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 debars 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 whatsomever 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. 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.

1711. *December* 29. Catharine Turnbull *against* Andrew Kinnier.

Catharine Kinnier being heritable proprietrix of some booths and houses in Edinburgh, she dispones 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,

in default of issue of the disponer's body, Catharine Turnbull pursues him, as the next institute, for payment of the 500 merks with which he is burdened. Alleged, Absolvitor, for the clause is conditional, in case he succeeded by virtue of that disposition; which condition not existing, he cannot be liable; for it were unreasonable to make him accept a disposition that burdens him with as much debt as the land is worth; and therefore he resolves to enter as heir of line to his sister, who only burdens him with these legacies if he succeed to her by the disposition; so the condition not existing can never bind him. Answered, This is the gloss of Orleans, and wholly distorts the clause whereby the disponer's *enixa voluntas* is evident, that her heritage shall be burdened with that sum *quocumque modo* her substitutes come to the estate; and it is *fraudem legi contractus facere* to say, I will repudiate my sister's disposition, and enter heir *ab intestato*, and so defraud and evite her legacies. The Prætor was juster than so; for he appointed quamdiu ex testamento adiri potest hæreditas, ab intestato non defertur, L. 39. D. De acq. vel am. hæreditate; et quamdiu potest valere testamentum tamdiu hæres legitimus non admittitur, L. 89. D. De reg. juris; so that entering to possess as heir or apparent heir will not save him; for, being a potestative condition, he may fulfil it; and if he refuse, then the law says, In jure civili receptum est quoties eum cujus interest conditionem non impleri fiat quo minus impleatur, perinde haberi ac si conditio impleta fuisset, quod etiam ad libertatem legata et hæredum institutionem perducitur, L. 261. D. De reg. jur. So that he may abstain from the heritage, and repudiate the succession; but if he intromit with the mails and duties as heir, he cannot reject the burdens annexed to the disposition, but must implement them; and seeing he has granted a factory, and uplifted the rents, he must be liable. The Lords found he might totally abstain, but if he meddled with the heritage, he could not repudiate the burdens laid on it by the proprietor; and therefore found him liable in payment of the pursuer's 500 merks.

No. 11.

Fol. Dic. v. 2. *p.* 431. *Fountainhall, v.* 2. *p.* 695.

*** Forbes reports this case:

Catharine Kinnier having disponed some booths and houses in Edinburgh to herself, and Mr. John Dickson, her husband, in life-rent, and the children to be procreated betwixt them in fee; which failing, to Mr. John's children of any other marriage; which failing, to Andrew Kinnier, her brother, his heirs and assignees; with this provision, That in case the husband's children of any other marriage should happen to succeed to the booths and houses by virtue of that disposition, they should pay £.100 Sterling to her said brother; and that Andrew Kinnier, if he succeeded by virtue thereof, should be obliged to pay some particular sums to the persons therein-mentioned, particularly 500 merks to Catharine Turnbull. The right to the foresaid shops and houses devolved to Andrew Kinnier, both *ab intestato*, and by the disposition; but he entered not by the

No. 11. disposition. Whereupon Catharine Turnbull pursued him for payment of the 500 merks.

Alleged for the defender: He is content to hold count to the pursuer, and other persons the disposition was burdened with sums to, they always allowing him retention of the £.100 Sterling *tanquam præcipuum*, as his falcidian or trebellianic share, conform to the Roman law, when the heir instituted was burdened with legacies equal to the value of the testator's estate; L. 73. Pr. in Fin. And so it is, that the disposition to the defender, failing Mr. John Dickson's heirs, is burdened with sums exceeding, at least equal to, the value of the tenements disponed. Now, it is not supposable that the disponer intended to put the defender in a worse case, when he represents her as heir, than had he been debarred by the existence of the persons instituted before him, viz. Mr. John Dickson's children of any other marriage; in which case, the pursuer and the other creditors or legataries in the disposition had no pretence to any thing. Besides, he is *quasi hæres institutus ex re certa*, which admits of no deduction or defalcation; L. 13. Cod. De Hæred. Instit. § 9. Instit. De Fideicom. Hæred.

Answered for the pursuer: By the falcidian law, which secured to the testamentary heir a fourth part of the heritage, and allowed only the faculty of legating to the extent of the remainder, the testamentary heir omitting to succeed *ex testamenta*, and claiming the heritage as *hæres legitimus*, forfeited *quartam falcidiam; 2do*, The defender having entered summarily at his own hand, and immixed himself with the heritage, by uplifting the mails and duties as apparent heir, repudiating the defunct's destination, he ought to be liable to all debts constituted by her, without allowance to claim any thing as *præcipuum*.

The Lords found, That since the defender entered not by the disposition, he is not simply liable; but that the subject disponed being burdened with £.100 Sterling to the defender, and 500 merks to the pursuer, the defender is liable for as much of the 500 merks as will remain in his hands over and above the £.100 Sterling intended by the disposition for himself *tanquam præcipuum*.

Forbes, p. 593.

1715. *January* 25.

HOUSTON, younger, of that Ilk, and his LADY, *against* SIR JOHN SHAW of Greenock.

No. 12.
Found, that a substitute in an entail may insist against the granter for exhibition, but reserving all de-

The now Sir John Shaw, standing publicly infeft in the fee of the lands of Greenock, without any restriction, *in anno* 1686, he and the deceased Sir John, his father, in March, 1700, in a contract of marriage, do jointly make a tailzie of their estate, and grant procuratory for resigning the same in favours of Sir John, younger, and the heirs-male to be procreated of the marriage; which failing, to his younger brothers *successivè*; which failing, to Mrs. Margaret Shaw,