

No. 9. bound to denude of the apprising upon the estate of Dunfermline, in favours of the pursuer.

Forbes, p. 333.

* * See No. 152. p. 12063. *vide* PROCESS. See also APPENDIX.

1710. December 15.

LESLIE and JOHNSTON of Knockhill *against* WILLIAM DICK of Grange.

No. 10.
Tailzied fee
becomes
simple when
it terminates
upon heirs
and assignees.

Mr. William Lauder having lent 20,000 merks to Dick of Grange, he got an heritable bond for it, and was infeft, in 1687. Colonel Sir James Leslie purchases this infeftment of annual-rent, and being likewise creditor to Grange in £.7000 Scots more by infeftment, the two extending to 30,000 merks, he makes a bond of tailzie, whereby he disposes these two annual-rents, and sundry other sums, failing heirs of his own body, in favours of James Dick, his sister's son, and the heirs-male of his body; which failing, to his eldest heir-female, without division, and the heir-male of her body; which failing, to ; which all failing, to himself, his own heirs and assignees; and this under irritant and resolute clauses *de non alienando et non contrahendo debitum*. After Colonel Leslie's death, James Dick, neglecting his uncle's tailzie, enters into a transaction with Captain Robert Leslie, the Colonel's brother, his heir-male and of line, and, on his serving heir, he takes a disposition from the Captain to the Colonel's estate, and particularly to the foresaid 30,000 merks contained in the two infeftments of annual-rent above-mentioned; and being infeft, entered into possession of the lands of Grange in virtue thereof, without regarding the tailzie; and he shortly after this deceasing, his brother William, serving heir to him in these rights, possessed the estate of Grange. Margaret Leslie, only child to Captain Robert, and Andrew Johnston of Knockhill, her husband, conceiving themselves prejudged by this conveyance, raise a declarator against her father, and William Dick, now of Grange, to hear and see it found and declared, that Captain Robert, her father, had forfeited his right, by inverting the order of his brother the Colonel's succession, by neglecting his tailzie, and entering heir of line simply to him, without the burdens inserted in the Colonel's nomination, and thereby the right was devolved to her, as next heir of tailzie, and so she had the only right to her uncle the Colonel's estate, and particularly to these two infeftments of annual-rent upliftable out of the estate of Grange; and, consequently, that William Dick, the present possessor of Grange, had no right thereto. Against this declarator, it was *first* alleged, for Dick of Grange, That she had no title to pursue this action; because, by the 22d act of 1685, introducing tailzies, at least confirming them, the person contravening not only tines and amits the right for himself, but likewise for his heirs and descendants; so that the branch on which she sits being cut off, her right must fall to the ground together with her father's; and so her

father's forfeiture must irritate, exclude, and evacuate, her pretences; *2do*, *Esto* she were not cut off, yet she is not the next heir; because her father, being yet alive, may have a son, who would be preferable. Answered, The act never designed to cut off the contravener's heir, except in competition with creditors, which was the only design of the act; seeing they are not to enter heir to the contravener, but to the granter; *et hoc non agebatur* to exclude them, otherwise that had been an unnecessary and inconsistent clause, which so great a lawyer as Sir John Nisbet put in his tailzie of Dirleton, that any of his heirs of tailzie incurring the irritancy shall forfeit both for himself and all descended of his body. As to the *2d* objection, law considers only the nearest heir existing at the time of the devolution, without attending to the birth of any nearer in possibility or hope, that *dominium* may not be *in pendent*; as was lately found betwixt Lord Mountstewart and the Lady Langton's Son about the estate of George Mackenzie of Rosehaugh; Sect. 3. p. 14903. *voce* SUCCESSION; and so my Lord Roxburgh was served heir to his own son, though the existing of children by him was possible, who, if then in being, would have debarred the father. The Lords inclined to think she had a sufficient title to pursue the declarator, but superseded the decision, because the *2d* point would determine the whole controversy—which *2d* defence was, That James Dick and the heirs of his body having failed, the right returned to Colonel Leslie, the maker of the tailzie, and his heirs and assignees whatsoever, for whom the irritant and prohibitory clauses were not made, but only to bind up James Dick, a riotous youth; and how soon the succession devolved to Sir James's own heirs, there the tailzie ended, the irritancies ceased, the succession returned to the natural channel of blood, and the fee, formerly tailzied, became a fee-simple in the person of Sir James, his heirs and assignees; and this is Craig's opinion, in his *Diegesis De successione talliata*; and Spottiswood, *voce* Tailzies, follows him; and Stair's opinion, Lib. 2. Tit. 3. is plain, that when the branches of a tailzie fail, and it falls to the disponer's heirs, as the last termination of the fee, the succession, before tailzied, becomes now simple, and free of any burdens and irritancies affecting the prior members of the tailzie; because the clauses being embargoes on property, and against the nature of dominion, (which imports a free disposal of our own), they are odious, and not to be extended. Answered, From the whole contexture of the nomination of tailzie, it appears how anxious Sir James was to continue and perpetuate his memory, which is wholly frustrated and evacuated if you loosen his own heirs from the prohibitory clauses; and if he binds up the first members of the tailzie, *multo magis* should it be extended to the subsequent branches, who are presumed to be less in his favour and regard, and therefore no more at liberty than the *persona magis dilecta* was; and Captain Robert, being a substitute, can be in no better case than the first institute, James Dick; and he is not simply called to exclude an *ultimus hæres* and the fisk, but as an heir of tailzie. The Lords, by a great plurality, found, That the prohibitory and irritant clauses did not affect nor reach the heirs of Sir James

No. 10. Leslie, the granter of the tailzie; and that Captain Robert not being under the irritancies, they assoilzied him and Grange Dick from the Lady Knockhill's declarator.

There were other two points debated in this cause, but were not determined; because the *2d* defence did fully end the cause. The *3d* allegiance was, This tailzie was null, not being registered in terms of the act of Parliament 1685. Answered, Registration is there appointed only to put creditors and singular successors, purchasing such lands, *in mala fide*; but *quoad* the tailzier's heirs, there was no need of registration. *4to*, It was alleged, That sums of money, though secured by infestment on lands were not a subject capable of being tailzied under irritant clauses, seeing, these being redeemable rights, whenever the money was paid, the tailzie evanished in smoke; likeas the act of Parliament speaks only of lands. Answered, Sundry persons have considerable estates consisting of wadsets or infestments of annual-rent; and why should they be hindered from securing their representation? And the Lords have allowed such ties and burdens, that intervening fiars may not fraudulently invert the succession as it is conveyed to them; 15th December, 1677, Nicolson *contra* Nicolson, No. 61. p. 8944.; 31st January, 1679, Drummond, No. 26. p. 4338.; 19th February, 1685, Wilson, No. 30. p. 4342.; and every body knows how the late Lord Ballenden tailzied his sums of money, though methods were used to frustrate it. And the redeeming does not totally extinguish the tailzie; because, by the presumed will of the tailzier, it must be re-employed in the same manner, and with the same irritancies as before. These points were not decided, because the hinge and importance of the whole cause depended on the *second* point, and determined the whole.

Fol. Dic. v. 2. p. 435. Fountainhall, v. 2. p. 608.

* * Forbes reports this case :

The deceased Colonel James Leslie, for love and favour, disponed his estate of Grange and other fortune, with and under the conditions and provisions after specified, failing heirs of his own body, in favours of James Dick son to the deceased William Dick of Grange, his Nephew, and the heirs-male of his body; which failing, to his heirs-female (the eldest succeeding always without division; which failing
which failing to Sir James, his heirs and assignees whatsoever; providing and declaring, that the said James Dick and other heirs of tailzie and provision above-mentioned should be obliged to assume the surname of Leslie, and bear Sir James' coat of arms, and to purchase land with his money, taking the rights to themselves in the terms above-mentioned. Which disposition contained the usual clauses and exceptions *de non alienando*, & *non contrahendo debitum*; and that in case the said James Dick, or any other heir of tailzie and provision above-mentioned, failed to perform any of the foresaid conditions or provisions, the contravener should loss his right, and the estate accresce and belong to the next im-

mediate heir in order as above. Sir James in the said disposition obliged himself, his heirs of line and others whatsoever, to serve heirs and confirm themselves executors to him if needful, to ratify the same, and denude in favours of the said James Dick, and the other heirs of tailzie and provision above-written, with the burden of the foresaid provisions, and conditions; and Sir James reserved to himself a power to alter. Upon whose decease, Captain Robert Leslie his brother, served himself heir of line, and without regard to the tailzie, disposed the estate to James Dick and his heirs whatsoever, to whom, dying without heirs of his body, William Dick his brother succeeded.

Margaret Leslie, Captain Robert's only child, and Andrew Johnston her husband, for his interest, raised a reduction, improbation and declarator, against William Dick and the Captain, to have it found and declared, that by James Dick's death and the Captain's contravention of the tailzie, by altering the succession, he the Captain forfeited his right to the estate, and it devolved upon Margaret Leslie his daughter, as next heir of tailzie and provision to Sir James.

Answered for the defender: Margaret Leslie hath no title to reduce, seeing she is neither heir of tailzie *nominatim* substitute, nor can be heir of line so long as the Captain her father liveth, who is served heir of line to his brother, and may have a son that would exclude his daughter. The estate being once established in the person of the Captain the immediate heir of line, his daughter can never pretend to it, but as heir to her father, whose deeds she is bound to warrant: And if he hath forfeited his right, then all descendants that can take under him, and have only right by and through him, forfeit their expectation also. *2dly*, No deed of Captain Robert's before the succession devolved on him, can give his daughter access to pursue this declarator of irritancy against him: For how can a person forfeit a right, before he have it? Besides, Captain Leslie was not obliged to enter heir of tailzie, nor could he; so that his entering heir of line could be no ground of irritancy. Again, though the heirs of line were bound to dispoise in favours of the heirs of tailzie, the heirs of tailzie did not require them to do it; and it is impossible, now that James Dick and his line have failed. Nor did James Dick ever accept of the tailzie, as he was under no obligation to accept it, but acquired from Captain Robert Leslie *tanquam quilibet*: And an irritancy can only affect him who possesseth by virtue of the right containing the clause irritant. *3tio*, The heirs of tailzie having failed, and the right returned to Sir James Leslie, the maker, his heirs and assignees whatsoever, the prohibitory and irritant clauses have no longer effect, and cannot affect these heirs and assignees. For the termination in favours of Sir James himself and his heirs and assignees whatsoever, was not a substitution, but a return whereby the fee that before was tailzied becomes simple, Craig, *De successione talliata*, Spottiswood, Title Tailzies, Stair, Instit. Lib. 2. Tit. 3. § 44. & 58. And as the adjection of assignees imports always a free power of disposal and alienation; so these words, *which failing* to Sir James himself, his heirs and assignees, naturally import a return of the estate to the lineal succession, with the same power and right of

No. 10. dominion, as the granter himself could have had, had James Dick and the heirs called in order under him failed in his own lifetime. As it were nonsense to pretend, that the Colonel could be heir of provision; so those who succeed in his place, do not succeed as heirs of provision, but as heirs designed by law in the right of blood. It was allenary to prevent an *ultimus hæres*, that the Colonel called his heirs whatsoever to the succession, failing all the members of the tailzie, without any dream of irritancy.

Replied for the pursuers: *1mo*, The right in the person of James Dick having become void by the contravention of the terms of the tailzie, it falls to the pursuer as next heir of tailzie, who hath interest to declare the irritancy, and right to succeed as if her father the contravener were dead; not as if she pretended to succeed as heir to her father, but as heir of provision to Sir James her uncle. The pursuer is not indeed next heir of line, while her father is alive, who may have sons; but a remoter heir of tailzie may declare an irritancy, when there are nearer heirs in being who have not forfeited: And she must be allowed to declare in the same manner as the nearest heir in being is admitted to serve though there be a nearer *in spe*. If a remoter heir were not allowed to quarrel deeds of contravention, it were in the power of the institute, by collusion with some of the interjected substitutes, to evacuate the tailzie, and alienate at his pleasure. *2do*, Though James Dick not being *alioqui successurus*, might have rejected the benefit of the tailzie, yet he could never make any legal title to his uncle's estate without the tailzie: Nor could Captain Robert devolve any right upon James Dick, but in the terms of the tailzie; seeing by being served heir of line he became immediately liable to perform the obligations in the tailzie. The pursuer is stated in a condition to oblige her father, either to subject himself to the irritancies, or to dispoise to her, if he had not been formerly denuded; for it is inconsistent that the Colonel could oblige an heir of line to dispoise to an heir of tailzie, and yet that this heir of line should be free from the irritancies. Though a person cannot properly be said to lose what he hath not, yet the Captain had *spem succedendi*, which he forfeited by incurring the irritancies: And an heir substitute in a tailzie may do many deeds before he succeed, which will effectually seclude him when the heritage devolves upon him. Nay further, Sir James Leslie's obliging his heir of line to denude in favours of his heirs of tailzie and provision resolves in a *fidei commissum*, by the civil law to be religiously observed L. 5. 8. 14. 21. C. *De fidei commiss.* And the party transgressing the defunct's will therein, was deprived of any benefit he could claim as heir or legatary. So that the Captain, having acted contrary to the trust reposed in him, should, as *hæres fiduciarius*, lose the benefit of succession *tanquam indignus*, which should devolve on the pursuer, as substituted by the tailzie. *3tio*, The Colonel designing the perpetuity of his family, in the way and manner projected by himself, and having substituted but one person, viz. James Dick and his line, did certainly intend to bind and tie up his own heirs of line under the same irritancies; as the only probable method to answer his design of preserving his family; seeing a

tailzied settlement cannot be instanced where there is but one single heir of tailzie. It is a begging the question to say, That these words, "which failing, to me, my heirs and assignees," were added only to exclude the fisk; for they import that Sir James designed not only his own heirs of blood to succeed him, as heirs of tailzie, but also such as he should appoint by an addition to his former nomination, without making any new disposition. Which is the reason he left himself a power by the blank in the tailzie, seeing the persons so named would be assignees to him, and liable to all the conditions in the nomination. James Dick's death before the Colonel, could not return any new power of disposal, which was inherent in the Colonel during his life;—so that there is no party betwixt the Colonel's surviving James Dick, and the Colonel's heirs whatsoever surviving him. Again, it cannot be thought, that the Colonel designed to clog James Dick his nephew and his heirs descendant (whom he preferred to his brother) with irritancies, and to leave his brother to a free and unconditional disposal; especially considering, that the Colonel names James Dick and the heirs after-mentioned, with and under the provisions after-mentioned; and heirs whatsoever are the heirs after-mentioned, consequently affected with the provisions. The word assignees in the termination of the tailzie cannot be applied to the assignees of Sir James Leslie's heirs, but to his own assignees: As these words, "to me, my heirs and executors," could never be understood to relate to the executors of my heirs.

Duplied for the defender. *1mo*, The forfeiture of an heir of tailzie, excludes his heirs of line, as well as himself, unless it be expressly provided against; therefore it is provided in Sir John Nisbet's tailzie, that if any of the heirs of tailzie descending of the granter's own body, shall irritate his right, he should forfeit for himself only. *Nuda spes* in a remote heir of tailzie cannot be a title of action to disturb property and successions; and though, the nearest heirs in being are admitted to serve, while there is a possibility of a nearer, *ne dominia sint in pendentibus*, declarators of irritancy which are penal, and not so necessary, are not so favourable in law. *2do*, Esto the Captain had denuded in favours of James Dick in the terms of the tailzie, yet by the failure of James Dick and his heirs, the estate returned to the Captain as heir whatsoever, free of irritancies: And by the nature and stile of tailzies, irritancies are only conceived against actual heirs contravening. The pursuer adduceth the authority of the civil law to prove a matter not in question, viz. that heirs are bound to fulfil the conditions made by the defunct: But there the very condition required by the defunct to be fulfilled, viz. to denude to James Dick, hath failed, and the estate hath returned to the legal channel. *3tio*, Its inconceivable how the word assignees can be applied to the blank; seeing if those left blank had been filled up, they could not be called assignees, but would have succeeded as heirs of tailzie; and the word assignees is not inserted immediately after the blank, but after the return to Sir James and his heirs, failing of the heirs of tailzie. Again the colonel had very good reason to affect only the heirs of tailzie and provision, with these provisions and irritancies; seeing all his

No. 10. care was to preserve his estate in the line of his substitution, so long as it lasted, which might have continued for many generations, though it hath now failed *ex accidenti*. But after these chosen substitutes should fail, when it was uncertain what person might succeed to him, or in what degree of propinquity, he had no further concern than to exclude an *ultimus hæres*. Where heirs and assignees are expressed in the last termination of a tailzie, the precedent naming of heirs under burdens, must be restricted to the special heirs of tailzie. Again, to understand by the word assignees, Sir James' own assignees, is against the rules both of sense and grammar; because, he had formerly provided for his assignees by his reserved power to alter, and the blank in his nomination. And it were ridiculous to suppose that Sir James would have postponed his own assignees to the heirs substitute; so that the word assignees being a relative, must properly be construed with the persons immediately before named.

Triplied for the pursuer: To conclude that the forfeiture of a substitute in a tailzie debar his heirs when both are called, is to alledge that the forfeiture of one heir of tailzie shall exclude another, which is absurd; for as irritancies are penal, so they are personal. The citation out of Dirleton's tailzie is misapplied, for he knowing that the forfeiture of any heir of tailzie had only a personal effect, except it were otherwise expressed, provided *ob majorem pœnam*. that if any one of his heirs of tailzie not descended of his own body, shall incur the irritancy, the forfeiture shall exclude himself and his heirs; but allowed the law to take place as to descendants of his own body, so as these should only forfeit for themselves. It doth not alter the case, whither the substitutes be called *nominatim*, or only *designative*; for albeit the person on whom the substitution terminates, may be uncertain, it must certainly be one that is nearest of kin to the maker of the tailzie. And the irritancies in tailzies must affect all the members, who by virtue thereof have right to succeed, heirs whatsoever as well as other substitutes;—*nam ubi lex non distinguit, nostrum non est distinguere*.

The Lords found, that the prohibitory and irritant clauses of the tailzie, do not affect the heirs and assignees of Sir James Leslie the maker of the tailzie; and that no deed done by Captain Robert before the succession devolved on him, can give the pursuer access to pursue this declarator of irritancy against her father

Forbes, p. 468.

No. 11. 1711. December 29. CATHARINE TURNBULL against ANDREW KINNIER.

If a bond or disposition of tailzie is made in favour of the heir of investiture, he cannot neglect it, and serve heir-at-law.

Catharine Kinnier being heritable proprietrix of some booths and houses in Edinburgh, she disposes them, in 1698, to the heirs to be procreated betwixt her and Mr. John Dickson, her husband, which failing, to Andrew Kinnier, her brother, with this provision, that in case he shall succeed, by virtue thereof, he shall pay to Catharine Turnbull, her husband's niece, 500 merks, and some legacies to other persons. The right of these tenements being devolved on Andrew Kinnier,