No. 6. to have right, was by service; but, in regard those pecuniary provisions came to be frequent in contracts of marriage in favour of children, and in bonds with special substitutions, the law hath been so far dispensed with, for the ease of creditors, as to allow those rights which are of less consequence than lands, and temporary, to be transmitted without necessity of a service; yet this is not to be drawn in consequence, to rights of greater importance, as land rights, which are framed to endure to perpetuity; and, therefore, to these no heir substitute can succeed without a service. *3tio*, Mr. Hamilton is so far from having any design to defraud his brother William's onerous creditors, that he is willing to become bound not to quarrel their debts and diligences, and to secure them upon the subject of the inventory, he being served *cum beneficio* in the most effectual way they can desire: though that is what, in strict law, he could not be obliged to do.

The Lords found, That the estate disponed by Walkingshaw was not, after the decease of Sir James Hamilton, fully vested in the person of the deceased William Hamilton without the necessity of a service; and therefore allowed James Hamilton's service to be retoured, with this provision, that, before retouring, he should give an obligation subjecting himself to the lawful debts and deeds of the said William Hamilton, as heir *cum beneficio inventarii* to him.

Fol. Dic. v. 2. *p.* 367. *Forbes, MS. p.* 57.

1715. *January* 21.

JAMES HAMILTON, Writer in Edinburgh, *against* The CREDITORS of ORBISTON, and HAMILTON of Dalziel.

No. 7.
Found as above, and seems to be the same case.

WALKINGSHAW having disponed in favours of the deceased Sir James Hamilton, which failing, by decease, to the deceased William Hamilton of Orbiston, his eldest son, an apprising of the estate of Orbiston, Sir James having deceased before William, and James Hamilton, the second son, being to serve heir to his father Sir James, there were objections made against the service by the Laird of Dalziel, and the other creditors of William, and the creditors of James Hamilton, the son of William, also deceased, as being jealous that, by such a service, all the debts contracted by William would fall to the ground, and all diligence done against him be unhinged. The question being therefore, Whether the estate disponed by Walkingshaw was, after the decease of Sir James, vested in the person of William his son, without the necessity of a service? And if William was fiar? Or if the estate was *in hereditate jacente* of Sir James?

It was alleged for Dalziel and the creditors, 1*mo*, That since William, by the substitution and his survivance, and using the disposition, became to have the right and benefit of the disposition settled in his person, it was sufficient to exclude the service; because, if the disposition belonged to William, there could be no service as heir of provision to any other but to him therein; and conse-

quently the service pressed by the pursuer as heir of provision to Sir James, in that right, could not take place. *2do*, In case of substitution in personal bonds, the right, without any confirmation, belongs to the substitute; and though there be not a *par ratio*, where sasine has been in the person of the first acquirer, yet where the right has remained but a personal right in the first acquirer, (as the disposition did with Sir James), the parity of reason should make the same law in personal rights as in moveable debts. *3tio*, If it should be supposed the disposition contained assignation to the mails and duties to Sir James, and, after his decease, to William; or an obligement of warrandice to Sir James, and, after his decease, to William; then doubtless William, after his father's decease, could without service have pursued for mails and duties, or charged on the warrandice, if incurred. Or if Walkingshaw had granted an obligement to renew the disposition to Sir James, and, after his decease, to William, certainly William would have had access to a summary charge on such an obligement without a service; and if, in such cases, William would have had a direct interest without a service, there can be no speciality that could oblige him to have a service before he can use the precepts and procuratory; for, it being a right, he must either be fiar of all, or fiar in no part. No. 7

Answered for James Hamilton, *1mo*, That Sir James being the only fiar, and principal contractor, and William only a substitute to him, the right could not be fully established in the person of William without a service; consequently, it remained *in hereditate jacente* of Sir James, and so might be carried by his surviving son's service to him. *2do*, No argument can be drawn from bonds to rights of lands; for though, for the ease of creditors, and the small consequence of such rights, and their being designed to be but temporary, custom hath introduced that bonds should be transmitted without any necessity of a service; yet it is otherwise in land rights, which are framed to endure to perpetuity, and to stand on record. Besides, both superior and vassal having considerable interests, these could not be distinguished nor kept clear, if the progress were not very distinct in the writ; whereas, in bonds, the superior, even where infeftment is taken, has very little interest. *3tio*, Without a service, William could have had right to none of these things; because obligements of warrandice, and obligements to renew dispositions of lands, are but a kind of accessories, and are inseparable from the principal right, and so must be transmitted the same way, unless such obligements be on separate writs. But then it will make nothing to the present purpose, because such obligements make no part of the conveyance of land rights, nor are subservient to connect the progress.

It was further alleged for the creditors, That there was no necessity for William to have been served in order to constitute him fiar after his father's decease; because the propinquity is instructed by the right itself, and so needed not be cognosced.

Answered for the pursuer, *1mo*, That the propinquity is likewise ascertained in all substitutions, where the substitutes are *nominatim* called, supposing there were fifteen degrees; for the propinquity of the last is just as much instructed as of the

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