No 15.
A legacy left, to be paid out of a particular fund, was held not to be limited; but payable out of the total executry, if the particular fund should be deficient.

1676. *July* 11. FINLAW *against* LITTLE.

A LEGACY being left in these terms, viz. That it should be paid out of the testatrix her household plenishing, and debts due upon accounts; THE LORDS found, That albeit the said plenishing and debts should not extend to satisfy the said legacy, that it was not a limited legacy, but ought to be satisfied out of the other executry; and that the said words were only *executiva* as to the order and way of payment in the first place; and *interpretatio* should be *ut actus valeat;* especially seeing the legatar was the defunct's relation. And it is to be presumed, that the foresaid qualification was only as to the way of payment; in respect the defunct did look upon her plenishing and debts foresaid, as sufficient to pay the same; and did not declare that the said legacy should be only paid out of the same, and in case it should be short, that she should have no more. And it appeared to the LORDS, That the executors had given up a very inconsiderable inventar of the plenishing, and far short of what a person of the defunct's condition and profession, being a great innkeeper, behoved to have in order to her calling.

Act. *Dalrymple, &c.* Alt. *Hog.* *In præsentia*

Fol. Dic. v. 1. *p.* 145. *Dirleton, No* 378. *p.* 184.

No 16.
A tack was set, bearing, 'certain lands containing 48 measured acres, with pasturage and pertinents, every acre to pay six firlots.' The setter insisted in a declarator, that there were 60 acres, and that the tacksman should pay accordingly; which was repelled, in respect the extent of the acres was not taxative, but designative.

1679. *January* 31. ROCHEAD *against* BORTHWICK.

THERE being a tack set by Halliburton of Inverleith to Isobel Borthwick and her husband, for certain years, bearing, 'Headshill containing forty-eight measured acres, with pasturage and pertinents,' Mr James Rochead having now right to the estate of Inverleith, pursues a declarator that there were sixty acres of land, and that the tack bearing every acre to pay six firlots, the defender should remove from twelve of these acres, or pay therefor.—The defender *alleged* absolvitor, 1*mo*, Because the tack mentions the acres to be measured, which being acknowledged by the heritor, he or his successors, could never crave a measuring again; 2*do*, The tack-duty is not for every acre of the land, but for every acre of 48 acres, and the land hath a common designation of Headshill; and the mention of the acres is not taxative but designative; and the very like case was so decided betwixt Hamilton and Robertson in July last.—It was *answered*, That this tack being *locatio*, the law says, *si mensor falsam mensuram dixerit* it does not prejudge the setter; and as to Hamilton's case, the question there was for repetition; which the Lords sustained not against the setter, having spent it *bona fide*.—It was *replied*, That *ratio decidendi* in that decision, was the same that the quantity was not taxative; and here the number of the acres is not upon the assertion of a metter, but upon the acknowledgement of the setter.

THE LORDS found, That the extent of the acres here was not taxative, but designative, and therefore assoilzied from the declarator. No 16.

Fol. Dic. v. 1. p. 145. Stair, v. 2. p. 686.

1683. *March.* MR THOMAS ROBERTSON *against* The LAIRD of Carngall.

No 17.

FOUND, that a minister's presentation to vicarage-teinds, as possessed by his predecessors, was not taxative, but demonstrative, there being no taxative word of *allenarly*, or the like, subjoined.

Fol. Dic. v. 1. p. 145. Harcarse, (MINISTERS) *No 690. p. 194.*

SECT. III.

Escheat of Delinquents Convict.—Grant during Pleasure.—Importing a Regality.—Naming a Person to an Office.—Betwixt and a Term.

1542. *May* 25.

ORMSTON *against* PROVOST and COMMUNITY of EDINBURGH.

No 18.
A burgh, by its charter, having granted to it indefinitely the escheats of all delinquents convict; the Lords found, that this cannot be extended to the escheats of such as are declared fugitive, and put to the horn for not compearance in a criminal cause; but that such escheats belong to the King and his donatary.

IN a cause of escheat of Robert Ormston, donatar to the King *contra* the Provost and Community of Edinburgh, the LORDS decerned, That for sae meikle as the man *de cujus escheta agebatur* committed the slaughter within Edinburgh; and the town shew *privilegium regis*, alledging all sic escheats to pertain to them; the forfaulter nevertheless was fugitive and put to the horn; and by reason he compeared not to underlye the law for that crime, swa because he past to the horn, all his goods was escheated; the LORDS decerned that escheat to pertain to the King and his donatar, because it fell because the man past to the horn, and not because he committed the said slaughter; and swa the town's privilege was found not to be extended in this caise; for in it there is not escheat granted to the town, but *delinquentibus in dicto burgo, et captis ibid. et convictis; et sic quando cadit escheta ratione criminis commissi infra burgum; non autem quando cadit* because ane faulter *infra burgum* past to the horn, for notwithstanding of the law for the crime committed be him within the town.

Fol. Dic. v. 1. p. 145. Sinclair, MS. p. 55.