

On the 27th June 1766, "The Lords adhered," upon advising a reclaiming petition and answers.

*Act.* Ilay Campbell. *Alt.* J. M'Claurin.

#### OPINIONS.

The court was unanimous in its judgment, upon the fact that *nihil defuit* to the suspender, who possessed for the whole 24 years, and was not ejected till after Whitsunday old style. The argument that Whitsunday in the decret meant the 26th May, was not considered as satisfactory. Judgment went upon the fact.

---

1766. *June 27.* MARGARET BURNET, Spouse of Alexander Bannerman, Merchant in Aberdeen, *against* MARJORY BURNET, Widow of George Forbes, jun. Merchant in Aberdeen.

#### TESTAMENT.

Construction, in case of an Error in the Narrative of a Codicil.

ON the 1st September, Dr James Burnet, physician in Aberdeen, executed a testament, whereby he appointed his brother, Mr Andrew Burnet, writer to the signet, his executor and universal legatary. He burdened him with different provisions in favour of his sister Marjory Burnet, and his niece Margaret Burnet, and their children. The import of those provisions was as follows:—  
 "To Marjory Burnet, my sister, in liferent, for her liferent use allenary, the sum of L.600 sterling, the fee of L.400 whereof I appoint for John and Margaret Forbeses, her children, equally betwixt them, &c.; and the other remaining sum of L.200 I destinate and appoint to Anna Bannerman, daughter to Alexander Bannerman, merchant in Aberdeen, and, failing of her by decease, to Margaret Burnet, her mother, (the testator's niece;) and the principal sum is to be settled and secured to the said Marjory Burnet in liferent, and to the said John and Margaret Forbeses, her children, and Anna Bannerman, conform to their said proportions in fee, in terms of the above appointment, at the sight, and by Thomas Burnet of Kirkhill, and Andrew Burnet," &c. On the 7th April 1763, Dr Burnet, being at the point of death, executed a codicil to his testament, of the following import:—"Whereas, by my latter will, dated the 1st September 1754, I did name Andrew Burnet my executor, with the burden of L.400 sterling, to be liferented by Marjory Burnet, and the fee thereof to be divided after her death betwixt John and Margaret Forbeses; and with the further burden of L.200 sterling to be liferented by Margaret Burnet, and the fee to Anne Bannerman; and being now resolved to add to these provisions, I do hereby burden the said Andrew Burnet with the sum of L.200 sterling in liferent to Marjory Burnet, and the fee to John and Margaret For-

beses, in fee equally between them; and with the further sum of L.200 sterling in liferent to the said Margaret Burnet, and the fee to Charles Bannerman." He further declared this codicil to have the effect of a latter will, and to be part of that which he had formerly made. From this recital, it appears that, by the narrative of the codicil, Dr Burnet mentions his having left the liferent of L.400 only to Marjory, and the liferent of L.200 to Margaret; whereas, in truth, he had left by his testament the liferent of the whole L.600 to Marjory, and only an eventual fee of L.200 to Margaret. Hence, a controversy arose between his sister and his niece. His niece claimed the liferent of L.200 by the narrative of the codicil, and of L.200 by the codicil itself. His sister claimed the liferent of L.600 by the testament, and of L.200 by the codicil. For determining this controversy, Andrew Burnet, the executor, raised a multiplepounding.

ARGUMENT FOR MARGARET BURNET, THE NIECE :—

The testament was executed in September 1754, nine years before the codicil. It was not strange that both the dying man and the writer should have forgotten its precise contents; but this mistake in the narrative of the codicil will not disappoint the plain will of the testator: it is sufficient if his last will was to have the money liferented in the manner described by the codicil. A false narrative in a deed, which a man cannot alter, is of no consequence; but where a man has it in his power to alter or make a new settlement, the false narrative has the same effect as if it had been truly contained in the former deed. Thus, if one should say in his codicil, "Whereas, by my will I have legated L.100 to John, I give him, by this codicil, L.100 more," it is certain that John would be entitled to L.200, although nothing had been legated to him by the will; for that the intention of the testator is clear that John should have L.200; and it matters not whether that sum was given him by the will or by the codicil. Thus, if one should say, "Whereas, I gave to John L.400 by my testament, I now give him an addition of L.200 more;" if it should happen that John had got L.600 by the will, he would get no addition by the codicil; for that the addition was only given upon the supposition that he had already got no more than L.400. In the present case, Dr Burnet took nothing from his sister and her children by the codicil, which he had given them by the will. The liferent of L.600 is still reserved to the sister, and her children get an additional legacy of L.200. Besides, it will be remarked that the codicil contains a more rational destination than the testament did; for, by the codicil, Dr Burnet separates the interests of Marjory and Margaret Burnet and their respective children, and makes each of the two liferent the portion given to children; whereas, by the testament, Marjory Burnet was to liferent not only the portion of her own children, but the portion of Margaret Burnet's child.

ARGUMENT FOR MARJORY BURNET :—

It is plain that Dr Burnet did not mean, by the codicil, to revoke a testament executed nine years before, whereof he did not so much as recollect the contents. His having forgot the precise tenor of the will, can never prove his intention to revoke it in whole or in part. The question then is, Whether can Marjory Burnet claim the additional liferent of L.200 provided to her by the codicil, because the narrative of that codicil mentions erroneously that L.400, not L.600, had been provided to her in liferent by the codicil. Narratives of deeds are generally little regarded in law: It was thought proper in the codicil

to recite the tenor of the testament ; and, the testament not being at hand, its tenor has been misrepresented. By the Roman law, it was an established maxim, that an error in the narrative of a legacy did not invalidate the legacy itself : —sec. 31, Inst. *De Legatis*. This maxim is well expressed by Papinian, l. 72, ff. *Cond. et Demon*. “ *Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret :*” He who grants a legacy may have many reasons for granting it besides the reasons expressed ; and, therefore, the error in the cause expressed does not prove that the testator meant to grant the legacy only in case that cause should be true. Thus, Dr Burnet might have intended to give his sister the liferent of L.200 by his codicil, although he set forth that he had granted her the liferent of L.400 by his testament, and not the liferent of L.600. As to the observation, that the codicil, as explained by Margaret Burnet, is more rational than as explained by Marjory Burnet ; it is answered, that, when words are express, and imply nothing illegal or absurd, the words of the testator must be the rule of interpretation ; otherwise a settlement may be made by the Court, more rational perhaps, but still not the settlement of the testator. If Dr Burnet, by his testament, appointed Marjory to liferent the provision of Margaret’s child, he might carry on the same plan by his codicil ; and, if the testament, so conceived, must by itself be held rational, a codicil conceived in like manner cannot be held irrational.

On the 12th February 1766, the Lord Auchinleck, Ordinary, found, “ That Marjory Burnet, by the testament, is provided in the liferent of L.600, the fee of L.400 thereof being to go to her own children, and the fee of the remaining L.200 to Margaret Burnet’s children. Finds that, by the codicil, on the recital, that by his testament he had left L.400 to his sister Marjory in liferent, and the fee of that sum to her children, and that he had left L.200 to his niece Margaret Burnet in liferent, and the fee of that sum to her children, and that he was resolved to add to these provisions, and therefore burdens his executors with L.200 more to Marjory in liferent, and the fee thereof to her children, and with the further sum of L.200 to Margaret Burnet in liferent, and the fee thereof to her children ; Finds, that Marjory Burnet is not entitled to the liferent of L.200 over and above the L.600, but is only entitled to the liferent of L.600 in all ; it appearing, from the codicil, that it was the testator’s will only to add L.200 to her fund in liferent, on the supposal that she was formerly provided to the liferent of L.400 only ; but finds, that her children are entitled to the fee of L.600 ; and finds there is sufficient evidence, from the codicil, that it was the testator’s intendment that Margaret Burnet, his niece, should have the liferent, and her children the fee, of L.400 ; and finds the competitors entitled in these terms, and decerns against the raiser of the multiplepounding accordingly.”

On 5th March 1766, the Lord Ordinary, upon advising representation and answers, adhered.

On the 27th June 1766, the Lords, upon advising petition and answers, “ adhered to the interlocutor of the Lord Ordinary.”

For Marjory Burnet, R. Blair. *Alt.* J. Burnet.

## OPINIONS.

COALSTON. The will of the testator ought to be the rule ; and his will appears from the narrative of the codicil.

Affirmed upon appeal.

---

1766. *June 27.* JOHN MONTGOMERY, Merchant in Newry, Ireland, and the Executors of Thomas Atkinson, Merchant in Newry, Chargers, *against* CAPTAIN COLIN CAMPBELL, Commander of the Prince of Wales revenue sloop, suspender.

## JURISDICTION—STATUTE.

1st, An unlawful seizure made at sea does not vest the admiral with a privative jurisdiction.  
2do, Construction of the Act 1672, c. 3, and 1686, c. 14, as to the Importation of Irish Victual.

[*Faculty Collection, IV. 7 ; Dictionary, 7359.*]

IN July 1761, John Montgomery and Thomas Atkinson loaded two ships with oatmeal, and took out their clearances at the custom-house of Newry, for North Faro, in Norway. While the two vessels were in the Sound of Mull, they were seized by Captain Campbell, an officer of the revenue, under pretence of their coming under the description of the statutes prohibiting the importation of Irish victual into Scotland. Various circumstances concurred to show that the clearance for North Faro was merely a cover, and that the voyage was intended for the north-west islands of Scotland. On the 1st September 1761, the vessels, having been carried to Fort-William, were unrigged, and their cargoes unloaded by the authority of Captain Campbell. Captain Campbell made an application to the Sheriff-substitute of Argyleshire, residing at Fort-William, setting forth, that, by various Acts of Parliament, the importation of victual from Ireland into Scotland is prohibited under certain penalties, besides forfeiture of the victual and bottom : that, by the said Acts, such victual, waterborne betwixt Loch Ryan and the Head of Kintyre, or the Head of the Western Isles, is deemed an importation ; and, subsuming that the foresaid vessels were seized in those circumstances, carried by him to Fort-William, and their cargoes unloaded ; and therefore praying the Sheriff to condemn the meal and the vessels as a legal seizure, and to inflict the other penalties directed by law. The shipmasters were examined, the depositions of witnesses were taken, parties were heard. On the 13th October 1761, the Sheriff pronounced the following interlocutor : “ In regard it did not appear that the defenders had broke bulk since their cargoes were loaded in the port of Newry, and it has been fully proven that the Sound of Mull was the common and safe passage for vessels trading from the southward to the northward, assoilyied the defenders, or ordains their cargoes and vessels to be delivered back to them ; the defenders being always obliged, before load-