

1765. June 28.

SIR THOMAS BURNET, of Leys, *against* GEORGE and ALEXANDER BURNET,
Elder and Younger of Kemnay.

The estate of Leys stood devised to heirs-male.

In 1733, Sir Alexander Burnet disposed the lands of Standingstones, a part of the estate, to George Skene of Skene, for the purpose of creating a freehold qualification; and, the end having been served, Skene re-disposed to Sir Alexander, "his heirs and assignees."

In 1740, Sir Alexander disposed his lands and manor-place of Crathes, to his only son Robert, "his heirs and assignees," in fee.

In 1746, Sir Alexander, in the view of creating a freehold qualification to his son, disposed the lands of Standingstones to him, his heirs and assignees, reserving his life-rent, and power to sell or burden; and assigned him to the unexecuted procuratory in Skene's disposition, on which he took infestment.

In 1754, Sir Alexander cancelled the disposition of the lands of Crathes, and renounced his reserved powers over those of Standingstones, in favour of Robert, his heirs and assignees whatsoever.

Upon his father's death, Robert made up titles by service, as heir-male and of line.

In 1759, Sir Robert, in order to give a freehold qualification to Alexander Burnet, younger of Kemnay, his nephew, disposed the same lands of Standingstones to him, his heirs, and assignees. It was concerted, that a back-bond should be granted by Kemnay elder, for re-disposing the property, to be held of Alexander during his life, for £.1 10s. Scots of feu-duty. This back-bond was extended in favour of Sir Robert, and his heir succeeding to him in his other lands and estate, but it never was signed, Sir Robert having died soon after the transaction.

However, within seven days of his death, he signed a mandate to his doer to deliver up the disposition to Kemnay elder, for behoof of his son, declaring that, in the event of his death, Alexander should have the benefit of the disposition, and that, in that event, "there is neither re-disposition, nor back-bond granted, or to be granted."

Upon Sir Robert's death, Sir Thomas Burnet, formerly of Criggie, now of Leys, the heir-male, brought a process for having it found, that Sir Alexander and Sir Robert had neither altered, nor intended to alter, the investitures of the lands of Standingstones, from heirs-male to heirs of line: That the property of these lands was a trust in the person of Alexander, and that he ought to re-dispose it, to be held of himself during his life, for payment of £1. 10s. Scots of feu-duty. He also insisted in a reduction of the mandate *ex capite lecti*.

The defenders admitted that no alteration was made by Skene's re-disposition; that the mandate was granted on death-bed; and that the property of Standingstones was a trust in Alexander, for behoof of Sir Robert and his heirs.

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What understood by the term *Heirs whatsoever*?

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The question, therefore, came upon the construction of the former deeds, who was the heir entitled to the benefit of the trust, the heir-male, or the heir of line?

Pleaded for the defenders: *1mo*, The disposition 1746 had the effect to vest the lands of Standingstones in Sir Robert, descendible to his heirs of line.

It makes no difference that the disposition was intended for giving Sir Robert a freehold qualification in the county, or that he was the heir *alioqui successurus*; in either view, a new fee was created; and, whatever interpretation may have been given to the term "heirs whatsoever" in accessory conveyances, the heir of line is always understood in original rights. The established form of altering the destination of an estate is by resignation for new investiture, in favour of a different series of heirs.

2do, Were intention to be the rule in this question, the transaction 1754 shows that Sir Alexander intended that the lands of Standingstones should descend to the heirs of line. The renunciation of Sir Alexander's reserved powers over those lands, came in place of the disposition of the lands of Crathes, which were plainly meant to go in that channel.

3tio, No argument can be founded on the terms of the back-bond, which never was signed, and consequently could not alter the investitures of the estate, though it were allowed to be a proper deed for that purpose.

Answered to the *first*: In a disposition to a stranger, and his heirs whatsoever, the heir of line must necessarily be understood, if there be no circumstances by which any other heir can be implied; but, in a disposition to the heir *alioqui successurus*, the term has no fixed determinate meaning in law. It is applicable to all different kinds of heirs *secundum subjectam materiam*, as is evident from a variety of cases which are to be found under the present title of the Dictionary, and from many others; Skene, No. 20. p. 11354. *voce* PRESUMPTION; Weir against Steil, No. 25. p. 11359, *IBIDEM*; Farquharsons against Farquharson, No. 43. p. 2290. *voce* CLAUSE; and Maclauchlan against Campbell, No. 54. p. 2312. *IBIDEM*.

No intention of altering the order of succession can be inferred from a clause of that kind thrown into a deed, which was not meant for a settlement of the estate, but for a quite different purpose. The deed 1746, was designed for giving Sir Robert a freehold qualification, and cannot have the effect of altering the succession, more than the re-disposition by Skene, which is admitted to have no such effect.

To the *2d*: The renunciation 1754, was intended for no other purpose than to provide for an interim aliment for the heir, and could not be meant as an alteration of the succession. It is far from being clear that the disposition 1740, would have carried the lands of Crathes, with the mansion-house of the family, to the heir of line, while the rest of the estate was devised to heirs-male. In that view, the deed would have been irrational; and, therefore, Sir Alexander must have been presumed to have intended to transmit those lands to the heir of the investitures. But, supposing that deed to have had a contrary effect, Sir Alexander

may have changed his intention between the year 1740 and 1754; so that there is no arguing from the one deed to the other.

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To the *3d*: The pursuer does not found on the back-bond as an alteration of the succession; but only as a circumstance to show that Sir Robert the disponee did not understand, that, by any of the former deeds, the lands of Standingstones had been set into a different channel of succession from the rest of the estate.

The Lords "Found, that the property of the lands of Standingstones was a trust in the person of Alexander Burnet, and that he must re-convey it to the pursuer, and his heirs succeeding him in the barony of Leys, to be holden of the said Alexander during his life, for payment of £.1 10s. Scots of feu-duty; and, after his death, to be consolidated with the superiority, in the person of the pursuer, and his heirs succeeding him in the said barony."

G. F.

Fac. Coll. No. 3. p. 221.

Act. Macqueen, Sir David Dalrymple. Alt Miller. Advocatus, Montgomery. Reporter, Kennet.

* * This case having been appealed, the House of Lords, 30th April, 1766, ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutor complained of be affirmed. And it is farther ordered, that the appellant do pay to the respondent £.80 costs, in respect of the said appeal.

1766. June 17.

MR. WILLIAM BAILLIE, Advocate, *against* MRS. AGNES TENNANT.

Alexander Walker of Stonypath left two children, viz. a son, William, afterwards Minister at Mackerston, who succeeded to the estate of Stonypath, and a daughter Isobel.

The daughter married John Tennant of Hundaxwood, by whom she had two children, Alexander, afterwards Colonel Tennant, and a daughter, Agnes Tennant.

After Mr. Tennant's death, Isobel Walker entered into a second marriage with Thomas Baillie, writer to the signet, by whom she had three sons and a daughter, and Mr. William Baillie was the eldest of these sons.

William Walker, the son and heir of Alexander Walker of Stonypath, in 1752, executed a deed of settlement of the following tenor: "I Mr. William Walker of Stonypath, Minister of the Gospel at Mackerston, for the love, favour, and affection I have and bear to my sister, and her children after-named, upon whom I am resolved to settle my real estate, and to prefer them thereto next after the issue of my own body, in the order of succession, and in the terms and under the conditions underwritten; wit ye me to have given, granted, and disposed, &c. to myself in life-rent, and to the heirs-male of my body; whom failing, to the heirs-female of my body, in fee; whom failing, to Isobel Walker my sister, relict of John Tennant of Hundaxwood, now spouse to Thomas Baillie of Polkemmet, writer

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Interpretation of the word "heirs" in a settlement.