1760. *July* 9. WATSON *against* WATSON.

No 9.
Seats in churches, taken to heirs and nearest representatives, do not follow the common rule of heritage, but divide among the nearest relations in the same degree.

THE Magistrates of Dundee, in the year 1669, empowered their kirk-treasurer to sell, at certain rates, the pews or desks which they had erected in the east kirk of Dundee. In pursuance of this commission, they were sold to different persons; and the dispositions run uniformly in the following words: 'To such 'a person, and his heirs, and others his nearest representatives whatsoever, re-'siding within the town and parish, heritably; secluding his assignees.'

Three of these seats came by progress into the person of Alexander Watson; who died in 1756, without children, leaving Elisabeth Watson, the pursuer, his sister-german, and Agnes and Euphame, sisters-consanguinean. Upon his death, Elisabeth, the pursuer, *contended*, That she, as her brother's sole heir, was entitled to all the three seats. Her sisters *maintained*, That each of them had an equal right; and as there were three seats, each of them was entitled to the possession of one.

Pleaded for Elisabeth the pursuer, Seats in churches, as being *res religiosæ*, cannot be sold, nor be capable of property, as feudal rights. All that can be competent to any particular person, is the right of sitting in a certain seat. Though seats in churches, however, are not feudal rights, as they are held of no superior, and incapable of infeftment, yet, seeing they are servitudes, or rights affecting an immoveable subject, they are heritable rights, and such as the heir can take without a service. They must therefore go to the heir at law; and consequently, the seats in question must belong to the pursuer, who has been served *legitima et propinquior hæres* to her brother. The clause in the disposition, 'to his nearest representatives whatsoever,' must be interpreted according to law; and as the right of sitting in a particular seat is of an heritable nature, it must go to the pursuer, who is heir at law to the defunct.

Answered for the defenders, The right in question is of a very anomalous nature, and such as is not known in law. It is neither properly an heritable nor yet a moveable right; and so the rules of law, distinguishing what rights go to heirs, and what to executors, cannot apply to it. And there appears to be as good reason, that the younger children should be allowed to continue their father's possession of a seat in the church, as that the eldest son should take the whole, more especially when there is a seat for every one of them. The words of the dispositions put this past all doubt, by which the seats are given, not to the heirs entirely, but to nearest representatives whatsoever, residing within the town and parish of Dundee. This is a particular destination, and must have its effect.

'THE LORDS having considered the dispositions produced, by which the seats in the church of Dundee are granted, not to heirs simply, but to the grantee, his heirs and other nearest representatives whatever, residing within the town or parish of Dundee; in respect it is not denied, that the seats in question were

No 9. disponed in the same terms, and that it is not denied, that the seat possessed by the pursuer is sufficient to contain her family, assoilzied the defender; 'and decerned.' *See* KIRK.

Act. *Maclaurin.* Alt. *Scrymgeour.* Clerk, *Home*
P. M. *Fol. Dic. v. 3. p. 266. Fac. Col. No 229. p. 421.*

1761. *June* 19.

DAME ELIZABETH M'KENZIE, Widow of the deceased SIR GEORGE M'KENZIE of Granville, *against* SIR KENNETH M'KENZIE of Granville.

No 10.
Found, that a sum secured by adjudication, was rendered moveable, by a decree-arbitral, decerning the debtor to pay, and the creditor to convey the adjudication, upon which decree a charge of horning had been given by the creditor's factor.

THE following question occurred in the ranking of the creditors upon the estate of Kinminity.

Mrs Elizabeth Edwards was creditor upon the estate of Kinminity in certain sums of money by three decreets of adjudication, which she made over in favour of her second husband Sir Kenneth M'Kenzie, who was father to Sir George, Dame Elizabeth M'Kenzie's husband, and also to Sir Kenneth. Sundry payments had been made of the sums due by these adjudications; and Sir Kenneth M'Kenzie senior, and Alexander Sutherland of Kinminity, entered into a submission to Messrs James Graham and Alexander Hay, advocates; and they, by their decreet, determined what sums were still due by Kinminity to Sir Kenneth, and found, That Sir Kenneth was creditor upon the estate of Kinminity in the sum of L. 20,000 Scots, and which sum, with the due and ordinary annualrent thereof from the date of the decreet-arbitral, until payment, they decerned the said Alexander Sutherland to pay to the said Sir Kenneth M'Kenzie, at five terms, viz. L. 4000 at each term, beginning at the term of Martinmas 1729, until the whole L. 20,000 should be paid. And they decerned the said Sir Kenneth, upon receiving payment of the sums decerned for, to assign and dispone to and in favour of the said Alexander Sutherland, and his heirs, the whole sums, principal, &c. contained in the three decreets of adjudication above-mentioned, together with the decreets themselves, and bonds by which the sums were originally due.

Upon the death of the said Sir Kenneth M'Kenzie, his son Sir George made up a title by confirmation to the sums decerned for by the decreet-arbitral, and likewise was served heir in general to his said father; so that, whether the sums were heritable or moveable, they were fully vested in him.

He afterwards made over his right thereto in favour of Sir James M'Kenzie of Royston, and Sir James Campbell of Arberuchill, for relief and payment of L. 10,112 : 13 : 8 Scots; for which sum they stood bound to the Countess of Bute, as cautioners for the late Sir Kenneth M'Kenzie. And Sir George and the said assignees, for their joint and separate interests, granted a factory to