ception of the clause making it transmissible by testament, and so moveable. Alleged farther for Grange, That he must have a share by collation, and he is willing to divide with them. Answered, 1*mo*, He can claim no share of the executry, for his father made his election and served heir. 2*do*, You are now a degree remoter, and his aunts must seclude him, there being no representation *in mobilibus*. 3*tio*, You have no inheritance to give in and collate. 4*to*, By the common law collation only takes place *inter liberos*, and not *inter collaterales*. The Lords thought this point deserved a hearing in the Inner-House. No. 27.

Fountainhall, *v.* 1. *p.* 825.

*** See the sequel, No. 11. p. 10326. *voce* PERSONAL and TRANSMISSIBLE.

1698. *November* 16. MRS. MARY HAY *against* ANNA CRAWFORD.

No. 28.
One having a tack of teinds to himself and heirs-male granted a sub-tack thereof, taking the rent payable to himself and heirs whatsomever. *Heirs whatsomever* interpreted to be heirs-male.

Mrs. Mary Hay and Anna Crawford being both creditors to the deceased Mr. Philip Nisbet, they both pursued his representatives for constituting the debt, and both adjudged a tack of teinds which belonged to Mr. Philip; but with this difference, that Anna Crawford, apprehending the right of the tack did fall to Mr. Philip's heir of line, she pursued Mr. Philip's son's daughter, and obtained a decreet *cognitionis causa*, and thereupon adjudged; and Mrs. Mary Hay pursued David Nisbet his brother, and obtained a decreet as lawfully charged to enter heir, whereupon she adjudged.

Whitsomhill, the debtor of the teind-duty, pursues a multiple-poinding against them both; in which it was alleged for Mrs. Mary Hay, That she ought to be preferred; because she produced a tack of teinds of the parish where Whitsomhill's lands lay, in favours of Mr. Philip and his heirs-male, with an adjudication against David Nisbet the heir-male.

It was alleged for Anna Crawford: That she ought to be preferred; because, albeit the tack was originally set to heirs-male, yet the tacksman might alter that destination at his pleasure, and provide the same to any other heir, which he had done, in so far as he had set a sub-tack of the same teinds to Whitsomhill, and taken the tack-duty payable to himself and his heirs whatsomever; and Anna Crawford having adjudged that sub-tack *per expressum*, her diligence was preferable to the diligence against the heir-male.

It was answered: The sub-tack did not alter the destination of the principal tack, because *illud non agebatur;* but the tack-duty was made payable to him and his heirs whatsomever, which *in dubio* is understood the heir of line; yet, where the subject of the tack is distinct to other heirs, heirs whatsomever must be understood the heirs of the principal tack, in the same way as an heritor setting a tack of his lands bearing an obligement to pay the tack-duty to his heirs whatsomever,

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