

The Lords here considered that the intromission was very small, and much of it applied to her husband's funeral and maintaining the family till the next term; and that the creditor was negligent, two years being elapsed before he inteded his pursuit, and had suffered her to establish the title by confirmation before he interpellated her by citation; therefore, by a scrimp plurality of seven against six, they found her confirmation sufficient to purge the passive title, and found her only liable *in valorem*.
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1705. *February 20.* ROBERT LESLIE, and DICK of GRANGE, *against* KATHARINE DICK and JAMES CHRISTIE of NEWHALL.

CAPTAIN Robert Leslie, and Dick, now of Grange, against Katharine Dick, and James Christie of Newhall, her husband. Sir James Leslie having acquired the right of sundry infeftments of annualrent out of the lands of Grange, belonging to Dick, his brother-in-law; he, in 1697, tailyied these rights to the heirs of his own body; which failing, to James Dick, Grange's second son, procreated by him with the said Sir James's sister, and the heirs-male of his body; which failing, to the said James Dick his heirs-female, the eldest succeeding without division; all which failing, to the said Sir James's heirs and assignees whatsoever. Both Sir James and James Dick of Grange died without heirs of their body; whereon Katharine Dick, Lady Newhall, only sister-german to the said James, claims the succession as his heir-female, and took out briefes for serving; but, the same being stopt, the Lords heard the point of right debated.

It was *CONTENDED* for Captain Leslie and Dick of Grange,—That Sir James's meaning was very clear, that James Dick's *heir-female* was not his heir-female whatsoever in the general, but only his heir-female procreated of his body, (though these words, by the carelessness and inadvertency of the writer, are omitted.) For, *1mo*, The narrative of the tailyie must regulate and expound his meaning: Now, there he expressly mentions James Dick, and the heirs of his body, which comprehends either male or female descending of his body, but will not extend to his collateral heirs-female. *2do*, To interpret these words, "his heirs-female," in general, whether descended of his body or not, were to make him do a deed both incongruous, absurd, and irrational; for, by that sense, if the said Katharine Dick, Lady Newhall, died without issue, then Sir James Leslie's estate had devolved to her sisters-consanguinean, daughters to Grange, by a former marriage, who were not a drop's blood to Sir James Leslie, but wholly strangers to him: and can any body think he was so ridiculous and senseless, that, failing of James Dick, his sister's son and his children, he would put his estate by all the rest of his sister's children, (she being the bond, *nexus, et copula*, tying his affection to them,) whereof there were three or four behind, and that ever he intended to let his estate go to Grange's children of his first marriage, with whom he had no sort of relation any manner of way.

ALLEGED for Katharine Dick, Lady Newhall,—That, in tailyies and last-wills, the thing to be inquired is, What was the defunct's will and pleasure? and, if that be clear and apparent from the words, without ambiguity or dubiety, there is no room left for descanting whether it was the most rational, just, and ex-

pedient way of settlement ; seeing, by the laws divine and human, the testaments of defuncts should be free,—*l. 1, C. de S. S. Eccles.* and by the *L. L. 12, tab. uti paterfamilias legasset de re sua, ita jus esto.* And if judges had liberty to add words under pretence of supplying and making up the sense, this were not to interpret testaments, but to sit down and make them what the defunct never intended : and how oft have we seen, that, when the last wills of wise and sagacious men have been first divulged and made public, (as in the case of the Duke of Lauderdale, the Lord Whitelaw, Brigadier Richard Cuninghame, and others,) the first reflection that naturally occurred was, What meant they by such an extraordinary unusual action ? but the answer is, such was the defunct's pleasure, and that must stop our mouths ; for what are we concerned to ask, whether the settlement was rational or not, ordinary or not, probable and defensible or not, natural or not ? If the nomination be distinct, plain, and intelligible, though never so surprising, that must silence all objections. But, *2do*, There were reasons enough to move Sir James Leslie to what he did : for he had no regard to his brother, who had disoblged him ; and as to his sister's eldest son, now pursuing, he knew him to be an idiot, and incapable ; and preferring his second brother to him, shows he never intended to have him to represent him ; but for his sister Katharine he had a particular kindness, and gave her a legacy beside this *spes succedendi* ; and the words of the nomination in the tailyie are plainly in her favour, she being James Dick's heir-female, (he dying without children of his own.) And what if the tailyie had stopt there and gone no farther, Would not she have excluded an *ultimus hæres*, and been preferred to the fisk ? So the words can take effect without any supplement or addition : The words " heirs of his body " are both in the clause preceding that of the heir-female, and in the subsequent ; and, therefore, being omitted in the middle branch, it must be rationally supposed that they have been *de industria* left out. And words must be taken in their natural and popular signification, and not to be detorted and wrested without necessity. And the Lords may remember how little latitude they have allowed themselves in such interpretations ; for in the tailyie of Burnet of Craigmyle, debated betwixt Montboddo and the heirs of line, though he only declared his dissatisfaction against his uncle, the first institute, for his ingratitude, yet, in regard he declared in writ he would cancel that tailyie, the Lords found it a total revocation, though he never cancelled it, but it was lying entire beside him at his death : Which shows how tender the Lords have been to recede from the precise words of the testator. And this is farther confirmed from that notable law, *l. 7, sec. 1 et 2, D. de Supellect. Legat.* Where a *paterfamilias* hath a peculiar notion what fell under the name of household furniture, Tubero thought the master's opinion was to be followed ; Servius argued, that the vulgar sense and estimation of the word among the generality of mankind was to be followed as the rule and direction in that case ; and Celsus approves of Servius's opinion, though *prior et potentior est mens quam vox dicentis* ; et *l. 12, et 24, D. de Reb. Dubiis, in ambigua oratione commodissimum id accipi quo res magis valeat quam pereat.*

ANSWERED for Dick of Grange,—That this chimerical extension of an heir-female is nothing but an invention of lawyers, which Sir James Leslie never dreamed of. And " heirs of James Dick's body " being mentioned both in the preceding and subsequent clauses, it must be holden and presumed as repeated here ; conform to that rule of law, *Quæ in præfationibus concipiuntur, etiam in*

stipulationibus repetita creduntur,—*l. 134, sec. 1, D. de Verb. Obligat.*; and to interpret it otherwise is but *verba captare et corticem sequi*, contrary to *l. 29, D. de L. L. l. 5, C. eod.* and is justly called *sæva verborum prærogativa*: And to interpret “heirs-female” to be those not of his body, is as absurd, in law, as to argue from the words, “*Hoc est corpus meum*,” a transubstantiation, is a paradox in divinity; *et l. 50, sec. ult. D. de Legat. 1*, lays down a good rule of interpretation, as first *consuetudo patrisfamilias*, then *mos regionis*, then *charitas et necessitudo legatarii, et verba quæ præcedunt et sequuntur*; *et Mantica de Conjecturis Ult. Voluntat. Lib. 8, tit. 11, sec. 6, ubi hæreditas vadit de hærede in hæredem, semper intelligitur de hæredibus sanguinis et descendantibus*; and Bartolus, *ad l. 29, D. de Lib. et Post.* says, *Appellatio hæredis in odiosis est restringenda, aliter in casu favorabili*; *et verba sunt improprianda ut evitetur sensus absurdus*; as necessarily would follow here, if heirs-female signified his heirs-female whatsoever.

The Lords looked on this as a case of divination, and a *quæstio voluntatis*, and saw a plain conflict and *pugna* betwixt the letter of the words as they stood and the true sense and meaning of the speaker; and, by a plurality of seven against six, found they ought to supply nothing, but take them as they stand; and found the succession devolved to Katharine Dick, his heir-female, and the clause was not to be restricted to the heirs-female of James Dick’s body. But there were two or three Lords absent at this vote, who were of the contrary opinion.

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1705. *February 28. JAMES TAIT against SAMUEL GRAY, FISCAL of EDINBURGH.*

JAMES Tait, servant to Mr John Falconer, younger of Phesdo, against Mr Samuel Gray, procurator-fiscal to the Town of Edinburgh. Some English stockings and silk stuffs, which are prohibited by the Act of Parliament 1700, being seized; and, in carrying them away, this Tait and others assaulted the town-officers who were carrying them, and took away a pock, containing a quantity of these stuffs, from them: whereon Tait being apprehended and imprisoned, he gave in a bill of suspension, complaining he was illegally incarcerated, without a previous subscribed information; and they had refused bail, contrary to the late act for personal liberty, and had taken the officers as witnesses against him, though inhale; seeing, if the goods were either lost or embezzled by their fraud or negligence, they became answerable therefore.

The Lords considered, that these acts against imported prohibited goods did not receive punctual and rigorous execution, but their transgression was much connived at; and lately, when such goods were seized in Captain Charters’s custody, that he run with his sword at some of the manufactory-men; yet this riot was not resented, but stifled; therefore the Lords would not pass his bill of suspension, without he found sufficient caution to pay the damages, and undergo the censure that should be inflicted on him, if found liable.

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