here he has the substitute whom he can charge to enter heir, and upon his renouncing, the way is patent to an adjudication of the subject, as a *hæreditas jacens*.

"The Lords found the bonds in question not confirmable."

Fol. Dic. v. 2. p. 366. Rem. Dec. v. 1. No. 103. p. 197.

1731. *July* 10. M'CULLOCH *against* M'LEOD.

No. 9.

JOHN DOUGLAS resigned his lands in favour of himself, and the heirs-male of his body, which failing, to Hector Douglas *nominatim;* and infeftment was expede accordingly. John Douglas having died without heirs-male of his body, Hector disponed the lands, without making up titles. After his death, the disponee insisting upon his right, it was found, that Hector was only substitute, and could have no right to the lands without a service. See APPENDIX.

Fol. Dic. v. 2. p. 368.

1748. *February* 8.

The CREDITORS of CARLETON, *against* GORDON of Carleton.

No. 10.

Upon a disposition of lands to take effect at the disponer's death, with reserved powers, a service, by a remote substitute, to the disponer, was found a proper title, the first substitute having predeceased the disponer.

JAMES GORDON of Carleton disponed his whole heritable estate which at that time pertained, and should happen to belong to him any time betwixt and his decease, to and in favour of the heirs-male of his body, which failing, to the persons after-mentioned; whom he appointed to succeed him as his heirs of tailzie and provision, and granted procuratory for resigning the particular lands therein mentioned, and all his other lands, &c. presently pertaining, or which should accresce to him before his decease, for new infeftment to be granted to the heirs-male of his body, which failing, to John Gordon, third son to Mr. William Gordon of Carleton, and appointed Nathaniel Gordon of Gordonston the next substitute in the tailzie, failing of the said John, which failing, another person, and the heirs-male of their bodies, which failing, any other person he should please to name, *etiam in articulo mortis;* reserving to himself power, *etiam in articulo mortis*, to annul or alter this deed, or dispone, burden, or contract debts upon the estate.

James Gordon died, and the possession of the estate was taken up by John, who expede no infeftment; and deceasing, was succeeded by Nathaniel, who served himself heir of provision in general to the maker of the tailzie, and disponed the estate to Alexander his son, who predeceased him; and both these had contracted debts upon which adjudications were led.