

No 9.

case; for if he had designed this tailzie only to stand in case he should die abroad and never return, what need was there of so anxious a care to make both an institution and substitution; he could not imagine, in the short time of his stay abroad, there was need to provide against that failure; and Stair, 14th November 1667, Henderson, *voce* PRESUMPTION, (which Dirleton has recorded in Latin,) shews a disposition of this kind was sustained valid; and his *perseverantia animi* appears, that when Mr Lesly returned to Scotland, he neither cancelled nor revoked this disposition, which he easily might, if he had designed the alteration of his succession; neither did he, in this disposition, or at any time, shew any regard to his cousin, Artindilly's Lady, who now competes. THE LORDS considered this was *quæstio voluntatis*, and a case of divination *de conjecturata mente defuncti*, where the presumptions were pregnant on both sides; but the plurality found the tailzie yet obligatory, and did not become void by his return; and there was no weight in that topic, that he had made no provision for children of his own body, for all such deeds are *per supervenientiam liberorum* sufficiently revoked in law, *l. 8. C. revoc. donat.* and Mr Lesly had a power to alter at his pleasure, if he had thought fit.

*Fol. Dic. v. 1. p. 250. Fountainball, v. 2. p. 45.*

1709. January 22.

MUIR against BERTRAM.

No 10.

ALEXANDER BERTRAM of Nisbet having got considerable means with Grizei Muir, his wife, at her desire he grants a bond to Rabina Muir, her sister, and some other of her relations, for 900 merks, payable at her death. Rabina pursues Bertram for her share of the legacy. He *alleges*, That the bond had a power and faculty to his wife to revoke, in case she met with any ingratitude, disobligement, or incivility; and *ita est*, she revoked and recalled Rabina's part; and, by a writ under her hand, bestowed it upon others. *Answered, Non relevat*, unless she had expressed the causes of ingratitude moving her to that alteration, which she neither has nor could do, but was imposed upon. *Replied*, She was the absolute best judge of that herself; and though remuneratory on the husband's part, yet it was *donatio mortis causa quoad* the wife, and so revokable at pleasure.—THE LORDS being equally divided, found, by the President's vote, they behoved to condescend upon and prove some cause of ingratitude or provocation, otherwise they could not sustain her revocation. Yea, a parent's exheredation of a child in some cases must be done *cum elogio, ut justa et legitima exheredationis causa nominatim exprimatur*.

*Fol. Dic. v. 1. p. 250. Fountainball, v. 2. p. 483.*