fovet causam; for if it shall be proved the granter was then insensible, by the palsy and lethargy affecting him, his retrocession falls to the ground, and so is concerned to depone that he was rational then, to support his own right. *Answered*, That right is long ago sopite and extinct, the debt being transacted and paid many years since, and all the writs given up and cancelled, so he is under no hazard that way. *Replied*, Glasnock's heir may reduce the retrocession, if he was then incapable to grant, and so cause him repeat the money. THE LORDS thought there was some weight in the objection; but reserved the consideration of it till advising. It was *objected* against Weir, That he had given bond to Gilmillscroft for a sum of money, and he had him under diligence for it, which impression might bias him to be partial. *Answered*, The bond was granted for the price of some sheep he had bought of Glasnock's executry, and, seeing the right was yet *sub judice*, he was willing to pay it, but knew not to whom, till the competition was discussed. 2*do*, It is no relevant objection against a witness that he is debtor to the adducer, seeing it is *vis legalis* to cause one pay their just debt. THE LORDS repelled this objection. Then Glasnock's heir *complained*, That Gilmillscroft had cited Mr Samuel Nimmo, late minister of that parish, and who being with the defunct in his sickness, could not but know his condition, and yet now shunned to adduce him, by which he was lesed, seeing he might have the benefit of putting cross interrogatories; and therefore craved that either he might examine him, or give him the use of his act to cite him. THE LORDS found a party could not be compelled to use any witnesses but whom he pleased; and therefore refused the desire, as informal and irregular. But the heir might have cited him, if he had done it *debito tempore*; but then he must extract the act himself, and take out his diligence, as he and the Clerks shall agree. (*See* WITNESS.) No 186.

Fol. Dic. v. 2. *p.* 191. *Fountainhall, v.* 2. *p.* 633.

1747. *February* 18.

Lord FORBES and Others *against* The Earl of KINTORE and Others.

No 187.
How one of more defenders dying, his heir is to be called into Court.

ONE of more defenders dying during the dependence, all of whom were necessary to be made parties, as being in society, and his heir being called by an incident, the question was, whether this was sufficient, or if it was not necessary to call him by an orginal summons or transference, in common form. *Ratio dubitandi*; where there are more defenders, the death of one does not throw the process out of Court; which is the case where a single defender dies during the dependence.

But the LORDS had no regard to this distinction, and "found no process."

It has been a form established since the foundation of the College of Jusice, that where a defender dies, the action must be transferred against his heir

No 187. *passive*; where it is only necessary to intimate a process to another party, that party, or his heir, may be called by an incident; but no decree can go against a man called only by an incident.

N. B.—In processes before the Commission for Plantation of Kirks, &c. the Lords allow even principal parties to be called by an incident.

Fol. Dic. v. 4. *p.* 149. *Kilkerran*, (PROCESS) *No* 6. *p.* 435.

*** D. Falconer reports this case:

CERTAIN Heritors on the river of Don pursuing several others inferior to them, for regulating their cruives, possest in common, it was *objected*, That all parties having interest were not called, in respect that William Brebner was summoned; whereas the right, at the time of the citation, was in James his father; although, when the action came to be insisted in, James was dead, and William had succeeded him; whereupon the pursuers, on a new summons, called William Brebner.

Objected, That there could be no process on this summons, the execution not bearing the names of the whole defenders, in terms of Act 6. Parl. 1672.

Answered, The intent of the act was, that executions should be particularly applied to a particular summons, and not be so general as to be applicable to any; which was done here, the whole pursuers being mentioned and designed; and it never was the practice, where there were many defenders, to resume them all in every execution, as in processes of ranking and sale, improbations and actions against debtors; besides, here William Brebner was the only defender called on this summons.

THE LORD ORDINARY, 3d December 1747, "repelled the objection."

On bill and answers, *observed*, That it might not be necessary to name the whole defenders, where their interests were separate; but here the cause could not go on against one without the rest.

THE LORDS sustained the objection.

Act. *Fergusson.* Alt. *H. Home.* Clerk, *Kirkpatrick.*

D. Falconer, v. 1. *No* 241. *p.* 326.

No 188. Decree being pronounced, and opened on a reclaiming bill, and the peti-

1748. *November* 4. GORDON of Muirake *against* The OFFICERS of STATE.

GEORGE JAMES GORDON, of Muirake, gave power to Mr Theodore Gordon to dispone his estate, who entered into a minute of sale thereof with Sir William Gordon of Park; after which, Muirake disponed it to Alexander Henry Gordon his own brother.