No 12.

exhausted by lawful sentences and preferable debts before citation. *Answered*, Though it mentioned a sea voyage, and the case of mortality, yet every writ proceeding on such a narrative is not to be construed equivalent to a deed on death-bed, or *sapere naturam testamenti*; but many acts and securities *inter vivos* proceed on such narratives; and Vinnius *de donat.* distinguishes whether *rememoratio mortis* in such writs be the *causa* and motive in granting them, or only the *terminus solutionis*; as where a sum of money is made payable after one's decease, or in tailzies, where failing Titius by death, the lands are provided to Sempronius, none will say that the mentioning death, in these or the like cases, makes them death-bed or testamentary deeds; and so it has been decided, 8th March 1626, Traquair, *voce* PRESUMPTION; and in that famous case, 14th November 1667, Henderson *contra* Henderson, IBIDEM, recorded by Stair and Dirleton; and lately, on the 17th February 1669, Grant *contra* Leslie,* where a disposition on a narrative of the granter's going abroad, and to be null on his return, was sustained as a valid deed against his heirs. Some thought, *esto* it were a *donatio mortis causa*, yet they knew no law nor practique restricting their effect to the moveables, and thought it more than a legacy. But the plurality found it a good effectual writ against both, seeing it bore to be uplifted as well out of his heritable as out of his moveable estate and fortune, and so sustained it as a valid act *inter vivos*.

Fol. Dic. v. 2. p. 73. Fountainhall, v. 2. p. 259.

1744. *December 7.*

The REPRESENTATIVES of MARY and JANET WALKER *against* The REPRESENTATIVES of WILLIAM WALKER.

No 13.
A substitution to a person failing another was found to carry the right to the heirs of the substitutes who failed before the institute.

ROBERT WALKER in Badlormy disponed to William Walker his brother, his whole effects that he should have at his death, estimating them at 1800 merks, under the burden of a legacy of 300 merks; and he specially provided and declared, "That in case William should die without children, the sum of 1500 merks, to which the goods, gear, and others foresaid, did extend, should fall, pertain, and belong, to the persons underwritten," &c. And amongst these are Mary and Janet Walkers his sisters, who having predeceased their brother William, and he also dying without children, their representatives pursued his for the sums left them in the disposition.

Pleaded for the pursuers, That the sums left to their predecessors were not to be considered as legacies, but substitutions; the whole which was left to William, deducting the legacy, was estimated at 1500 merks, and that is quite exhausted with substitutions, failing him and the heirs of his body; in case of which failure, Mary and Janet being called, the pursuers apprehend they are comprehended under that call; Janet and Mary are preferred to the extrane-

* Examine General List of Names.

ous heirs of William; and therefore the pursuers their children ought likewise to be so. It is agreeable to law, that what is provided in favours of a man, is understood to be also in favours of his heirs, *L.* 30. *Cod. De fideicommissis*, 5th January 1670, Innes against Innes, No 60. p. 4272. No 13.

Pleaded for the defenders, The pursuers not being called in Robert's settlement, can only claim as representing Janet and Mary, who never having any right, could transmit none to them. The maxim, That what is provided to a man is provided to his heirs, does not apply; for though it may hold in a settlement of an estate on a man, that it goes from him to his heirs, though not mentioned; yet if he is only the substitute in an entail, and dies before the institute, his heirs can have no claim.

The testator appears to have preferred William and his children, and failing them, Janet and Mary; but here the deed stops; and it does not appear that he preferred their representatives to all others.

THE LORDS repelled the objection, That Mary and Janet Walkers were dead before William Walker, and found that their heirs had right to the subject, on making up proper titles.

Reporter, *Lord Justice-Clerk.* Act. *Gillon.* Alt. *H. Home.* Clerk, *Forbes.*

D. Falconer, v. 1. *p.* 22.

1747. *December* 4. WILLIAM ELLIOT *againtt* DUKE of BUCCLEUCH.

No 14.
A tack was let to a party and his heirs, and such assignees as the proprietor should approve of, excluding all other assignees. Found not adjudgeable.

THE Duke of Buccleuch, in the year 1739, set a tack of the land and miln therein mentioned to William Scot and his heirs, 'and such his assignees as 'the said Duke shall approve of, excluding all others his assignees,' for the space of 19 years, and for a rent of L. 101: 5s. Sterling. William Scot becoming bankrupt, his creditor William Elliot writer in Edinburgh brought a process of adjudication, comprehending the said tack among other heritable subjects. Compearance was made for the Duke, for whom it was objected that the tack could not be adjudged, in respect it was granted to Scot and his heirs personally, that it was not transmissible to his assignees without the Duke's consent, and that he did not consent that the tack should be conveyed to Mr Elliot.

In answer to this objection, the following arguments were urged in behalf of the pursuer. A tack is a mutual contract implying in its nature the choice of a person; and for that reason the tacksman can no more substitute another to labour the ground for him, than an undertaker can substitute another to build a house which he himself undertakes to build. And though tacks are made real by statute, and good against purchasers, yet still it continues law, that a tack granted to a man personally for a limited time, is not assignable by him; for it would be rendering the landlord's choice ineffectual, if he could put ano-