of any other marriage, excluding all her other executors or assignees, payable at Martinmas 1712, but secluding all diligence for payment or security of it during the granter's life, but prejudice to him to pay the whole or any part he should think proper;—and in case of the wife's death without children then existing, declaring the bond as to what should not then be paid, to be void and null, and excluding the husband's administration, because it was alimentary for the wife and childrens support and subsistence. The wife died in 1713, leaving one daughter, who died in 1716, without making any title to the bond. Hedderwick died only in 1735, and no demand made on the bond till 1748, when David Grim was served heir and decerned executor to his daughter, and sued Hedderwick's heirs for payment. The defence was that the bond was gratuitous and alimentary, not exigible during the granter's life, and all executors and assignees other than the children of Jean Ogilvie excluded, and therefore Jean Ogilvie and her child having both failed long before Hedderwick the bond became extinct. 2dly, That the daughter had made no title to the bond, and therefore the pursuer had no right as heir or executor to her. Answered: The bond could only become void in one event, Jean Ogilvie's dying without children. To the second, That the children of that mariage were not substitute to their mother but *re et verbis conjuncti* with her, *et concursu tantum partes fecerunt.* The Lords on my report first found that the bond subsisted notwithstanding the predecease of both mother and daughter before Hedderwick. This found by the narrowest majority six to six, the President being one of the six against the interlocutor and so not counted. Next they found that the daughter had right to the bond without any title. This was found by a pretty great majority, though Kilkerran who was for the first interlocutor was against this, at least would not vote. So that if a vote had been put on the whole case the defenders must have carried it. But I own I was against both. I cannot understand the *re conjuncti.* While the children lived with the mother they would no doubt be alimented as she was, but suppose them married or out of the family in her time, they could take none of the money from her during her life.

No. 13. 1752, Nov. 17. M'LACHLAN *against* CAMPBELL of Skirvane.

IN a competition between these parties for the salmon fishing in the water of Add, upon mutual declarators, Skirvane produced a disposition in 1717 of the lands, *inter alia,* of Dunadd, with the salmon fishing and other fishings on the water of Add, by Lachlan M'Lachlan of that ilk, which was admitted to be intended of the superiority of the lands, which had been before feued, and the feu-rights expressly excepted, with infeftment on the disposition. Dunadd again produced a precept of *clare constat* to one of his predecessors by Lachlan M'Lachlan of that ilk (I suppose the same person) of these lands, and *per expressum* of the salmon fishing, but produced no charter nor ancient right nor no sasine on that charter, which were said all to be lost. In the Outer-House an act was pronounced for both parties to prove possession, and for Dunadd to produce his other rights. He proved possession to preserve his right, but as he produced no one infeftment we preferred Skirvane, 3d July last. But Dunadd reclaimed and produced further the extract of the sasine 1696 on the precept of *clare constat.* His petition with answers coming this day to be advised, the President was of opinion, that however the precept of *clare* and

sasine might be good against the granter, yet it could not be good against singular successors deriving right from him even after the precept and sasine upon it, and that Skirvane was in this case preferable to Dunadd though he purchased from the granter of that precept more than 20 years after; which appeared to me very singular, and therefore it is I mark it. But the Court was of a different opinion and preferred Dunadd.

No. 14. 1753, Aug. 10. ANGUS AND JEAN BRODIE *against* J. STEPHEN.

THESE Brodies complained to us, that after they were decerned executors *qua* nearest of kin, Mr Stephen, Commissary-Depute of Murray, refuses to expede the confirmation unless a party would make oath and confirm the whole inventory; but on serving the complaint they compromised. He confirmed the testament, and they passed from the complaint, except as to their expenses: But as he refused to pay them, they served the complaint again, which forced him to put in answers, wherein he justified his former refusal, on pretence of the interest and security of creditors, whereof he himself was in this case one. But the Court found that he had done wrong in refusing confirmation, and therefore found him liable in expenses

SERVICE OF HEIRS.

No. 1. 1736, Jan. 8. COLONEL ERSKINE *against* SIR J. BLACKADDER.

THE Lords found the proof for Colonel Erskine more pregnant for proving that the defender is not grandson to Sir John Blackadder of Tulliallan, than the defender's proof that he is his grandson, and therefore reduced the defender's service. In the same cause one John Blackadder was found a false and perjured witness, and ordained to be imprisoned till the 21st instant, and then to be carried to the Cross with a paper-hat with the inscription, "John Blackadder, for the crime of perjury;" and his ear to be nailed to a post for an hour, and then to be dismissed; and the Magistrates ordained to see the sentence put in execution; and he was further declared infamous, and his moveables escheated to his Majesty's use.

No. 2. 1738, July 21. EDGAR *against* MAXWELL.

See the Note of this case, No. 6, *voce* SERVICE AND CONFIRMATION.

No. 3. 1742, Feb. 5. THE CREDITORS OF BIRKHILL *against* THE HEIRS OF MR GEORGE AYTON.

THE Lords sustained both defences: The first, on the exheredation or exclusion, in respect the next heir after her was expressly called. 2dly, The negative prescription both of 20 and 40 years; for we thought the service not *ipso jure* null.