

1705. January 18.

BARBER *against* BARBER.

JAMES BARBER, merchant in Inverness, having married a gentlewoman of his own name, in the end of November 1698; and resolving upon a voyage to Spain about his trade, to get his young wife's consent the easier, he grants her a bond in December 1698, within a month of his marriage, mentioning his purpose of going abroad, and the common fate of mortality, and that he knew not if his wife was with child, or if the marriage would subsist year and day, without one of which the provisions matrimonial for tocher or jointure did *hinc inde* cease by an old custom, but which he looked upon as inconvenient and repugnant to the nature of marriage, giving the bride no compensation for her loss; therefore he, in case the marriage dissolved within the year, without a living child, assigns and disposes to her 3000 merks, to be paid out of his heritable and moveable estate, with annual rent from the first term after his decease; seeing in that case of his dying within the year without a child, she would have no access to her jointure; therefore he gives her this 3000 merks in récompence thereof. James having plied his voyage to Spain, in his return, the ship is cast away at the Isle of Man, and there he perishes in March 1699. The rumour of this coming to Inverness, his wife and friends go into mournings; and, in October thereafter, the said Jean, his wife, also dies within the year of the marriage; and her sister Elisabeth, spouse to James Cuthbert, confirmed herself executor to her, and particularly gives up that 3000 merks bond she had got from her husband before his departure, and pursues Margaret Barber, the husband's sister, and John Ross of Achnacloch, her husband, on the passive titles, for payment. *Alleged, 1mo*, That the bond was null, because *non constat* that the husband was dead, at least that he deceased first, seeing if he outlived the wife, the condition of the bond never existed. *Answered*, They would prove as much as would be required, as to any who die abroad or at sea, viz. that the report came of their death or being lost, and that they were held and reputed dead by all, and no word of them for several years; for where a ship and its whole company are drowned, where can witnesses be got to prove any more than held and reputed? This the LORDS thought sufficient in such a case. *2do, Alleged*, That *esto* she had survived the husband, yet she also dying within the year, the bond became extinct, seeing he could have no other design in giving her this provision, but to be a mean of her livelihood instead of her jointure; but she also dying within the year, had no need for it. THE LORDS found *ipso momento* he died the bond took place, and did not extinguish by her subsequent death, though within the year, which case the husband had not provided for. *3tio*, It was *contended, Esto* it were a valid standing obligatory writ, yet it could amount to no more but a legacy, or a *donatio mortis causa*, being of a testamentary nature, and so could affect only his moveables, but nowise reach his heritage; and *quoad* the executry, they offered to prove

No 12.

A man before marriage granted bond to his bride, payable in case the marriage was dissolved within year and day, without a living child. He died within the year without children. She also died within the year. Her executors were found entitled to the sum.

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 practise 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 disposed 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.