No. 118. is. This decreet was given, the defenders being absent; for after they had compeared, and proponed some defences, viz. dilatories, that the reason of the summons was eiked, altered, and mended, in substantial points, in respect whereof the procurators for the defenders, viz. the King's Advocate and Stuart, alleged, that they ought not to answer, until they were of new summoned; and which allegeance was repelled, and a short day, viz. ten days, thereafter, was assigned to them to answer to the summons, and reason as it was mended; thereafter they passed from their compearance, and the sentence was given, the defenders not compearing.

Act. *Nicolson & Craig.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 430. *Durie, p.* 706.

1695. *December* 31. INNES *against* INNES.

No. 119.

In a competition betwixt an heir-male and an heir of line, an old tailzie being produced by the former, bearing, That the estate had always been conveyed to heirs-male, therefore the granter obliges himself to his father to provide the same, in like manner, to his heirs-male, &c. the Lords found this tailzie onerous, and so not revocable.

Fol. Dic. v. 2. *p.* 430. *Fountainhall.*

*** This case is No. 386. p. 11212. *voce* PRESCRIPTION.

1701. *December* 9.
BURNET of Monboddo *against* The HEIRS of LINE of SIR ALEXANDER BURNET of Craigmyle.

No. 120.
A person having executed a tailzie, and thereafter a revocation of it, binding himself to cancel the tailzie, it was found, that it was revoked by the posterior deed, altho' he had not cancelled it.

Sir Alexander Burnet of Craigmyle signed a bond of tailzie, in the year 1686, in favours of himself, and the heirs-male of his own body; which failing, to Thomas Burnet, his uncle, and the heirs-male of his body; which failing, to James Burnet of Alagaiven, also his uncle; and failing of him, to Robert Burnet, his third uncle; and the heirs-male of their bodies, in their order; which all failing, to his own nearest heirs-male whatsomever.

The said Sir Alexander did thereafter, in the year 1688, sign a declaration and obligation, at Edinburgh, narrating certain onerous causes and considerations known to himself, and which, for the respect he bore to his uncle under-written, as being his own so near a relation, and, lest the same should thereafter be reputed a reflection upon him or his family, he thought not fit to express, or make known to the world; therefore he altered, revoked, rescinded, and annulled a disposition or bond of tailzie formerly granted by him in favours of Thomas Burnet, his uncle, his sons, and their heirs-male, or any one or other of them, of the lands therein

specified, or any other lands or heritages whatsoever, declaring all dispositions, contracts, tailzies, writs, or securities, granted by him in favours of his said uncle, his sons, or their heirs-male, to be void and null, and obliging himself, immediately after his returning home to the North, to cancel, destroy, and tear his name from the same: And further, failing heirs-male of his own body, he thereby obliged him, and his heirs-male and of tailzie, to pay to his daughters the provisions therein specified, at certain ages, and to aliment, educate, and entertain them, till the terms of payment. No. 120.

Sir Alexander went home, and lived several years after, and did not cancel the foresaid bond of tailzie; but, both the said bond and declaration and obligation being found by him at his death, Monboddo, as heir to Alagaiven, the second uncle, claimed the succession by virtue of the said revocation, alleging, that the same did only revoke the bond of tailzie, in so far as was conceived in favours of Thomas, the eldest of them, and his issue; whereupon he serves heir of tailzie, and pursues the daughters to denude.

It was alleged for the daughters: That the tailzie was wholly revoked, in as far as albeit the disobligation of Thomas be only narrated, yet the bond of tailzie itself was simply revoked, without any limitation or restriction to Thomas, who, and his issue, was principally considered at the making of the tailzie; therefore, he had no consideration nor regard to the substitutes, as appears, not only by the words revoking, which are general, but likewise by the obligation to tear away his name from the same.

It was answered: 1*mo*, The narrative being with a particular regard to Thomas and his issue, the revocation of the tailzie implied a natural restriction to the persons that disobliged; and there is nothing insinuated, before nor after, to prejudge other substitutes; but, on the contrary, his constant resolution was to preserve his memory and family, which perishes, if the estate devolves to the daughters, and their husbands; for, in a testament, before he made the tailzie, he expresses his intention, that his daughters marrying, his cousins should succeed; and the narrative of the tailzie is, that the estate may remain with those descended of his family, who shall bear his sirname and arms, who may preserve the estate, and augment the same. 2*do*, In the same revocation he makes provisions to his daughters, failing heirs male of his own body, and obliges him and his heirs male, and of tailzie, to pay these provisions; and, if he had intended that his daughters should succeed *ab intestato*, he would never have obliged his heirs of tailzie to pay these provisions upon the very event of their succession. 3*tio*, As to the obligement to tear the tailzie, all that was still with regard to Thomas; and therefore when he went home, never did cancel the same. 4*to*, By the civil law, testaments were most favourable, and *in dubio* were always sustained; and several authorities were adduced, both from the civil law, as particularly Van Eck, to whom this particular case was stated in borrowed names, and who gives his opinion, that the revocation is only partial; and several citations were adduced from Mantica, to clear the favour of testaments; and Leg. 2. D. De his quæ in testamento delentur, Cancellaverit quis testamentum, vel induxerit, et si propter unum hæredem

No. 120. facere dixerat, id postea testamentum signatum est. The question is stated, what shall become of the testament? Is is answered, Si omnia nomina induxerat, ut proponitur ascripserat; autem id se fecisse, quia unum hæredem offensum habuit, multum interesse arbitror, utrum illum tantum fraudare voluit hæreditate, an vero causa illius totum testamentum infirmare, ut licet unus inductionis causam præbuerit, verum omnibus affeurit: Et si quidem soli ei ademptam volueri portionem, cæteris nihil nocebit inductio, non magis quam si volens unum hæredem inducere, invitus et alium induxerit; quod si putaverit totum testamentum delendum, ob unius malum meritum denegantur actiones.

It was replied: 1*mo*, Though the offence of Thomas gave the occasion, yet the defunct revoked the tailzie; and there is no need of conjectures where the words are clear; and if it were to purpose, there is greater evidence he designed his daughters to succeed; for he never did any thing in their prejudice, but the tailzie; and, by a former testament, he expressed his design, that they should succeed, and the lands he purchased himself were provided to heirs whatsomever; and the narrative of that tailzie proceeds upon the disobligation he had received from his only brother, whom he excludes *cum elogio;* yet he passes by the daughters by that tailzie, without taking the least notice of them; and in the same way, upon a disobligation from his uncle, he annuls the tailzie, without mentioning the substitutes, and brings the succession back to its natural course. 3*tio*, The provision in favours of the daughters was for this good reason, that a part of his estate had been acquired by his father to the heirs male, which had been overseen at the making of the tailzie, and he obliges himself, and his heirs male, and of tailzie, to pay these provisions, of purpose to burden the heirs male above the value of the succession, and thereby to exclude them effectually, which was a proper method, especially considering that his writs were not at hand; so that he could not frame a bond of tailzie. And, however the whole matter might have been done in a more clear and plain way, it is sufficient, that what he did, does clearly express his intention, and is effectual in law. 4*to*, The obligement to tear his name, puts the point beyond question; and it is no matter whether he cancelled the tailzie or not; for, *in quæstione voluntatis*, it is sufficient to clear his design and meaning at the time; and his obligment to tear his name from the tailzie demonstrates, that he designed it to be as effectually void and null, as if his name had been actually torn from it; and his will so expressed, does entirely annul the deed, *ipso facto*, and being once null, it could never revive, without a positive deed.

As to the citations, it is answered: 1*mo*, There is a manifest difference betwixt testaments and tailzies; for testaments were most favourable by the civil law, and tailzies, which cut the natural line of succession, were unfavourable with them; and, even by the civil law, imperfect deeds, in favours of descendants, did annul formal testaments, in favours of strangers. And as for the opinion of Van Eck, it was upon the application of a party: and as to the text in the civil law, Lex 2, D. De his quæ in testamento delentur, the case there proponed is quæstio voluntatis. If it appeared, that the testator did, upon the account of

one of the heirs institute, not of design, but as by chance, the induction went no further than the true design; and it is remarkable, that, in the case there stated, post inductionem tetamentum signatum est, whereby it might be presumed, the testator intended not a total nullity, else why was he careful to complete an imperfect deed? No. 120.

The Lords found, That the tailzie was wholly revoked by the posterior declaration and obligement."

Dalrymple, No. 28. p. 35.

*** Fountainhall's report of this case is No. 38. p. 2284. *voce* CLAUSE.

1713. *June* 23.

WILLIAM SCOT of Raeburn and His TUTORS *against* WALTER SCOT of Highchester and His TUTOR.

No. 121.
A tailzie, while it remained in the terms of a personal right, not perfected by charter and sasine, especially being in favour of heirs to be begotten, was found revocable by the maker of it, without consent of the first institute.

In the year 1686, the deceased Sir William Scot of Harden made a tailzie of his estate in favours of himself, in life-rent, and to Sir William Scot, elder, of Harden, his father, in fee, and, failing of him by decease, to the heirs-male lawfully to be begotten of his own body; which failing, to Robert Scot, his brother-german, and the heirs-male of his body; which failing, to the heirs-male of Sir William Scot, the elder's, body; which failing, to the heirs-male of Raeburn's body. Which tailzie was made with the ordinary prohibitions and irritancies, and particularly, "That it should be nowise lawful to the said Sir William Scot, elder, and the heir of tailzie and provision above-written *successivè*, in no time coming, to alter or infringe the same, nor to sell, annailzie, dispone, or put away, &c. And in case the said Sir William Scot, elder, or the heirs of tailzie above-mentioned, should happen to contravene, then, and in that case, the deeds done by them should not only be null, but they and their descendants should lose and forfeit their right, and the estate devolve upon the next heir of tailzie." This bond of tailzie was registered, July 15, 1691, and inhibition served thereon, at the instance of some of the heirs of entail. In the year 1698, young Sir William Scot, with consent of old Sir William, revoked the first tailzie, before it was completed by infeftment, and made a new tailzie, wherein Highchester is brought in before Raeburn, and thereupon Highchester is served heir, and in possession.

William Scot of Raeburn, to whom the estate of Harden would have now fallen by the first tailzie, pursued reduction and improbation of the second, upon this ground, That the first tailzie being perfected by all the solemnities of registration and publication, and containing no reservation to alter or revoke, but, on the contrary, several special reservations of power to provide particular sums, in case of a second marriage, &c. the revocation thereof, and the new tailzie, are entirely void and null; especially considering, that Sir William Scot, younger, stood obliged, in the first tailzie, to resign to himself in life-rent allenarly, where-