SERVICE AND CONFIRMATION.

SECT. I.

In what Cases is a Service requisite to a NOMINATIM Substitute.—Substitution in Moveables.—Subjects whether to be taken up by Service or Confirmation?

1627. *January* 10. LAIRD of WAUCHTON *against* HAMILTON.

No. 1.

SIR ALEXANDER HAMILTON of Innerweik, having borrowed from John Fairly 4000 merks, to be paid at Whitsunday 1606 to himself, or he being dead, to his son William, the Laird of Wauchton, one of his cautioners, having paid the sum after John's death, took assignation from William to the bond in his brother's name, who afterwards pursued Sir Alexander for his relief. It was alleged, *first*, That it pertained not to William, unless he had been confirmed executor to his father, the sum being moveable, and so of necessity falling under testament; for albeit William was substitute in the bond, yet it ceased not to remain *in bonis paternis* till his death, and so fell under executry, he having verified himself executor to his father. It was alleged next, that an executor could not make assignation of any sums before he had received sentence, (which is kept before the commissaries.)

"The Lords found it was not a naked assignation, but in a manner a discharge, which they thought he might well give *ante sententiam*; *hoc attento maxime*, that he was the person unto whom the money was destined to be paid in the bond."

Fol. Dic. v. 2. *p.* 367. *Spottiswood*, (EXECUTOR) *p.* 112.

1665. *December* 5. HELEN HILL *against* MAXWELLS.

No. 2.
A clause of substitution in a legacy, providing the

IN an account and reckoning between Helen Hill, relict of John Maxwell in Glasgow, who was one of the tutors named by John to his bairns, and Mr. Robert

No. 2.
fathers' free goods to two daughters, and failing of either of them to the other, the one dying, the portion was found to accresce to the other, without the necessity of confirmation.

and George Maxwells, his brethren, who succeeded the daughters, being dead, John by his testament leaves his two daughters, and failing of either of them, by decease to the other, his universal legatars. One of the daughters died pupil, and the other shortly after her age of 12 years, nominated the said Helen her mother, universal legatrix; whereby Helen craved the universal legacy of both the daughters. It was alleged, that the last daughter, not having confirmed herself executrix to the first, the first share was never established in her person, and so could not be transmitted by her testament, but belonged to the nearest of kin of the first daughter, viz. the said Maxwells. It was answered, That this being a substitution of each of the two daughters, to other, *nominatim*, by the death of the one it accresced into the other, *ipso facto*, without confirmation; as in the case of bonds of provision, payable to the father, and by decease of him, to such a bairn named, albeit the father be fiar, and the bairn but heir-substitute, it needs not confirmation; but the bairn may summarily charge or pursue. The Lords found no need of confirmation, but that it did accresce to the second daughter upon the death of the first, and so was carried by the second's testament.—In this account, Mr. Robert, as heir, pursuing for the heritable bonds, the tutrix answered, that she ought to have allowance of what was wared out upon repairing of the tenement in Glasgow. It was answered, That she as tutrix, *ex officio*, was obliged to exhaust the moveables first, one person being both heir and executor, and not to exhaust the heritable bonds that bore annual-rent, and to let the other lie unprofitable, and now to apply it to her own use by her legacy. It was answered, That it was employed upon the heritage, and so was profitable to the heir only, being employed upon the house, and that by a warrant, the heir being then under tutors, to repair it out of the first and readiest of the defunct's estate.

"The Lords found that article relevant, to be deducted out of the heritable estate." See TUTOR and PUPIL.

Fol. Dic. v. 2. *p.* 367. *Stair, v.* 1. *p.* 322.

*** This case is also reported by Newbyth:

Umquhile John Maxwell, by his latter will, having left his third in legacy to his two daughters, Janet and Bessie, equally betwixt them, and failing of the one to the other, and both of them surviving their father, and Janet having deceased before Bessie, it was questioned, Whether or not Janet's half of that legacy did accresce to Bessie without confirmation, and so belonged to Helen Hill, who was universal legatar to Bessie; or, if it required confirmation, to establish it in Bessie's person, and so belonged to Mr. Robert and George Maxwell, as nearest of kin to Janet, to whom they were executors. The Lords found there was no necessity of a confirmation, in regard of a substitution; but found that it would be liable to Janet's creditors within the same process. The Lords found, that Helen Hill, who was universal legatar to Bessie Maxwell, who deceased before Janet Maxwell, and to which Bessie Mr. Robert Maxwell was heir, might repair the

tenements which fell to the pursuer as heir, by uplifting other moveables or heritable sums, since it was *in rem versum hæredis*.

No. 2.

Newbyth MS. p. 42.

1675. *July* 23. LAMINGTON *against* MUIR.

No. 3.

AN heritable bond being payable to a father, and, after his decease, to his two sons *nominatim*, all three were infeft *unico contextu*, the precept of sasine being in the same terms. Though the sons were only here substitutes, yet the Lords thought that their infeftment supplied the necessity of a service.

Fol. Dic. v. 2. *p.* 367. *Stair.*

*** This case is No. 45. p. 4252. *voce* FIAR.

1680. *February* 4. ROBERTSON *against* PRESTON.

No. 4.
Persons *nominatim* substituted in bonds, need no service nor confirmation.

MARY ROBERTSON pursues the representatives of my Lord Preston, for payment of a bond due by him to her. They alleged no process, because the bond being conceived payable by the pursuer's father, and failing of him by decease to her, the father was fiar, and she was but heir-substitute; and he having survived the term of payment, the sum was *in bonis defuncti*, and so must be confirmed. It was answered, That bonds of this tenor are always effectual without confirmation, being much more than a conditional assignation, to take effect at the cedent's death; for by the very tenor of the bond, it is intimated and notour to the debtor.

The Lords found no necessity of confirmation.

Fol. Dic. v. 2. *p.* 367. *Stair, v.* 2. *p.* 751.

*** See Thomson *against* Merkland, No. 11. p. 5774. *voce* HUSBAND and WIFE.

1708. *February* 12. KER *against* HOWISON.

No. 5.
An eldest brother being fiar, and the second only substitute, it was found, that the latter, without being served heir in special, could not dispone.

MR. RICHARD HOWISON, minister at Musselburgh, having bought some acres near the windmill of Edinburgh, he takes the rights to his wife and himself in liferent, and to William, his eldest son, and his heirs, which failing to Richard his second son, and his heirs, and they also failing, to his own heirs and assignees; and the sasine bears not only himself and William his eldest son, but also Richard his second son, to be *nominatim et per expressum* infeft. William, the eldest son, going a voyage to the Indies, dies there; whereon Richard the second son serves himself heir in general to William, and dispones these acres to Jean