excluding the *jus mariti* of the husband, and annualrents thereof, were sufficient to acquire the same, and no more; unless she would shew, that she had other funds, exclusive also of the *jus mariti*. But in respect that John Burns, the brother and apparent heir of Richard, in the conveyance of his debt, acknowledges there was a separate fund from the 4000 merks, sustained the whole debt so conveyed by him.'—*See* PRESUMPTION. No 11.

Act. *Wal. Steuart.* Alt. *Ferguson.*

Fol. Dic. v. 3. *p.* 215. *Fac. Col. No* 99. *p.* 175.

SECT. III.

Simple Destination.

1705. *January* 25. ROBERT DALGARDNO *against* ROBERT DURHAM.

No 12.
A person disponed his estate to one grand-son and the heirs of his body; whom failing, to another grand-son and the heirs of his body; whom failing, to the granter's nearest heirs and assignees. A disposition by the grand-son institute in favour of his sister-uterine, upon the narrative, that her father had tailzied his lands to him, was sustained; the institute being found a simple fiar, and the substitution no bar to dispone even gratuitously.

HUGH WATT of Foulshiells having only one daughter, and no sons, she is first married to Hamilton of Boighead, by whom she had a son called Thomas; then to David Bruce, by whom she had a daughter called Jean, married to Adolphus Durham; then she married James Dalgardno in Leith, by whom she had a son called Robert. Hugh Watt, her father, in the settlement of his lands of Foulshiells, dispones them to Thomas Hamilton, his daughter's son of the first marriage, and the heirs of his body; which failing, to Robert Dalgardno, his grand-child by the third marriage, (passing by Jean Bruce, his grand-child by his daughter's second marriage;) which failing, then to the said Hugh Watt's own nearest heirs and assignees. Thomas Hamilton, the first institute, dispones these lands of Foulshiells to the said Jean Bruce, his sister-uterine, in liferent, and to Robert Durham her son in fee, on this narrative, That David Bruce, father to the said Jean, had tailzied his lands to him, therefore in remuneration he made the said disposition. Robert Dalgardno, the substitute, finding himself frustrated by this conveyance of Hamilton's to Durham, and his substitution and right of succession thereby evacuated, and the tailzie made by Watt, his grand-father, disappointed and broke, he raises a reduction and declarator of Hamilton's disposition, on this reason, that, by the whole tract of Hugh Watt's disposition to Hamilton, it was evidently his will and purpose, that failing of heirs of Hamilton's body, (which case has now existed), the lands should next fall and descend to Dalgardno, his other grand-child; and, though there was no express irritant clause or prohibition to invert the tailzie, or alter

No 12. the destination he had made, yet it was clearly implied on the matter, seeing he reserved a power to himself allenarly to alter; *that* imports a restraint on Hamilton to do it, and so he being a limited qualified fiar, he could not, by an arbitrary, voluntary, and gratuitous deed, evacuate the tailzie, and dispone the lands without any onerous cause to another, in prejudice of him, the substitute, who, by the precept of sasine, is infeft as well as Hamilton, and so is a fiar on the matter as well as he; and the clause of warrandice is absolute, which Hamilton has contravened by granting his right. It is acknowledged, that, for onerous causes, he might have disponed these lands, and the substitute would never have been heard to quarrel the same; but this is an officious and gratuitous deed, and can never be supported by that mutual tailzie of Bruce's to him, there being no proportion betwixt the two. *Answered*, The impugning this disposition, was to draw in question the very first principles and fundamentals of our law, whereby a naked substitution in a tailzie without irritant and resolutive clauses, did never impede the institute to dispose of the lands at his pleasure, he being absolute and illimited fiar; and, if Hugh Watt had designed to bind him up, he might have done it by two lines, declaring it should not be liesome to the said Thomas Hamilton, his grand-child, to alter, change, or derogate from the tailzie he had made, or to do any deed in prejudice of Dalgardno, the next substitute; which he not having done, Thomas Hamilton was an illimited fiar, and at full liberty to dispose of the lands to whom he pleased; and, whatever was Hugh's intention *et enixa voluntas* in having the tailzie stand, yet he had not done it in the method law had prescribed; *et non fecit id quod poterit facere*; and the Lords cannot now supply the defect, by adding an irritant prohibitory clause to his tailzie, which he had omitted, but must judge upon it as it is conceived; and the infefting the substitute was an error in the writer, and the hail clauses of warrandice and others imported no more than the repetition of the substitution made in the dispositive clause. *Replied*, Though Hugh Watt's tailzie contained no express irritancy, yet it was more than a naked destination of succession, and the substitute was a conditional fiar, and to be considered like a *fideicommissarius* in the common law; and Hamilton as a *hæres fiduciarius*, who indeed had the power and administration of the subject disponed to him, so it were for necessary and onerous causes; but, after his death, he was obliged to restore the subject to the fideicommissary here, that being a tacit condition implied in the nature of his right, which he could neither evacuate nor defraud by a gratuitous voluntary deed in favour of any other; for *quod inesse debet, illud inesse præsumitur*; and by this favourable interpretation, and analogy of law, in bonds of provision and legacies conceived in favour of an institute *primo loco*, which failing, to return to the granter and disponer, there the case of returning is ever reputed conditional, and cannot be frustrated by gratuitous donations in prejudice of the granter, as Dirleton argues in his Doubts, *voce* TAILZIES, and has been often so decided, 31st January 1679, Drummond, No 26. p. 4338., where even there was a pretence of an onerous cause by a mutual

tailzie; 28th February 1683, Strachan, No 6. p. 4310.; 10th February 1685, The College of Edinburgh, *infra*, *h. t.* Sect. 5.; and Feb. 1683, Bonar, *voce* PROVISION TO HEIRS AND CHILDREN. THE LORDS thought, whatever Hugh Watt's design might be in making this tailzie among his grand-children, that the one might not defraud or disappoint the other, yet he had not done it effectually; and therefore found Thomas Hamilton a simple fiar, under no restraint or prohibition, and that a substitution was no impediment nor bar on the institute to dispone gratuitously; and sustained Thomas Hamilton's disposition to Robert Durham, and repelled Dalgardno's reasons of reduction against it, and assoilzied Durham from the same: And so found Hamilton might break his grandfather's tailzie, being under no legal restraint. Many of these controversies arise from the ignorance or negligence of the formers and writers of these dispositions and other papers, by not inserting the necessary clauses therein, whereby the parties-contractors, their minds come not to be clearly expressed. It is an old saying of the famous Italian Lawyer AZO, *Ignorantia notariorum peribit mundus, et justitia corruet.*

No 12.

Fol. Dic. v. 1. *p.* 305. *Fountainhall, v.* 2. *p.* 260.

1724. *February* 6.

JAMES, WILLIAM, *&c.* MOFFATS, *against* WALTER and BESSIE MOFFATS.

No 13.
A person granted a disposition of his effects, with this provision, 'that if any 'of the dis- 'ponees 'should de- 'cease with- 'out children, 'the share of 'the deceased 'should ac- 'cresce to the 'survivors.' One of the disponees having assigned his right, and died without children, the assignation was reduced.

JAMES MOFFAT having granted a disposition of his effects, with this provision, 'That if any one or two of the disponees should decease without children, 'the share of the person or persons so deceasing, should accresce and fall to 'the surviving and their children,' under which provision the disposition is declared to be granted by James, and accepted by the disponees,

It happened that Isabel Moffat, one of the disponees, assigned her right, and died without children: The question was, If by any gratuitous deed she could disappoint the foresaid provision?

It was *alleged* for Isabel's assignee, That the clause mentioned in the disposition was no more than a simple destination of succession; and though there was a substitution in a certain event, yet since there was no clause not to alter, it only entitled the substitute to the succession, in case she had not otherwise disposed of her share, but imposed no limitation on the institute to hinder her from disposing of the subject, or altering the substitution at her pleasure.

It was *answered*, 1*mo*, That by the conception of the clause of substitution, the right of the disponees was no more than a conditional fee. 2*do*, That in this case, where the provision of substitution is made the quality of the conveyance, the substitution could not be altered; for, by the conception of the writ, the institute by his acceptance becomes obliged, *ex pacto*, to re-convey to the substitute, in case of the existing event.