No. 18.

William his eldest son, with the burden of provisions to his other children Matthew, Daniel, and Margaret. Daniel, one of the younger sons, being at sea in a voyage from the East-Indies, made his will, May 1739, in which he " gives and bequeaths all his goods, money, and effects, to John Campbell his father; and, in case of John's decease, to his beloved sister Margaret Campbell." The testator died at sea in the same month of May, and, in June following, John Campbell the father also died, without hearing of Daniel's death, or of the will made by him. William, the eldest, brought an action against his sister Margaret and her husband, containing, amongst other conclusions, that, by his father's survivance, Daniel's effects were vested in the father, and descended to him the pursuer, by the father's disposition in his favours; by which the substitution in favour of Margaret, contained in Daniel's will, was altered, supposing it to be a proper substitution.

To support this conclusion, the father's settlement was appealed to, disponing to the pursuer, in express terms, all the effects that should belong to him the time of his decease; which included, among other subjects, the effects that formerly belonged to Daniel, and which vested in the father by his survivance.

It was answered, That nothing more was intended by the Provost than to settle upon his eldest son his proper effects, which, but for that deed of settlement, would have descended to his heirs *ab intestato;* that there is nothing in the tenor of the deed of settlement, or in the circumstances of the parties, upon which to presume that the father intended to void the substitution, had he even known of it at the time; but his ignorance of the substitution removes all suspicion of his having any will about the matter, secret or revealed; consequently, that the case resolves into the following question, Whether Daniel's effects must be carried by the mere force of the words in the father's settlement? which must be answered in the negative, because, though the words are general and sufficiently ample, yet words alone, without intention, have no operation in law; and, with respect to the father's intention, it certainly goes no farther than to provide to his eldest son what would otherwise have fallen to his heir *ab intestato.*

" Found, that the general disposition in 1734, granted by John Campbell to his son the pursuer, several years before Daniel's will had a being, does not evacuate the substitution in the said will, but that the same does still subsist.

Rem. Dec. v. 2. *No.* 13. *and* 14. *p.* 25.

1744. *December* 7.

The NEAREST in KIN of MARY and JANET WALKERS *against* The NEAREST in KIN of WILLIAM WALKER.

No. 19.

If the substitute die before the institute.

Robert Walker, tenant in Bedlormy, settled all his effects, being moveable, upon William his brother, and the heirs of his body, with a provision, that if William should die without heirs of his body, the sum of 1500 merks, at which

No. 19.

the effects disponed were estimated, should fall and pertain to Janet and Mary Walkers, and others therein named, in certain proportions.

It happened, that Mary and Janet died before William; and, after William's death, without issue, a process was brought at the instance of the representatives of Mary and Janet, against the representatives of William, the disponee, for the said Mary and Janet's proportions of the said sum. To whose claim it was objected, That the provision to Mary and Janet was conditional, in case they survived William; and as they, not having survived him, could not take, neither could their heirs, because they were not at all called.

But the Lords found, "That Mary and Janet were substitutes to William, and found, that their heirs, although not expressly called, had right to the subject, upon their making up proper titles."

Fol. Dic. v. 4. p. 303. Kilkerran, (SUBSTITUTION) *No. 2. p. 522.*

*** D. Falconer's report of this case is No. 13. p. 10328. *voce* PERSONAL AND TRANSMISSIBLE.

1756. *August* 3. GEORGE FORBES *against* JOHN FORBES.

No. 20.
A. disponed to herself in life-rent, and her children *nascituri* in fee, whom failing to B. A. died without children. A.'s heir at law was preferred to the gratuitous disponee of B.

Janet and Isobel Gordons were infeft in a tenement lying in the town of Aberdeen, as heirs to their father John, the proprietor. Janet, at this time, was married to Alexander Forbes, who having in his hands 6000 merks, belonging to his sister-in-law Isobel, became bound, in her contract of marriage with Alexander Crombie, to pay the same to him, in name of tocher. In this contract, Isobel Gordon dispones her half of the tenement "to herself and the said Alexander Crombie, and the longest liver, in life-rent, for their life-rent uses allenarly, and to the heirs that should be procreated of the marriage; which failing, to Isobel's heirs of any other marriage; which failing, to Janet and the heirs of her body in fee."

Isobel having died without heirs of her body, the succession opened to Janet, who, without making up any titles as heir of provision, disponed this half of the tenement to her second son John. After Janet's death, her eldest son George, disregarding the disposition in favour of his brother, made up his titles as heir of provision to his aunt Isobel, and was infeft. He commenced a process of mails and duties against the tenants before the Bailies of Aberdeen. The tenants raised a multiplepoinding, calling John, who was in possession, and George, who was claiming the rents from them. The process was advocated to the Court of Session.

George claimed preference, upon this footing, That his mother Janet was an heir of provision only; and, as she died in apparency, that her gratuitous disposition in favour of her son John was *a non habente potestatem.*