No. 28. is not understood thereby to alter the destination of the succession of his lands from heirs-male, or heirs of tailzie, but to provide the tack-duty to his heirs, who shall succeed in the right of the lands.

"The Lords preferred Mrs. Mary Hay's diligence against the heir-male; and found, That the destination of the principal tack to heirs-male was not innovated or altered by the sub-tack."

Fol. Dic. v. 2. p. 401. *Dalrymple, No. 4. p.* 6.

1699. *July* 19.

NICHOLAS MARJORIBANKS *against* SIR FRANCIS KINLOCH.

No. 29.
The presumed will of the testator.

Margaret Adingston, relict of Francis Kinloch, factor at Paris, having the right of her husband's estate in her person, dispones it all in favours of Margaret Marjoribanks, her grandchild by a daughter, with a clause, that failing the said Margaret and heirs of her body, then a substitution to Gilmerton and others. Of the same date, she makes a testament, nominating her said grandchild to be her executrix and universal legatrix, but does not repeat the substitution. Nicholas Marjoribanks, sister to the said Margaret, and executrix confirmed to her, pursues for the moveable debts falling under executry. Alleged, You are only consanguinean sister to the defunct, and all the means came by her mother, and we as substitutes have the only right thereto. Answered, The grandmother's testament contained no such substitution, but was simple; and therefore James, Margaret's nearest of kin, must have the only right to the moveables. Replied, The disposition and testament being both of one date, the one cannot be a revocation of the other; neither is any mutation or alteration of the parties' design to be here presumed; so the two are to be reputed *tanquam unicus contextus*, and the clause of substitution in the disposition must be held as if it were repeated in the testament, et actus sunt ita interpretandi ut actus potius valeat quam pereat. Duplied, A testament, in construction of law, is *ultima defuncti voluntas*, and must derogate from all other deeds, and must imply a revocation of deeds which are not of a testamentary nature, though they be of the same date, and the testament must be the only rule for the transmission of moveables. The Lords, observing the disposition and testament to be both in favours of one person, found the clause of substitution behoved to take place in both, as the presumed will of the defunct.

Then alleged, Sundry of the debts were innovated by taking new corroborative securities to the said Margaret Marjoribanks, and her heirs and executors, which clearly conveyed them to Nicholas the pursuer. Answered, *Novatio non præsumitur*, and she was minor, and could neither invert nor alter her grandmother's destination of the succession; and no more could her curators do it, as was found, 14th July, 1667, Margaret Scot against Sir Laurence Scot, No. 8. p. 11344. *voce* PRESUMPTION, that bonds of corroboration, though conceived to different heirs, yet will fall and belong to the heirs in the first bond corroborated. The Lords found

the taking of bonds of corroboration during the minority did not alter the substitution and first destination. No. 29.

Fol. Dic. v. 2. p. 400. Fountainhall, v. 2. p. 61.

1706. *January* 2. DUNDAS *against* DUNDAS.

No. 30.

A proprietor in his contract of marriage having bound himself to tailzie his estate, failing heirs-male of the marriage, to certain persons therein named; it was found, That this implied no obligation to provide the estate in favour of heirs-male, *quia positus in conditione non censetur positus in institutione.*

Fol. Dic. v. 2. p. 400. Fountainhall. Forbes.

*** This case is No. 5. p. 4083. *voce* FACULTY.

1706. *January* 15.

JOHN WAT, Writer in Edinburgh, *against* DAVID FORREST, Baillie.

No. 31.
A service as heir sustained to make one *passive* liable for the defunct's debts, who had a nearer heir *in utero* at the time of the service.

John Wat, as creditor to the deceased Major Lauder, having pursued David Forrest, as heir to his daughter Helen of a first marriage, who was heir to the Major, for payment of his debt; the defender alledged he could not be liable *passive*, because his cognition as heir to his daughter Helen was null, in so far as she had a sister of a second marriage *in utero* at the time, who *pro nata habetur*, and as *propinquior* excluded the father, and at the time of that second daughter's decease there was a brother George *in utero*, who now lives.

Replied for the pursuer: The defender's service as heir to his daughter, who had a sister *in utero*, was not null *ipso jure*, but only *ope exceptionis*, and reducible at the instance of that child when born, if she thought fit to use her privilege, and object the nullity. So that the defender in the mean time stands liable to the debts; for the said daughter *in utero* the time of his service died without being entered heir to her sister; and the brother, yet an infant, was served heir by the defender his father only as a blind to evade the passive title himself, who had possessed these ten years by-gone under the colour of heir to his daughter whom he served heir to the Major. Nor could the defender's service be nullified by the son, who was neither gotten nor born at the time; and when he comes to be a man, will certainly *ex capite fraudis & minorennitatis* reduce his service to such a *damnosa hæreditas*, whereby the creditors will be baulked of their expectation from him.

Duplied for the defender: The service of a father to a child while another exists is certainly null *ipso jure*, as contrary to law; seeing there cannot be an heir where there is no *hæreditas delata*, more than a sister or younger brother's service to a father upon an absent elder brother's being reputed dead, would have any effect