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to be contracted on death-bed, and his disponing to a stranger, with such a burden, viz. that though the reserved faculty to burden might be effectual against a stranger, who could ascribe his possession to no other title, it cannot be effectual against the heir, who can repudiate the disposition and enter by a service; seeing *nemo cavere potest, ne leges in suo testamento habeant locum.* And the acceptance of the disposition with possession by virtue thereof, can be no homologation of the bond; because homologation is never extended to what the party did not know at that time, Tailfer *contra* Maxton, *voce* HOMOLOGATION. Neither doth homologation of an article in a writ, homologate others of a different nature, Primrose *contra* Dun, IBIDEM. Nor takes it place where the deed is ascribable to other causes, Barns *contra* Young, IBIDEM; and *ita est*, That the defender's acceptance of the disposition is ascribable to a design of possessing the estate with the legal burdens made in *liege poustie.* Which method he could hardly omit; seeing he could not serve heir to his father who died not last vest and seased. For the defender, when an infant, was infeft upon the disposition by his father before his death; and he could not reduce an infeftment in favours of himself, who was *alioqui successurus.*

THE LORDS found the defender's accepting and bruiking by, after his majority, a disposition with the burden and reservation of provisions made, or to be made, to the younger children, was a homologation of the bond pursued for, and excluded the reason of death-bed: Though it would not hinder the defender to found upon the nullities of wanting writer's name and witnesses, or other reasons of reduction, such as force or fear; and therefore decerned against him, as liable to pay.

Forbes, p. 93.

1705. *December* 13.

GILBERT LIVINGSTON *against* MARGARET MENZIES, and the HEIRS of LINE of SALTCOATS.

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A person made a tailzie in favour of some others, failing heirs of his own body, but bearing this reserved faculty, 'that it should be lawful to him *at any time during his lifetime*, to alter the said tailzie,' which *de facto*, he so far did, as to make a new tailzie on death-bed. The Lords

GILBERT LIVINGSTON serves himself nearest heir-male of George Livingston, last Laird of Saltcoats, who deceased in October 1704, and pursues a reduction of a bond of tailzie, made by the said George in favour of the said Margaret Menzies, his sister's daughter, as done *in lecto ægritudinis*; at least the substitutions, material clauses, and some marginal notes, being added a few days only before his death. *Alleged*, You have no title, right, nor interest to pursue this action, as heir-male, because the estate of Saltcoats, for many generations, was provided to heirs whatsomever; and this was never altered till George, in his contract of marriage with Beinston's daughter, in anno 1655, with consent of three of his curators, (being then minor), provided the estate to the heirs-male of the marriage; and failing of them, to his other heirs, passing by his daughters of that marriage; and upon which tailzie, Gilbert now founds his right;

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found that he might, on death-bed, annul the first tailzie.

which tailzie cannot subsist in law, being done by a minor (though authorised) to the lesion and prejudice of his heirs-female, and contrary to the tenor of the old infeftments, which a minor could not alter; especially considering, that one of his three curators consenting was his own uncle, who, by bringing in himself after the heirs male of the marriage, was *auctor in rem suam*, and acting for himself, which a curator cannot do. *Answered*, The making a tailzie to heirs-male being for preservation of the sirname, is a rational deed, and followed in most of the families in Scotland, and so may be lawfully done by a minor; and is no lesion, seeing there are competent tochers provided in the contract to the daughters; and he was legally authorised, 1*mo*, Because Mr Patrick his uncle's concurring as one of the curators, was but a *spes remota*, and could be no temptation. 2*do*, There are two others subscribing with him, which must be reputed a quorum, unless it be proven there were more curators; and Mr Patrick's joining with them signifies nothing, seeing *utile per inutile non vitiatur*; and by the common law, *l. ult. C. de integr. restitut. minor. is qui jure communi utitur, non potest videri circumventus; et l.* 116. *D. de reg. jur. lædi vel decipi non videtur qui jus publicum sequitur.* So he who makes a tailzie in his contract, conform to the laws of the land, cannot be reputed as lieged. *Replied*, Minors, with consent of their curators, may do all deeds of administration, but not what imports absolute dominion; but, to cut the line by a tailzie, is an alteration of the natural succession, and a donation, none of which is allowed to minors. The Lords considered this had been often debated, as in Nicolson's case, (*voce* Minor), and others, if a minor can break a tailzie, or make a new one, and was never decided; therefore, they waved the point at this time, and proceeded to the other question in this debate, viz. 1*mo*, If the said contract 1655 was prescribed, seeing neither infeftment nor any thing else had followed upon it by the space of fifty years? *Alleged*, That the heirs-male, till the case now existed, were *non valentes agere*, and against such no prescription runs. *Answered*, The obligation to perfect the right did immediately arise, though the other may change it at his pleasure. The Lords did not decide this, but generally thought it was not prescribed conform to the practique, Duke of Lauderdale *contra* Earl of Tweeddale, *voce* Prescription. Then they proceeded to the third point, viz. the heir-male's reason of reduction of Alexander's disposition to George, his younger brother in 1680, whereby he alters the tailzie to the heirs-male made in his father's contract of marriage in 1655, and brings it back again to the former channel, and provides it to George's heirs whatsomever; which was, the said Alexander's fatuity and furiosity at that time, whereof a large condescendence was made, and so he could give no consent, nor legally break his father's tailzie; *et resoluto jure dantis, resolvitur et jus accipentis*. *Answered*, Though he had no great judgment, yet every weakness will not annul a deed, especially where it is so rationally done as this was, *in præsentia amicorum*, his nearest friends being witnesses; and the *judicium centumvirale* at Rome sustained Tuditanus's testament, though notourly known

to be furious, in regard nothing of folly appeared in his will. And now to inquire *de statu defunctorum*, after so long a time, is *pessimi exempli*, and dangerous; and his brother, who only could quarrel it, never did it, but bruiked and possessed by it, though he had right *utroque jure*, both by the disposition, and *ab intestato*. Some of the Lords urged to have a trial before answer, by giving a mutual probation of his condition at that time; the one to prove madness, and the other lucid intervals; but the plurality repelled the reason of reduction, and sustained the disposition, whereby the lands returning again to heirs whatsomever, Gilbert's title as heir-male was cut off. See the 25th of July 1672, Gray*. Alexander's disposition to George was pleaded as equivalent to a special service as heir to Alexander, and an infeftment. But this notion was objected against as a strange sort of transubstantiation, by a substantial transfusion and change of one right to another of a quite different nature, which were to make accidents subsist without a subject, and implies a contradiction. No 69.

On the 1st February 1706, a protestation for remedy of law against this interlocutor, and those pronounced since, was given in for the said Gilbert Livingston.

1707. *February* 25.—GEORGE LIVINGSTON *contra* Mrs Margaret Menzies, in in the competition mentioned *supra* for the estate of Saltcoats, the last Laird having, in August 1704, made a tailzie, failing heirs of his own body, in favours of James Aikenhead, son to Alexander Aikenhead writer; and failing him, to George Livingston his uncle; James the first institute being lately dead, George the next substitute claims the estate; against whom it was *alleged* for Mrs Menzies, that the tailzie founded on bore this express faculty of reservation, That it should be lawful for him, at any time during his lifetime, to innovate the said tailzie at his pleasure, and that *de facto* he had exercised this power, by making a new tailzie in favour of Mrs Menzies, his niece, and by writing on the back of Aitkenhead's and Livingston's tailzie, an express revocation, narrating his faculty, and declaring he had rescinded, voided and annulled it, except only to validate his tailzie of that date to Mrs Menzies. *Answered*, This reserved faculty being to alter and innovate only at any time in his life, must be understood *civiliter*, and not *judaice*, and could only empower him to revoke it in *liege poustie*, when he was in health, and not by a deed on death-bed; where it was intended, that he might do it at any time, though *in agone mortis*, lawyers had invented a clause for it, viz. that it should be lawful for him to change, alter and innovate, *etiam in articulo mortis, et in lecto ægritudinis*; which words not being adjected to this faculty, he could not revoke it, nor by a new tailzie alter and break it on death-bed, as it is acknowledged his posterior tailzie and revocation were, being on the 13th of October 1704, within a few days of which he died, and never went to kirk nor market, and had the diseases on him; whereas, at the signing of Aikenhead's and Livingston's tailzie, he was in perfect health, and had not contracted the disease whereof he died, but went

* Gray against Gray, *voce* FEAR.

No 69.

to kirk and market, and outlived sixty days after it, so that he satisfied both the ancient and recent laws of death-bed; and it appears the Lords have made a distinction betwixt these two clauses; for, where it bore only a power to alter during life, they found this could not be legally exercised on death-bed, unless the clause had also added these words, *etiam in articulo mortis*, and so it was decided, 25th February 1663, Hepburn of Humbie *contra* Hepburn, No 1. p. 3177.; and though Stair observes, that the case was transacted betwixt the parties; yet he adds, the LORDS thought their opinion agreeable to the terms of law. And the like was found, on the 24th July 1672, Cant *contra* Porterfield, No 2. p. 3179.; and 22d June 1678, Birnie *contra* Polmais and Brown, No 58. p. 3242.; and the law of death bed is amongst the ancientest of our constitutions, and ought to be kept so inviolably sacred, as not to be touched without shaking the foundation of our securities, and *l.* 39. *D. de manum: testamento:* Liberty, though most favourable in itself, yet being conferred *in tempus inhabile*, when he ceases to be master, cannot be exerced; because, *devenit in eum casum a quo incipere non potuit;* even so here, Saltcoats *fecit quod non potuit, et non fecit quod potuit;* and if the first clause 'of any time in his life,' had been sufficient to authorise him to alter it on death-bed, our lawyer would never have excogitate that new clause and addition, *etiam in ipso mortis articulo.* And in a late case, Davidson *contra* Davidson, No 67. p. 3255. in 1688, the Lords did not so much as allow an alteration on death-bed, though contained in a charter under the Great Seal, *quia nemo ita cavere potest, ne leges in suo testamento locum habeant;* nor can the King give a power to dispense with so public a law. *Replied* for Mrs Margaret Menzies, That, at the beginning, when tailzies were not fully understood, the Lords were strict in the interpretation of these words, 'at any time in his life;' but, by the current of decisions since that of Humbie in 1663, they have always extended these words to the tailzier's whole natural life, *vita* being only *spiraminis fruitio, et morti opponitur;* and *l.* 18. § 1. *D. de manumissis testamento*, says, *Cum moriar, liber esto, totum vitæ tempus complectitur.* And so it was found, 28th June 1662, Dame Margaret Hay *contra* Seaton, No 61. p. 3246.; 22d June 1670, Douglas *contra* Douglas, No 6. p. 329.; and in February 1686, and 1687, it was renewed, Brown *contra* Congalton, No 65. p. 3251. also No 66. p. 3253.; and lately, on the 8th February 1706, Bertram and Kennedy *contra* Veir, No 68. p. 3258. And Lord Dirleton, in his Doubts and Questions, page 198, 199. explains LIFETIME, of a natural life, and that a man can qualify and burden his gift as he pleases; and if you accept it, you must take it *cum onere*, and never quarrel it, whether done on death-bed, or not. THE LORDS, by plurality, found, that Saltcoats might, on death-bed, recal and annul Aitkenhead's and Livingston's tailzie; though his faculty bore no more but the words, 'at any time in his life,' and wanted the additional clause, *etiam in articulo mortis*, thinking them only exegetical, and an extension of style, for better clearing the sense, but did not find them necessary; and that these words, 'any time in his life,' were opposite to death, and not only to sickness and death-bed; and that it was too restrictive a sense to interpret

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them only of the state of health and *liege poustie*, or *legitima potestas*; but that they comprehended the tract of our whole natural life to the last moment thereof; though this exposed men in their greatest infirmities and weakness, both of body and mind, to be circumvened and imposed upon, they coming best speed at that time, who are nearest, and always about them when dying, craving it as a reward of their services and other officious flatteries; *potiores erunt qui tunc sunt moribundo propiores et presentiores.*

1707, *June* 17.—In the competition for the estate of Saltcoats betwixt George and Gilbert Livingstons as heirs male, and Mrs Menzies, his niece, as heir of tailzie, mentioned 25th February 1707,—The Lords having allowed a mutual probation, before answer, anent the last laird's condition when he made this tailzie, whether it was a free voluntary deed; or if he was imposed upon by undue solicitations and importunity, by fraudulent insinuations when he was *moribundus*;—Gilbert adduced two witnesses, viz. James Aikenhead, son to the writer to the signet, and Mr John Ogilvie, schoolmaster at Aberlady, against both whom Mrs Margaret made the following objections: 1*mo*, against Mr Aikenhead, that he was one of the members and substitute branches of the tailzie, and so could gain by supporting his own tailzie, and deponing against the other. *Answered*, He was named at a very remote distance, and many are placed before him; and to shew how unconcerned he was, he offers under his hand to renounce his hopes and apparency of succession. The Lords thought this offer very suspicious, especially in an estate tailzied under irritancies, where they cannot well renounce to the prejudice of their posterity; and therefore sustained the objection, and repelled the witness. The objection against Ogilvie, the second witness, was, that after his citation, he was heard say that the deceased Saltcoats was owing him some fees, aud he would depone best for them that would pay him what was owing. There was little doubt as to the relevancy of the objection; but the question arose *de modo probandi*; and Mrs Menzies offered to prove by witnesses who heard him utter these words, and which should be the rather admitted that he was *malæ famæ*, and under no good repute? *Answered*, The emission of words, which may be easily mistaken, cannot be proven by witnesses; for, at this rate, there may be a *progressus in infinitum*; for as you reprobate my witness by witnesses, so I shall object against yours, and offer to prove by other witnesses; and so it shall never come to an end. *Replied*, This case being debated in the divorce pursued by Whitford of Milton's Lady, against Him, in 1671, the Lords allowed such objections to be proven by witnesses, and only required they should be *omni exceptione majores*. See *voce* WITNESS, and Sir George Mackenzie's pleadings, page 78.—but there a reprobator was expressly craved and reserved. THE LORDS here refused to admit witnesses for proving this objection, but only sustained it by his oath; but to refresh and convince him, they allowed the witnesses to be present at his deponing, whether he had not that expression, which was an evident prodition and selling of his testimony, if he

No 69. said so; and therefore granted a diligence for citing them to be confronted with him.—*See* WITNESS.

December 31.—The case, mentioned 25th February and 17th June 1707, betwixt George Livingston and Mrs Margaret Menzies, about the estate of Saltcoats, was this day advised; and the first point determined was about the cancellation of the sidescription of the first sheet of the first tailzie, which the last laird made in August 1704, in favours of James Aikenhead, and George Livingston; and the second point was anent the import of his revocation wrote on the back of that tailzie in October thereafter, when he was on death-bed, annulling it in so far as concerned the substitutes therein, except Mrs Menzies, his niece, and declaring it should stand good and subsist for supporting the said tailzie made in her favours. The first point stood thus: He was induced by Alexander Aikenhead to make a tailzie, wherein, after the heirs of his own body, James Aikenhead, son to the said Alexander, is next substitute; then George Livingstone, his own uncle; then Hamilton of Bardowie, a remote relation, and so forth, with this provision that it should have no effect during his lifetime, and that it should be lawful at any time during his life to alter, innovate, change or make the said tailzie void or null, whereanent a declaration under his hand should be a sufficient document. The rumour of this deed going abroad, many applied themselves to Saltcoats, and represented the unreasonableness of it, to pass by his two sisters and their heirs, and give away his estate to Mr Aikenhead, a remote friend. Upon this remonstrance, he did tear away his name from the first juncture of the sheets of the first tailzie, which bore the dispositive part, with the members of the tailzie, and a part of the lands, and left all the rest of it entire; and afterwards by advice made a second tailzie in favours of Mrs Menzies, and wrote a revocation on the back of the first tailzie, with the reservation foresaid; but both these were on death-bed. James Aikenhead, the first member of the first tailzie dying, George Livingston, the next immediate substitute, claims right; against which both Mrs Margaret Menzies, and Mr James Bailie's wife, the other aunt, objected, 1*mo*, It was cancelled in the first sheet. 2*do*, Was revocable, and *de facto* revoked. *Answered* for George, The tearing away the first sidescription, and the rest standing entire, can never annul that tailzie, unless it were clearly documented and instructed that he did it *eo animo* to make his succession devolve *ad hæredes suos ab intestato*, his aunts, which he never intended, having oft declared they should never have a fur of his land, for they had both disobliged him; and there is neither law nor fixed custom for sidescribing, so *esto* it had wanted all the sides, yet being subscribed at the bottom, it would have been valid and sufficient; and though it is a laudable practice, that sheets may not be altered nor cut, and to prevent the putting in of new clauses, yet when the Lords made the act of sederunt, 8th July 1691, ordaining the margins to be subscribed, it only relates to judicial acts and diligences, but not to voluntary rights and con-

tracts, and so *casus omissus habetur dedita opera omissus.* And the act of parliament 1696 for writing decreets book-ways, and that each sheet be signed as margins use to be, imposes no necessity for subscribing margins, for *id non agebatur*, but only is mentioned *exempli gratia.* Next, if he had designed to cancel it, it would have been easy for him to have torn away the bottom and last sheets, which would have been the most effectual way, or to have scored his whole subscriptions, or cast it into the fire; but he did nothing like a settled, composed, deliberate will of destroying it; only being influenced and pushed, he takes away the first, and here he bethinks himself and stands; and the Roman law is very clear on this head, if there be any induction or deletion done *subito vel incaute*, it does not annul the deed *l.* 12. *l.* 30. *C. de testam. l.* 1. § *ult. C. de his quæ in testam. del.* where the *onus probandi* of the design lies on the impugner of the writ. *Replied*, Where a writ is still in the granter's hand undelivered, and never perfected by resignation or infeftment, any declaration of his mind and purpose to alter it is sufficient; and what stronger evidence could he give than to rive away his subscription from the first sheet; and so all the rest of the paper is a tail without a head, and can serve for no use, but to put tobacco in it. Yea, since they have appealed to the common law, even thither they shall go; for the Romans were so nice, that if the very thread or string, the linen that tied the leaves of the testament together, was cut, the testator and seven witnesses subscriptions signified nothing, *l.* 1. § *penult. D. de bonor. possess. secundum tab.* This point being put to the vote, whether the partial cancellation of one of the sidescriptions only was sufficient to annul the first tailzie *per se?* and the Lords being equally divided, six to six, the President, by his casting vote, found it was not sufficient *per se.* Then the Lords proceeded to the second point, whether Saltcoats could validly exerce the faculty and reserved power of altering, when he was upon death-bed; and it was *alleged* for George Livingston, that he could not, for this would overturn that most excellent law, the origin whereof is so old that it cannot be traced back to its foundation. The first mention we have of it is in *Regiam Magistatem, lib.* 2. *cap.* 18. and all our lawyers, particularly Craig, p. 85. look on it as a sacred and inviolable corner stone; and the reserving such a power to alter is contrary to law, *nam pactis privatorum nequit derogare jure publico.* Next, this clause does not bear a power to alter *etiam in articulo mortis*; and so this faculty could only be exerced, *in liege poustie*, as was found 25th February 1663, Hepburn, No 1. p. 3177. *Answered*, for Mrs Bailie and Mrs Margaret Menzies; that the law of death-bed was certainly a most excellent useful law, but cannot be so far extended as to restrain proprietors from reserving faculties to alter their settlement and succession, during any time in their life, where the deeds are rational. No 69.

But there are several cases here carefully to be distinguished, 1*mo*, Whether the deed be still in the granter's hand, or if it be a delivered evident. For in the first case, he may freely destroy it at his pleasure, though it had reserved no faculty to alter; but where it is delivered, there is a greater *jus quæsitum* to the

No 69. party, which cannot be taken away without a formal revocation. 2*do*, It is to be considered whether the tailzie stands in the naked terms of a destination and bond of tailzie, without any thing following upon it, or if it be completed by resignation, charter, or seisin. In the first case, any declaration of his contrary will irritates and annuls. In the second, it requires more express deeds. 3*tio*, A difference must be made betwixt bonds of tailzie in favours of the heirs of blood or the heirs in the investiture, and where they call remoter heirs, or strangers to the family. In the first case, law will not so easily annul and void such a tailzie; but where it is put out of the channel, law will easily yield to any intimation of the party's change of mind, to bring it back to the lineal succession. 4*to*. We must distinguish whether the faculty of altering be exerced as a total eversion and annulation of the former tailzie, or be only a burden and clog laid upon it, as children's provisions, or other sums of money. In the first case, law will be more strict in adhering to the first deed, than it will be where it is only a burden on the substitute in the tailzied fee. Now, to apply these four distinctions to the case in hand: Saltcoat's first tailzie to Aikenhead was never delivered, nor ever perfected by infeftment; it was to strangers, and not the nearest in blood, and was but a partial revocation, preserving it still *quoad* Mrs Menzies's right; and this reconciles the seeming contrariety and clashing that appears in the cross decisions cited by either party; some of them reducing the deeds as *in lecto*, though they want the clause *etiam in articulo mortis*, others again sustaining them in respect of the reserved power to alter at any time in their life; such, as 28th June 1662, Seaton of Barns; No 61. p. 3246; February 1663, Hepburn, No 1. p. 3177; 26th June 1670, Douglas, No 8. p. 329; June 1672, Cant and Porterfield, No 2. p. 3179; February 1686 and 1687, Brown *against* Lady Keith, No 65. p. 3251; in 1678, Birny and Polmais, No 58. p. 3242; in 1688, Davidson's case, No 67. p. 3255, mentioned by Dirleton, p. 150; 8th February 1706, Bertram *contra* Weir, No 68. p. 3258; and Stair, *lib.* 3. *tit.* 3, § 29. and as to the *l.* 55. *de legat.* 1. that *nemo potest renunciare juri publico, nec providere ne legis in suo testamento locum habeant*, that brocard holds only where it is *jus utilitate publicum*, but not *in jure auctoritate publico*, as the law of death-bed is. The Lords, by a plurality of eight *contra* three or four, found the tailzie made to Aikenhead revocable even on death-bed, and actually so revoked, and therefore null *quoad* the substitutes therein, reserving still to consider if it could subsist to support Mrs Menzies's second tailzie, though the Lords inclined to think it null *in toto*, and that it could not both stand and fall in part, but did not decide it at this time. Yet there were sundry acts of importunity and insinuations proven for impetrating from him the second tailzie in her favours, and that he regreted to sundry, that he could not get leave to die in peace, till he did it. And though no force, violence, or threats were used, yet much practising made it uneasy to a sick dying man, who will do much to redeem his quiet at such a time. Yet the Lords did not think that these offering advice, or representing what was

most fit and honourable to his family, could be reputed undue solicitations. However, if both tailzies fall, the succession falls and devolves *ab intestato* to his two aunts equally between them. No 69.

Fol. Dic. v. 1. *p.* 216. *Fountainhall. v.* 2. *p.* 300. 352. 371. & 410.

*** Dalrymple reports the same case:

THE deceased George Livingston of Saltcoats, who died in the end of October 1704, having no issue, made a tailzie of his estate in August preceding, above sixty days before death, in favour of James Aikenhead, and the heirs male of his body; which failing, in favour of George Livingston of Midfield, and the heirs male of his body, and the other heirs therein mentioned; with a provision that the same should have no effect during his lifetime; and that it should be lawful to him, at any time during his lifetime, to alter, innovate, change, or make void, or burden the tailzie, and a clause dispensing with the not delivery.

James Aikenhead being a remote relation of a daughter of the family, several of the nearer relations having notice, did apply to him to alter; and accordingly he made a posterior tailzie some days before his death, in favour of Mrs Margaret Menzies, his eldest sister's only daughter, and to the other heirs therein mentioned; and also, by a holograph declaration on the back of the tailzie, revoked the same to all intents and purposes, except in so far as it should subsist as an obligement to denude in favour of Mrs Margaret Menzies, and the other heirs of tailzie mentioned in a disposition of the same date.

After his decease, James Aikenhead, the first institute, being also dead, George Livingston, the next heir of the first tailzie, raised a reduction of the second tailzie and revocation; Mrs Margaret Menzies raised a reduction and declarator in terms of the revocation; and Anna Livingston, one of the two sisters and heirs portioners, and her husband, raised a reduction of both first and second tailzie, and *insisted* on these reasons, 1*mo*, The first tailzie was cancelled in as far as George Livingston, the granter, determining to make a new tailzie, did tear away his name from the side-scription to the joining of the first and second sheet; which first sheet did contain the obligement on the granter, and did name and design the whole heirs of tailzie, and contained a great part of the procuratory, viz. the nomination of the procuratory and a good part of the lands; and the second sheet did contain the rest of the lands and the procuratory of resignation; so that the substance of the tailzie being cancelled, the whole became void; and the second tailzie upon death-bed, founded upon it, fell in consequence.

As to the matter of fact, there being a probation led, it was proven by Mr John Menzies advocate, that the defunct told him that he had torn away the first side-subscription, and accordingly he saw in his custody the tailzie and the piece torn away folded up with it. Culteraes and Mr John Menzies's servant

No 69. concurred that they saw the tailzie without the side-scription, and the piece torn away folded up with it at the opening of papers after the defunct's burial, and by ocular inspection it appeared to be so torn as could not have happened by chance, but *ex industria*.

It was *answered*, 1*mo*, The witnesses were Cambo, Mrs Margaret Menzies's uncle, Culteraes her half-brother, and her uncle's servant; and her uncle's is a single testimony as to what the defunct spoke concerning the cancelling, and nothing could annul the deed except it had been done by the defunct himself with purpose to cancel it; for if it had been done by any third party or chance, as long as the rest of the side-scriptions and subscriptions remained entire, the writ was good; 2*do*, The second sheet, which contains a good part of the procuratory and of the lands, and of the designation of the whole heirs, and the side-scription of the second and third sheet being entire, makes that sheet unquestionably authentic; 3*tio*, Though the other two witnesses depone that the tailzie was wrapped up in a paper sealed and quoted in the back not to be opened up till after his death, yet the back was not written nor signed by the defunct, nor sealed with his seal, and the Lady Waliford, Mrs Margaret's mother kept the key of the cabinet where it lay; 4*to*, No law requires side-scribing.

It was *replied*, 1*mo*, Mrs Margaret Menzies's relations are the most unsuspect witnesses in this point; because the cancelling the first tailzie defeats the second, which was made on death-ded, and has no other foundation than the obligement on the heirs of the first to denude; 2*do*, There is no reason to suspect the paper could be cancelled by any but the defunct, being wrapped up in a sealed paper in the defunct's cabinet; and though the key had been in his sister's custody, who gave over all right to her daughter, no body could have more interest to sustain the second tailzie by the first; 3*tio*, Side-scribing of all papers being so universally and long practised, and necessary for preventing of fraud, it is now a part of our law, and more especially since the act of Parliament 1696, for writing of contracts and other evidents book-ways.

'THE LORDS found the probation adduced not relevant to annul the tailzie.'

The said Anna Livingston *insisted* in the second reason of her reduction with concourse of Mrs Margaret Menzies, viz. That the first tailzie was revoked by the second, and by a separate revocation on the back thereof as above mentioned, and that by virtue of the faculty contained in the first tailzie.

It was *alleged*, 1*mo*, The first tailzie was made *in liege poustie*, when men are only in capacity to dispose of their heritage, and what is then deliberately done cannot be revoked on death-bed; for dying persons *præsumptione juris et de jure* are weak and unfit; 'si quis in infirmitate positus in lecto terram suam distri-'buere cœperit quod in sanitate facere noluit, hoc potius ex fervore animi quam 'mentis deliberatione fecisse videtur,' Lib. 2. cap. 18. Majest. And in this case, the defunct never designed the succession to either of his sisters, or their issue, when he was in health; and the pursuer is of his name and his blood,

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being cousin-german and the heir male's brother; 2*do*, The faculty reserved in this case does not so much as mention a power to exercise the same on death-bed, which would not be relevant though he did; much less can such a general clause be further extended, than to a deliberate alteration or burdening in *liege poustie*, for lifetime in this case is a term contradistinct to death-bed, L. 2. cap. 18. of the Majesty, 'Quamvis autem generaliter cuilibet liceat de terra 'sua rationabilem partem pro voluntate sua cuicunque voluerit in vita sua do-'nare; in extremis tamen agenti hoc nulli hactenus permissum est.' And the decisions of the Lords do clear that such reservations cannot entitle a party to exercise a faculty on death-bed, as was found 25th February 1663, Hepburn of Humbie *contra* Hepburn, No 1. p. 3177. where the heir male reduced a disposition on death-bed, in favour of the disponer's only daughter and heir of line, albeit the ancient destination of the estate to the heirs of line had only been altered by the disponer's contract of marriage, which bore a faculty to alter at any time during life, but not *in articulo mortis*. The like 24th June 1672, Porterfield *contra* Cant, No 2. p. 3179. where a grand-mother having taken security to herself and her grand-children, with a faculty to alter at her pleasure, which she exercised on death-bed in favour of her son, who was her heir, yet the deed was reduced at the instance of her grand-children. And in the known case of Davidson *contra* Davidson, No 67. p. 3255. decided in the 1687, where a father acquired a right of lands in favour of himself in liferent, and his eldest son in fee, with a faculty to alter, sell, and dispone at any time during his life, *ac etiam in articulo mortis*; and having accordingly altered on death-bed by disponing in favours of his second son, yet the Lords found that the eldest could not be prejudged by a death-bed deed; by all which it is clear, that the Lords decisions have not allowed the old and excellent law of death-bed to be eluded upon pretence of any such faculties or reservations which are not consistent with the law of death-bed. It is true, there were other decisions condescended on by the pursuer, where the Lords have sustained death-bed deeds; but there is a clear distinction doth arise by observing the decisions on both sides, viz. That where the exercise of the faculty reserved on death-bed imports a total alteration, and doth wholly enervate the heir's right, there the Lords do not sustain the death-bed deed; but again, where the exercise of the faculty is but a moderate burden upon the heir, consistent with the fee and succession, there the deeds are sustained.

It was *replied* for the pursuer, 1*mo*, In general, as to all the decisions, and the case stated in the Majesty, they relate to heirs in the investiture by public and solemn rights and deeds, which are of their nature more firm, and less to be touched on death-bed for the security of succession; but here the first tailzie quarrelled was made in prejudice of the heir of the investiture, truly after his death-bed sickness, which was a decay, albeit in the construction of law it was in *liege poustie*, being 61 days before his death, and it was private, without the knowledge and advice of any of his friends, elicited by the writer of it, who

No 69. inserted his own son as the first heir, being a remote relation, kept latent and always in the defunct's custody and power, and no infeftment ever followed upon it; and as he might have cancelled it, so he might alter, revoke or burden it with any deed signifying his pleasure; and if the challenging of any side-scription had been instructed to have been done with intention to have annulled it, the Lords would have reduced it on that single ground; 2*do*, Where rights are made in favour of the heirs of the investiture, with such faculties to burden on death-bed, such faculties do prove ineffectual, because the heir can repudiate such dispositions or tailzies, *et omissa causa testamenti succedere ab intestato*, which a stranger can never do; 3*tio*, There is no difference in law whether the faculty bear *etiam in articulo mortis*, or not, if it bear at any time during lifetime; for no man reserving such a faculty can be presumed to restrict it to health, and more especially in this case, where the provision runs in these terms, that the deed should have no effect during his lifetime, and that it should be lawful for him at any time during his lifetime, &c.; where *lifetime* being twice expressed in the clause, it must have the same signification in both, and in the first part, it is capable of no other construction than to the last moment *inclusive*.

4*to*, As to the particular decisions, that of Humby's was transacted before, as the decision mentions, and the heir male's right was constituted by a public and solemn contract of marriage; and that of Porterfield did only bear *revocable during pleasure*, and neither mentions lifetime nor death-bed; and Davidson was a case where the alteration was in prejudice of the heir male and of line on death-bed; in which, nevertheless, the Lords were much divided, because the fee had been taken originally to the eldest son, with a faculty to the father to alter; so he was to be considered as a stranger heir, who could not succeed but by tailzie, nor quarrel the conditions and faculties of it; but as such a deed in favour of the eldest son would have made him heir passive *per præceptionem*, so it is to be considered *per fictionem brevis manus*, as if the father had acquired the right originally to himself, and disponed to the son, and the son and heir was allowed to quarrel.

5*to*, There are many decisions which favour the pursuer, and especially all that have occurred of late, 26th June 1662, Dame Margaret Hay *contra* Seton of Barns, No 66. p. 3253.; 22d June 1670, Douglas *contra* Douglas, No 6. p. 329.; February 1686, Brown *contra* Congleton, No 65. p. 3251.; February, 1687, Lady Keith *contra* Congleton, No 66. p. 3253.; 18th February 1706, Bertram of Nisbet *contra* Weir of Stonebyres, No 68. p. 3258. in which last case the heir male and of line was found liable to the burden of provisions on death-bed, because he had not entered *ab intestato*, but possessed by virtue of a right bearing power to burden at any time during life, and did not bear *in articulo mortis*.

'The Lords found the first tailzie revocable and revoked, but did not determine whether the revocation on death-bed should only annul the tailzie and leave the succession to descend *ab intestato*, or if the said revocation of the

tailzie would also convey the right of succession to Mrs Margaret Menzies and the other heirs mentioned in the revocation and second tailzie. No 69.

Dalrymple, *No* 86. *p.* 109.

*** This case is also reported by Forbes:

GEORGE LIVINGSTON of Saltcoats, having a matter of three months before his death, tailzied his estate, passing by the Lady of Waliford and Anna Livingston, spouse to Mr James Bailie, his two sisters, in favour of James Aikenhead, and the heirs of his body; which failing, to George Livingston of Midfield, &c. with a reserved power and faculty to alter at any time in his life, by a declaration under his hand; did sometime after tear away his name and side-scription from the margin joining the first and second sheets of that tailzie, in which first sheet the obligation to resign, procuratory of resignation and lands were contained; and upon death-bed made a new tailzie to Mrs Margaret Menzies his neice, and her substitutes; and of the same date, wrote a holograph declaration upon the back of the first tailzie, whereby he revoked and annulled it, except in so far as concerned the faculty therein to alter, which he would have subsist for supporting the second tailzie. After Aikenhead's decease, there arose a triple competition betwixt George Livingston the next substitute in the first tailzie, Mrs Menzies and Mrs Bailie, the defunct's sister.—Mrs Bailie *alleged*, That the taking of the side-scription from the first tailzie did annul the same *in toto*; and that the second tailzie, granted on death-bed, could not subsist in prejudice of her one of the heirs of line, notwithstanding the defunct's exercising the faculty reserved in the first tailzie, by his declaration on the back thereof.

Mrs Menzies *pleaded*, That the cancellation might both concur to strike out George Livingston, and be effectual to validate the tailzie in her favour, according to the holograph declaration.

Alleged for George Livingston, 1*mo*, The tearing the marginal side-scription from the first sheet of the first tailzie, doth not annul the same, nor derogate therefrom in the least; because, 1*mo*, No law or fixed custom requires side-scribing of obligatory writs, as an indispensable solemnity; in evidence whereof, the Lords made an act of sederunt for the side-scribing of decreets, inhibitions, and other diligences, without mention of private voluntary rights; and *casus omissus habetur pro omisso*. Nor can the tearing one marginal side-sciption be interpreted to annul the writ, where all the rest are entire, and the subsequent sheets have an inseparable connection with the first; and the obligement to resign, procuratory, and lands, fell to be in the first sheet only from the accidental clossness of the write; 2*do*, Taking away one of the side-scriptions could not evacuate or prejudice the tailzie, unless it were clearly instructed to have been done by the defunct *eo animo*, that his succession might go to heirs *ab intestato*, which is not done; on the contrary, in token that notwithstanding

No 69. ing thereof, he considered the first tailzie as valid, he signed a revocation thereof several days after the cancellation; and further, declared it to subsist for a particular effect; which distinction betwixt a deliberate and casual cancelling of writs is authorised in the common law, *L.* 12. *and L.* 30. *C. de Testam. L.* 1 *pr. et* § 1. *L. ult in Fine ff. de his quæ in test. del.*

Answered for Mrs Bailie; (For Mrs Menzies seemed not very solicitous to debate this point,) 1*mo*, It is the constant and uniform practice with us to side-scribe writs consisting of different sheets, for securing against fraud by substituting one battered sheet in place of another in different terms; and custom prevails as law, in matter of form, as well as in point of right; 2*do*, Whatever might have been said before the act of Parliament 1696, appointing every page of securities written book-ways to be signed, as the margins were before; it cannot be pretended that side-scribing is a matter of indifference since that act, which equalleth the side-scription to the page subscription; and the first tailzie was framed long after the said statute; 3*tio*, There is a great difference betwixt a writ not side-scribed from the beginning, and the taking away a side-scription once adhibited, which certainly inferreth a design to invalidate the writ; 4*to*, Accidental cancellation is not to be presumed, but must be proved by the asserter; and if the taking away of that which joined the leaves of a testament among the Romans, did annul it, notwithstanding of the remaining subscriptions, and seals of the testator and seven witnesses, *L.* 1. § *pen. ff. de bon. poss. sec. Tab.*; much more must the taking away side-scriptions with us at so materialia part of the writ, be sustained sufficient to annul the same.

It was further *alleged* for George Livingston; That Saltcoats had no power to revoke and cancel the first tailzie upon death-bed; for the reserved faculty to alter must be understood civilly *in terminis juris*, and could not be exerced on death-bed; unless at least the words *etiam in articulo mortis*, or *in lecto ægritudinis* had been added, which are not in the said reservation. The reason of the law of death-bed, viz. That persons in a weak and dying state might not be imposed on by the importunity and influence of those about them, to do things they would abhor in perfect health, or be distracted or diverted thereby from the main work of preparing themselves for their last change, takes place as well in the case of such a faculty reserved in *liege poustie*, as where there is no such reservation at all; and this death-bed tailzie in favour of Mrs Menzies, was contrary to what the defunct intended when he was in perfect health; 3*tio*, A reserved power, conferred *in tempus inhabile*, cannot be then exerced, *L.* 39. *ff. de Manumiss. Testam. quia devenit in casum a quo incipere non potuit*; so that though the reservation had born an express faculty to alter upon death-bed, the faculty could not have been exerced *in lecto*, since *pactis privatorum non derogatur juri communi*; and far less should we presume that a person designed to impinge upon the common law, where the words of the clause are not express; 4*to*, It is clear from the current of decisions, that the defunct could not, upon death-bed, innovate the first tailzie, by virtue of the reserved power to alter at

any time during life, 25th February 1663, Hepburn of Humby *contra* Hepburn, No 1. p. 3177.; 14th July 1672, Porterfield *contra* Cant, No 1. p. 3179.; 22d June 1678, Birnies *contra* L. of Polmais, No 58. p. 3242.; and in the year 1687, Davidson *contra* Davidson, No 67. p. 3255. cited in the 150th page of Dirleton's Doubts; *5to*, The note upon the back of the first tailzie, whereby the defunct annuls the same, except as to the reserved faculty, cannot be sustained as a revocation; because it implies a contradiction, to declare the tailzie null, and to subsist for the supporting of another tailzie; for one and the same writ cannot subsist as to one part, and be null as to another. No 69.

Answered for Mrs Margaret Menzies; Males have indeed successively of a long time enjoyed the estate of Saltcoats; but by investitures in favour of heirs whatsoever, and so not as heirs male but as heirs of line. The granter's power to alter the first tailzie on death-bed, is not only clear from the reserved faculty whereby it was to have no effect during his lifetime, and he was empowered to innovate and make it void at any time in his life; but also from this circumstance, that the disposition was never completed or delivered to the heirs of tailzie, but remained in the custody of the granter till his death; so that it was in his power to have burnt or destroyed it, and consequently he might alter; since *qui potest plus, potest minus;* nor is a reserved power to alter contrary to law, which only allows the quarrelling of such rights as are made without consent of the heir; whereas the heir, accepting of a disposition with a quality of this nature, is understood to consent thereto. The old law of the Majesty, and statutes of King William are not disputed, as to the case of death-bed; but these, as to the question in hand, how far lifetime includes death-bed, are as little pertinent as any part of Wallace's book. Nor are the ancient feudal constitutions to this purpose: The words *during life* do in grammar and law include every moment of life, and are contradistinct to death; as death-bed is to *liege poustie*; for, as lawyers observe, *momentum mortis vitæ annumeratur;* and *vita est spiraminis fruitio, et morti opponitur; 2do*, If people on death-bed are under a natural incapacity to dispose, upon the account of weakness and want of judgement, then how comes it that they can make testaments, and dispose of vast moveable sums? *3tio*, The general story that the faculty is *collata in tempus inhabile*, is a begging of the question; for the only subject of debate here is, if a faculty contained in a writ in *liege poustie*, can be exerced on death-bed; and though such reservations were not at first currently received, they are now become ordinary clauses in tailzies. The difficulty, if men could provide *ne leges in suo testamento valeant*, or by a reserved faculty prejudice the law of death-bed, is now quite over, and it is no longer doubted but they may; *4to*, This opinion is confirmed by decisions, 22d June 1670, Douglas of Lumsden *contra* Douglas, No 6. p. 329.; 28th June 1662, Dame Margaret Hay *contra* Seaton of Barns, No 61. p. 3246.; in both which practics, the faculty was exerced in prejudice of the heir of line; whereas here it is exerced in favour of the only daughter of the eldest heir female, who by the tenor of the ancient infeftments

No 69. would fall to be heir portioner of line. There are likewise other decisions to this purpose, February 1686, Brown *contra* Congleton, No 65. p. 3251.; February 1687, Lady Keith *contra* Congleton, No 66. p. 3253.; 8th February 1706, Bertram of Nisbet *contra* Weir of Stonebyers, No 68. p. 3258. As to the decisions adduced for Mr Livingston, they may be easily taken off; for that of Humby *contra* Hepburn was transacted; and in the case of Porterfield and Cant, there was no such reserved faculty as here; nor was the disposition in that of Birnies *contra* Polmais completed till after the contracting of death-bed sickness; and it is easy to discover that my Lord Dirleton, who observes the practique of Davidson *contra* Davidson, was of a different opinion; 5*to*, The allegeance upon the inconsistency and ineffectualness of the note indorsed upon the tailzie, is *jus tertii* to Mr Livingston, who has no benefit if the tailzie fall *in toto*; but then what hinders a tailzie to be altered in whole or in part, or to be declared void as to one clause and to subsist as to another?

Replied for Livingston; All the decisions adduced in derogation of the excellent law of death-bed, are to be strictly interpreted, and considered only as privileges indulged in favourable cases; such as the burdening heritage upon death-bed with provisions in favours of relicts and children, or the doing of deeds consented to, or homologated by the heir. Again, there is a difference to be put betwixt burdening the estate on death-bed, and altering the succession from its natural channel; and there is a difference betwixt faculties consistent with the existence of the right, and those inconsistent with it, as that before us, whereby the first tailzie is pretended to be quite evacuated.

Duplied for Mrs Menzies; The distinction betwixt burdening estates on death-bed in favours of wives and children, and the burdening them in favours of strangers, and the difference of burdening an estate with debts, from the alteration of the course of succession, are altogether groundless and arbitrary; seeing, if the matter be decided by the law of death-bed, all alienations, whether to children or strangers, and any diminution of the heritage, as well as alteration of the course of succession are reprobated; for there are no degrees in things forbidden as to the effect of nullity, all is null that is done *lege prohibente*. Again, it were of dangerous consequence to distinguish upon the favourableness of cases, except where favour has an express and clear rule in law for it: The pretences of specialities and favour being more pernicious to the course of law, than any other art or pretence whatsoever.

Albeit Mrs Menzies and Mrs Baillie concurred in their pleading to support the faculty of altering on death-bed, yet they differed in this, Mrs Bailie contended that the quality in the revocation of the first tailzie, is not relevant to sustain it for conveying the right of succession by the second tailzie to Mrs Menzies, in prejudice of the defunct's heirs of line.—To Mrs Menzies *answered*, That the heirs of line cannot plead the benefit of the revocation, which must be taken with this quality in favour of the second tailzie; for such a qua-

lified revocation on death-bed hath been sustained as effectual in our law, 25th January 1677, Ker *contra* Kers, No 64. p. 3248. No 69.

THE LORDS found, That the first tailzie was not annulled by the cancelling of Saltcoat's side-scription from the joining of the first and second sheets thereof; but was revocable, and revoked on death-bed, by the revocation on the back thereof; and found, that the quality in the revocation is not relevant to sustain the first tailzie, for supporting the second, and conveying thereby the right of succession in favour of Mrs Margaret Menzies; and therefore reduced both tailzies, and declared in favour of Mrs Baillie, one of the heirs of line.

Forbes, p. 226.

1740. *January* 16. JOHN M'KEAN *against* ELSPETH RUSSEL.

JAMES M'KEAN being creditor to Sir Hary Innes in a bond for 2000 merks, payable to himself if in life, and, after his decease, to certain other persons, containing a power to James, at any time in his life, to uplift, receive, and discharge the same, without consent of the persons whose names were therein mentioned, did, on death-bed, exerce this faculty, and gave it away, not only from the heirs at law, but likewise from the substitutes. No 70.

In a reduction on the head of death-bed, it was *pleaded* for the heir at law, That the death-bed deed did evacuate the substitution, whereby there came to be place for him; and though with the same breath the subject is given away to strangers, the alienation could not be effectual against him, being done on death-bed.

THE LORDS repelled the reason of reduction.

Fol. Dic. v. 3. *p.* 172. *C. Home, No* 140. *p.* 240.

1755. *February* 11.
DAUGHTERS of WILLIAM LORD FORBES, and their HUSBANDS, *against* JAMES LORD FORBES.

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It was found by the Court of Session, that notwithstanding of a reserved faculty of making provisions to a certain extent to younger children, the defunct could not prejudice his heir, by provisions made on death-bed.

BY contract of marriage betwixt William Lord Forbes and Dorothy Dale his promised spouse, executed at London September 1720, he became bound to provide his land estate to the heirs male of the marriage; whom failing, to his other heirs male. And, as by this contract the Lord Forbes put himself and his heirs under a limitation not to alter the order of succession, nor even to contract debt in prejudice of the heir male of the marriage, it was thought reasonable to reserve a power for providing the younger children, which was done in the following words: 'That in case there shall be an heir male of the intended 'marriage, and one or more younger children, it shall be lawful for the said 'Lord Forbes, at any time in his life, *ac etiam in articulo mortis*, to make such