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.

No. 10.

The creditors pursued a ranking and sale, and Nathaniel dying during the dependence, called Alexander the son of Alexander, now the apparent heir, for whom it was pleaded, That his grandfather, by serving heir to the maker of the tailzie, had not made up any proper title to the estate; for that the disposition was to John Gordon, who had no need of a service, but took as disponee; and it was competent to the defender to serve to him, without being liable in his father's and grandfather's debts.

The Lord Ordinary, 27th January, 1748, "found that the title was properly made up by the service of Nathaniel to James Gordon, the maker of the tailzie."

Pleaded in a reclaiming bill, That there were two methods by which a person might execute a settlement of his estate; 1*st*, By resigning in favour of himself and a series of heirs; or, 2*dly*, By disponing to a person with a series of heirs, reserving full powers over it to himself: Betwixt which ways there was no difference with regard to the material interest of the persons concerned, but a considerable one in the manner of making up titles on the disponer's death; for, by the first, the fee remaining in him, the title behoved to be by service to him; but, by the second, the fee was vested in the disponee; though in virtue of the reserved powers, the disponer was real proprietor, and the disposition did not take effect till his death; and therefore at that time the disponee took without service.

It was objected, That a service to a tailzier was necessary to shew that he was dead, and without heirs-male of his body.

Answered, The use of a service was not to prove facts, but to convey a right; and there being no right in the *hereditas jacens* of the defunct, it was quite improper.

Objected, The conveyance was in the first place in favour of the heirs-male of the tailzier's body, and there being none existing at the date in whom the fee could rest, it necessarily remained with himself.

Answered, The disposition took no effect during the granter's life, but immediately on his death vested the right in the first called existing at the time.

Objected, James Gordon appointed the persons favoured to succeed to him as his heirs of tailzie, &c.

Answered, The feudal law does not admit of an institution of heirs, and this appointment, if he had not disponed the lands, would have been ineffectual; and therefore the expression was improper, but yet excusable, as he had reserved to himself full power over the estate, which could not be carried without being subject to his deeds.

The Lords refused the bill, and adhered.

See 6th June, 1745, Mercer of Aldie against Andrew Scotland, No. 119. p. 9786. *voce* PASSIVE TITLE.

Pet. *R. Craigie.*

D. Falconer, v. 1. *No.* 242. *p.* 327.

No. 10.

*** This case is also reported by Kilkerran:

In the year 1688, James Gordon of Carleton settled his estate thus: He disponed, and obliged himself to resign his lands of Carleton, &c. in favour of the heirs-male of his body, whom failing, to John Gordon, third son to Earlston, whom failing, to Nathaniel Gordon of Gordonston, &c. and the heirs-male of their body, with prohibitory, irritant, and resolutive clauses, against contracting of debt, &c.

John Gordon, the first substitute named, predeceased the maker, who died without issue-male, and Nathaniel Gordon made up his titles by service as heir of tailzie and provision to him; and after contracting certain debts, disponed his estate in his son's contract of marriage; who having contracted yet greater debts, the creditors of father and son adjudged the estate, and pursued a ranking and sale; wherein, after the death of Nathaniel and his said son, Alexander, the grandchild of Nathaniel, appeared and objected to the creditors, that all their debts were void for want of powers in the debtors who contracted them, in respect the title made up by Nathaniel, from whom his son did derive right, was inept, for that he ought to have served not to the granter of the disposition, but to John Gordon, whom he called the first institute.

But in respect the disposition was not made directly to John Gordon, but first to the heir-male of the granter's body, whom failing, to John Gordon, the title was found to be properly made up by a service to the granter.

Plainly there was no right ever in John, the first substitute, that could be carried by a service.

Kilkerran, No. 7. p. 512.

1757. *July* 6. WILSON *against* SELLERS.

No. 11.

A PERSON granted bond to a man and his daughter for a certain sum which he had borrowed from them. The father died without ever making any conveyance of his half; nor did the daughter make up any title, but conveyed the bond to an assignee. It came to be questioned, if the daughter ought not to have taken up the share of the father by a general service. The Lords found there was no necessity for a general service.

Fol. Dic. v. 4. p. 268. Fac. Coll.

*** This case is No. 19. p. 5184. *voce* GROUNDS and WARRANTS.