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.

No 13. THE LORDS found, That Isabel could not dispone gratuitously, and that her share accresced to the surviving disponees.

Reporter, *Lord Polton.* Act. *Pat. Grant.* Alt. *Ja. Boswell.* Clerk, *Mackenzie.*
Fol. Dic. v. 3. *p.* 214. *Edgar, p.* 24.

1725. *July* 17.

JOHN SEMPLE, Surgeon in Edinburgh, *against* ROBERT GEDDES Surgeon there, and JANET MURRAY his Spouse.

No 14.
A father left his second son a patrimony secured on land. Failing this son, and his heirs, the sum was destinated to others. The bond was uplifted in the son's minority. He ratified the discharge when major. He executed a settlement including this sum, and afterwards died. Found that the substitution in the bond had been entirely vacated.

DAVID PLENDERLEITH of Blyth, left to his second son Archibald a patrimony of 10,000 merks, which was heritably secured in Blackbarony's hands, the fee was provided to the son, and the liferent of the half thereof to the said Janet Murray, Archibald's mother. The father appointed, that if Archibald should have no heirs-male, lawfully begotten to succeed him, 'That then the equal 'half of the said sum should belong to Alexander Plenderleith his immediate 'younger brother, and the other equal half to John the third son: And if the 'said Archibald should only have heirs-female, then the equal half of the said 'portion should only belong to the heirs-female, and the other half to his 'brothers.'

Archibald, as soon as he passed the years of pupillarity, made choice of Mr Geddes (who had married Janet Murray his mother) to be his sole curator; and in a few days thereafter he made a testament, nominating his mother his executrix and universal legatrix.

Mr Geddes immediately uplifted the money from Blackbarony, and did not lend it out again; but Archibald advancing in age, became merchant, and employed his patrimony in trade, and after his majority he cleared accounts with Mr Geddes his curator, and discharged him; he also ratified the discharge, which in his minority had been granted to Blackbarony, of the 10,000 merks; after which he died unmarried, and his mother, as his executrix by the testament, intromitted with all his effects.

Alexander Plenderleith assigned his interest in the half of Archibald's portion to John Semple, who thereupon insisted in a reduction of the testament in favours of Mr Geddes, upon this head, that Archibald's patrimony being by their father's settlement appointed to belong, as to the one half thereof, to Alexander, in case Archibald died without heirs-male of his body, it was not in Archibald's power, by any gratuitous deed or testament, to disappoint Alexander of the half of the said patrimony, for the limitation was at least as strong as a clause of return; yea, so strong was the implied prohibition on Archibald, not to disappoint his brothers, that had he married, and left only daughters, it was not in his power to give them more than one half of his patrimony.