

1701. December 9.

BURNET against BURNETS.

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A man tailzied his estate to three persons *successive*. The first offended him; and he executed a writing, declaring, that for this cause, he revoked the tailzie, and would cancel it; but did not actually cancel it. The second substitute claimed the estate; but it was found the revocation was total.

THE competition between the Heirs of line of Craigmill and Burnet of Monboddo, the heir of tailzie, was decided. Sir Alexander Burnet of Craigmill made various settlements of his estate; first by a testament, in 1684, having only two daughters, he leaves his lands to them, they marrying his uncle Thomas Burnet's sons. In 1686, he makes a tailzie to the heirs-male of his own body; which failing, to Thomas Burnet, his eldest uncle, and his heirs-male; which failing, to James Burnet of Allagevan, his second uncle; and his also failing, to Mr Robert Burnet of Craigie, another uncle, &c. *3tio*, By a declaration and obligation, in April 1688, he revokes the tailzie, with this narrative, that Thomas Burnet had offended him, but, being so near a relation, he would not express the cause for the reputation of his own family; therefore, on this consideration, he annuls the tailzie, and obliges himself, as soon as he returns to his own house in the north, where the tailzie was lying, (he being at Edinburgh the time of his signing this revocation,) to cancel, destroy, and tear his name from the said bond of tailzie. After this he lives six years, but never cancels the tailzie; and dying in 1694, both the tailzie and revocation are found lying beside him entire. Monboddo being Allagevan's heir, and so the second branch and member of Craigmill's tailzie, immediately after Thomas, (expunged and disinherited in manner foresaid,) he serves himself heir of tailzie to Sir Alexander Burnet, the maker of it, and thereon pursues Isabel and Margaret Burnets, his daughters, as heirs of line, and Farquharson of Invercauld, husband of the said Isabel, to denude in his favour in terms of their father's tailzie.—*Alleged* absolutor, *imo*, Because the pursuer has not sufficient title, being only served heir to Sir Alexander, whereas he is not the next immediate substitute to Sir Alexander, but only *secundo loco* to Thomas the eldest uncle, whom he cannot pass by; and he being debarred, so is his substitute.—*Answered*, Thomas had but *nudam spem succedendi*, and that being evacuate by the revocation, Allagevan's *separatum jus succedendi*, as next in the tailzie, takes place.—*2do*, *Alleged*, Monboddo or Allagevan can pretend to no right by virtue of the bond of tailzie, because Sir Alexander, in his own lifetime, did wholly revoke the same; for proving whereof the foresaid declaration of revocation, in 1688, being produced, a great debate arose, whether it was a total revocation of the whole tailzie, as to all the members substitute therein, or only partial, in so far as concerned Thomas, the first substitute, and his heirs.—Monboddo *contended*, It was but partial, on these grounds, *imo*, That the *enixa defuncti voluntas* is evident, that his estate should go to heirs-male, that his memory might not be swallowed up by daughters, *quæ in aliam transeunt familiam*. *2do*, The narrative of the revocation explains the defunct's meaning, that he intended to exclude none but Thomas, to whom he gives an *elogium* of his unworthiness and undeserving; but does not express the least discontent against any of the rest; *ergo* no mutation of his will can be

presumed *quoad* them. 3<sup>tio</sup>, His obligation to tear his name from the tailzie was no more but a resolution, which he seems to have altered and deserted; for he lived six years after that, where he had every day an opportunity of doing it, if he had pleased, and did it not; neither can any man properly oblige himself to himself. 4<sup>to</sup>, The subsequent clauses shew he never designed a total revocation; for then it would have been ridiculous and inconsistent to name provisions to his daughters; for they were to succeed to all; so the heirs of tailzie behoved to be the persons burdened with the payment; *ergo*, the tailzie subsists *quoad* the subsequent members thereof. 5<sup>to</sup>, All testaments and settlements of estates are so favourably to be interpreted, *ut actus potius valeat quam pereat*, especially where the defunct *plus dixit et minus voluit*; in which case lawyers use always *interpretationem restrictivam*; as here, his concern against Thomas, the first heir of the tailzie, to exclude him, makes him engage, in strong and comprehensive words, to cass, annul, and tear the tailzie; whereas by the *causa finalis* it is plain he designs no more but to revoke it *quoad* Thomas, and never intended that *ejus malum meritum* should infect or corrupt the rest. And *Mantica de conjecturis ultimarum voluntatum*, lib. 2. tit. 15. et lib. 3. tit. 5. is clear, that *pro sustinendo testamento verba possunt improprissime sumi, et sensus magis quam verba amplectenda*. 6<sup>to</sup>, The heir-male and of tailzie urged he had the common law on his side, l. 2. et 3. *D. de his que in testam. del.* where one is excluded, *illius heredis malum meritum* does not prejudice the rest. And so Bartolus and Gothofred expound it; and the last of these laws is a decision of the Emperor Antoninus sitting in judgment, and, upon a hearing, determines with the advice of lawyers, his assessors: And Julius Clarus, § *Testamentum quest.* 96. is of the same mind: And Cornelius Van Eck, the famous professor of law presently at Utrecht, has, on stating the case to him, as betwixt Titus and Sempronius, in October last, given his opinion, that the defunct has not designed a total revocation, but alienarily as to the person of Thomas, named *cum elogio*, which they produce.—*Answered* for the daughters, heirs of line, That the case was *questio de voluntate defuncti*, and though the paper was not accurately drawn, yet it contained plain evidences of a total revocation: For, 1<sup>mo</sup>, It declared all his former tailzies to make no faith, and obliged himself to tear his name therefrom, which clearly demonstrates what was his meaning and intention at that time; for if he had actually taken his name from the tailzie, where would the right of this heir now pursuing been? 2<sup>do</sup>, It is acknowledged on all hands, that it is effectually revoked *quoad* Thomas the first institute; now, that being granted, it must fall *in-toto*; for *heredis institutio est caput et fundamentum totius testamenti*. 3<sup>tio</sup>, It revokes the tailzie made in favour of Thomas's sons, and their heirs-male; *ergo*, the pursuer's right is revoked, for he is heir of tailzie to Thomas and his sons. 4<sup>to</sup>, Whatever the impulsive and procatartic cause of the revocation might be, yet the *causa finalis* is quite distinct therefrom; for though the motive inductive was Thomas's miscarriages to him, yet his final cause is to

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annul the tailzie, that his daughters may succeed. 5to, The arguments drawn from his provision in favour of his daughters is of no moment; for he had an old estate of ten chalders of victual, which necessarily went to the heirs-male; therefore to exhaust it, he burdened them with as much debt to his daughters as extended to the value, that so the whole might come to his daughters. 6to, As to the citations from the laws and doctors, it is answered, That Cujacius, Zoesius, and other interpreters, read that, *l. 2. D. de his quæ in testam.* otherwise, viz. *substitutus emolumentum non habebit*, and not *institutus*. And the words of this revocation are strong and plain, where no room is left to conjecture, as Cicero speaks, *Non oportet de ejus voluntate argumentari, qui, ne id facere possumus, indicium nobis reliquit suæ voluntatis*. And as to Van Eck's opinion, the case was not fully stated to him; neither is the response of a living lawyer so much to be regarded, they being oft impetrate by money or favour. Our records tell us, in the famous controversy betwixt Bruce and Baliol, anent their succession to the Crown, Baldred, Bisset, and others, went to Bononia in Italy, and other Universities abroad, and each of the parties got consultations in their favour; and the English chronicles observe the same in that extraordinary question started about King Henry VIII's divorce from Queen Catharine of Spain. Likeas Antonius Faber, *Cod. Saband. lib. 6. tit. 5. definit. 16.* gives a decision of the Supreme Court of Savoy, expressly contrary to Van Eck's opinion, and of more authority than his, where the expressing the name of one of the heirs did not restrict to that heir, but annulled the testament *in toto*. Much more was argued from presumptions on either side; and the vote being stated, Whether the declaration produced imported a total, or only a partial revocation? it carried by a plurality a total; for these LORDS thought, if he had designed it only against Thomas, and that it should stand to all the rest, it had been the easiest thing in the world to have said, that he recalled it as to Thomas allenary, or added a *salvo*, but prejudice of the tailzie as to the rest of the substitutes, nothing of which is done; and that the lineal succession is favourable, and tailzies odious, and so not to be extended beyond their precise words; though tailzies by the feudal law are nowise unfavourable, but rather tend to the support and preservation of ancient families.

On the 6th of January 1702, the LORDS having adhered to this interlocutor, upon advising a reclaiming bill for Monboddo, and answers, the tutor of Monboddo gave in a protestation for remedy of law to the Parliament, and took instruments on his appeal. See This case *voce* TAILZIE.

*Fol. Dic. v. 1. p. 147. Fountainball, v. 2. p. 127.*