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,

No. 12. fences against registration, or any other legal effect.

pursuer, and her heirs, &c. There are also prohibitory and irritant clauses, *de non alienando, et non contrahendo debitum.* Which contract is recorded in the register of tailzies. The younger brothers having deceased, without issue, and the pursuer, standing next in the tailzie, pursues for exhibition thereof, that the same may be recorded in the books of Session, for preservation of the principal, because principals are not left in the register of tailzies.

Alleged for the pursuers: Whoever has interest in a writ, whether immediate or remote, has interest in the preservation of it, and, for that purpose, may have it judicially exhibited, and put into the public repository; nay, this might be urged in a simple substitution, though alterable by the fiar; for it is not enough to say the writ may be revoked, *ergo*, it ought not to be exhibited, for the very way of proponing that, shows it is still a subsisting writ; but, in the present case, the rule is more firmly established, where the heirs of entail are only life-renters; and if Sir John have the absolute power of disposing of it, the exhibition and registration will not in the least diminish his right; especially since it is already published by his own deed; so that it is not like an undelivered writ. This is founded in the civil law, where the remoteness of the right does not hinder this interest; for every conditional right, not purified, is a remote right. But so it is, that, by the common law, all substitutes, legatars, *fide commissarii*, &c. yea, they who were such *sub conditione tantum*, had right to this action, and for which the Prætor proposed a special interdict, De Tab. exhibend.; and is further cleared from L. 2. Pr. D. Quemad. test. aper. tabularum testamenti instrumentum non est unius hominis h. e. heredis, sed universorum quibus quid illic adscriptum. Yea, in L. 1. § 5. & 11. D. De Tab. exhib. it is expressly said, that Interdictum de tabulis exhibendis ad omnem omnino scripturam testamenti sive perfectam, sive imperfectam, etiam deletam, pertinet; and a remote heir substituted is like a *heres*, or *legatarius sub conditione*. And thus it is said, in L. 3. § 14. D. De tab. exhib. Et si sub conditione legatum sit, quasi conditione existente sic estimandum est; nec compelli debebit, ut se restituturum caveat quiquid consecutus est, si conditio defecerit. By which, notwitstanding the condition, he had the interdict competent to him for exhibition. The like in our practice, where there is no immediate right, but a *spes* only; as in the case of a tutor-in-law against a tutor-dative, who was in possession of the pupil's writs, 15th December, 1664, Fork *contra* Loudon, No. 20. p. 3977.; where the reason is given, viz. that it might not be in the power of the other to embezzle. As also in the case of a personal creditor, observed by Spottiswood, 3d July, 1635, Howison, *voce* TITLE TO PURSUE, who, in order to an apprising, was allowed to pursue exhibition of an heritable bond due to the debtor.

Answered for the defender; 1*mo*, That he was neither bound to exhibit nor register his own writ, unless the Lords should find, that the pursuers have a sufficient interest to insist in such an action; for, in every exhibition, the defender is allowed, in the first place, to dispute the *jus persequendi*, before he can be decerned to take a day to exhibit; and the very nature of the thing requires it,

No. 12. otherwise sentence would pass in the conclusion, without allowing parties to examine the premises; 2*do*, The ordinary case of decerning to exhibit, reserving against delivery, is, where there may be some doubt concerning the nature and circumstances of the writ; but here, the pursuers libel upon a writ of a particular tenor, and the defender, admitting the tenor to be as libelled, says, he cannot be compelled to exhibit, far less to register; 3*tio*, The defender founds on the nature of property, and therefore the writ called for being his proper evident, he cannot be compelled to do any thing in relation to his own property, (of which he is *liber moderator et arbiter*), at the instance of a party who does not (in this argument) say he has power to dispose on the subject at his pleasure; 4*to*, *Actio est jus persequendi in judicio quod nobis debetur;* therefore the pursuer's title must appear before an action can be sustained, particularly in case of exhibitions. Thus, L. 19. D. Ad exhib. Sed quidam consuluit, an possit efficere hæc actio ut rationes adversarii sibi exhibentur, quas exhiberi magni ejus interesse est. Respondet, non oportere ejus civile calumniari, neque verba captari, sed, qua mente quid diceretur animadvertere convenire. Whence it is plain, that men are not to be disturbed in their possessions or property, but where there is a peculiar title. As to the Interdict *De tab. exhib.* that interdict concerns not the law of Scotland; for with us there is no such recognition nor solemnity of seals to subscriptions required as gave rise to that interdict anent testaments among the Romans. Besides that, the interdict relates only to writs that have been left by a person deceased. But this action is like exhibition of a testament while the testator lives.

Replied for the pursuers: That the cases widely differ; for a testament, while the testator lives, has no being, has conveyed no right; whereas, a contract of tailzie registered, has once given a right; revocable or not, is not the question. And as to the things being the defender's property, &c. these are jura or exceptiones differendæ in directum judicium, (*i. e.* the pursuer's special conclusion), re interim exhiberi jussa; L. 13. § 13. D. Ad exhib. And as to the other laws cited, the pursuer's interest is evident and still permanent, and must be so, *hac lite pendente*, during which time the defender can innovate nothing to their prejudice; since *tenetur et qui dolo desiit possidere:* Whether their title be so strong as to force the registration? is a question only disputable after exhibiting. The pursuer's interest being clear, the reasons for exhibiting the principal are, 1*mo*, That the extract from the record of tailzies does not answer the intent of this action, because the same cannot satisfy in an improbation; and every person that has interest in a writ, has interest to be so master of that principal as might answer any such process, if intented. 2*do*, Another reason is, the difficulty of making up tenors, if it should be lost, and the pursuers prevail in this principal process; nor matters it though they give no reasons of their fear of an improbation, or losing the paper, since prestat intacta jura servare quam post vulneratam causam remedium querere. 3*tio*, A third reason is, That the only remedy of proving the tenor in such cases, viz. instrumentary witnesses, &c. may be disappointed.

The Lords found the defender ought to exhibit, reserving all defences against the registration, or any other legal effect, as accords. No. 12.

Act. *Sir Walter Pringle, &c.* Alt. *Hugh Dalrymple, &c.* Clerk, *Mackenzie.*

Bruce, p. 51.

*** See case, Schaw against Schaw, Sect. 6. *h. t.*

1723. *January.* IRVINE *against* IRVINE.

No. 13.

It was found, in conformity with Symson and Home against Home, No. 6. p. 15353. That a remote substitute may pursue contravention of a tailzie, where the nearer heir lies by and neglects his right. See APPENDIX.

Fol. Dic. v. 2. p. 427.

1724. *February* 26. JAMES WILLISON *against* CALLENDER of Dorator.

No. 14.
Tailzies good against heirs without registration.

Callender of Dorator tailzied his estate, with clauses irritant and resolutive, in favours of Ludovick Willison, *alias* Callender, the present Dorator, and the heirs-male of his body; and failing of him, to James Willison, his brother; with several other substitutions. The said Ludovick Willison, *alias* Callender, of Dorator, having contracted debts, contrary to the tenor of his right, James Willison, the substitute, pursued a declarator of irritancy: Against which this was made, That the tailzie not being registered in terms of the act 1685, the same could not be allowed, and was ineffectual to prejudge either Dorator or his creditors.

To make good this defence, it was pleaded, That the act 1685, anent tailzies, is an entire new constitution, settling the rules that govern the whole subject of tailzies; and therefore derogates from all former practice in this matter: But so it is, that the act gives allowance or authority only to such tailzies as are authorised by the Lords, and recorded; consequently, without that, tailzies can have no manner of effect, and so can neither be good against heirs or creditors, these being the two classes with respect to which the act statutes equally.

It was answered, That the act 1685 is no new correctory law, abolishing every former practice anent tailzies. It is plainly a declaratory law, not restricting the power of making tailzies; introducing, indeed, some things new, for the security of creditors, but leaving the heirs entirely to that footing they are placed upon by the tailzie. Hence, the receiver of a disposition, containing strict prohibitory and irritant clauses, if he contravene the condition of his own right, must fall from the same, as the disponer has appointed, this new act notwithstanding; for though the creditor may, the heir can never object, that the tailzie is void, because not