

FIAR, ABSOLUTE, LIMITED.

S E C T. I.

Obligations to Execute an Entail.

1631. *January 14.* HELEN SHARP *against* MR JOHN SHARP.

MR JOHN SHARP on the one part, and Sir William Sharp his brother on the other part, by contract betwixt them, with consent of their father Sir John Sharp, subscribed by him and the saids parties, having contracted and obliged them and their heirs, ilk one to others, that what land any of them should be provided to by their father, or which they should conquer by any moneys which they shall be provided to by him, that they should resign the same *habili modo*, for infeftment to be made of the same to them, and the heirs gotten, or to be gotten, of their own bodies; which failing, to the other brother survivor; and failing of the bairns of the body of the brother surviving, to the heirs of their said umquhile father; which contract thereafter the said brethren ratify by another contract, after the death of their father. After this first contract, the father having provided these sons to certain lands in his own lifetime, and thereafter dying, Sir William being a son of the said umquhile Sir John, by his second wife, and having sundry sisters-german begotten by his father upon the same common mother to them, and Mr John being a son begotten upon his father's first wife, and so being brother to Sir William by one father, but by divers mothers; Sir William thereafter being married, and deceasing, leaving one only son behind him, who also thereafter dying, the said Mr John thereby craving the benefit of the tailzie, contained in the said mutual contract, against the sister of the said Sir William then living, viz. the relict of Robert Bruce of Pitlithie, and against the bairns of Robert Dunbar, who were begotten by him upon the other sister of the said Sir William, being

No 1.
A contract entered into betwixt two parties, obliging them to tailzie their lands mutually to one another, was found no bar from selling their lands.

No 1. wife to the said Robert Dunbar, she being deceased ; and which persons, as heirs to the said Sir William, were pursued for fulfilling of the said contract to the said Mr John, in respect of the existence of the said condition of tailzie, through the decease of the said Sir William, and that there were no bairns extant begotten by him ; this contract of tailzie being desired to be reduced by the said sister of the said Sir William, and by the bairns of the other sister deceased, as heirs of line to him, as said is, upon divers reasons of reduction pursued against the said Mr John ; the matter and compend of all which reasons resolved in these heads, viz. that the said contract of tailzie was not lawful, seeing the same was a paction *de futura successione*, which was prohibited in law ; and that it was also *pactum nudum*, remaining in the naked terms of an intention, not vested with any act following thereupon, nor no deed done by either of the parties, which might make it to have the force of any perfect security which could be obligatory in law against any of them ; and that the nature thereof was so ineffectual to bind, that if inhibition had been served thereon, yet notwithstanding thereof, the party inhibited might sell his lands, or otherways tailzie or dispone thereupon as he pleased ; in doing whereof, neither the contract nor inhibition could any ways prejudice the doer or receiver of any other security of the lands : Attour this was a contract, which being *inter contractus innominatos* treated of in the law, and of that nature as *facio ut facias*, either of the parties hath place of repentance *antequam perficiebatur rei interventu* ; for, before something be done by one of the parties to the other, they may repent, and resile therefrom ; and nothing being here done according to the contract, as umquhile Sir William had place and liberty in his own time, and might revoke and resile, if he were living, so may the pursuer his heir, who succeeded in his universal right. Likeas, in effect, both the said Sir William and Mr John have resiled, and declared their repentance in their own times, by doing of diverse deeds destructive of the tailzie contained in the contract ; for Mr John hath, since the contract, taken divers infeftments of sundry of his lands to himself, and his heirs whatsoever ; likeways Sir William hath done the like, whereby they in effect have manifested their will, that they had both receded from the tailzie ; also this contract was not obligatory against Sir William, seeing Mr John having failed in keeping and fulfilling of his part of the tailzie, and having done the saids contrary deeds thereto, rendered the contract void, that thereby he could not seek the implement of any part contracted to him, having broken that which he ought to have performed for his part. All which reasons being at length considered in presence of the LORDS, they found none of these reasons relevant to reduce the contract of tailzie, and assoilzied simpliciter therefrom ; for the LORDS found, that albeit a simple tailzie made by any person in favour of another, that other not being contractor with the maker of the tailzie, and the tailzie not depending, nor being done upon any necessary or onerous preceding cause which might have produced the same, and compelled him thereto, but being done by a simple bond, or by a

voluntary charter, alterable and changeable as often as the maker pleaseth, as *donatio mortis causa*, which is ay ambulatory during the giver's lifetime; yet that tailzies done by way of contract, and perfected and subscribed by two parties *scienter*, and mutual on both parties sides, specially the father's consent adhibited thereto, and being reiterated and approven by a posterior ratification, and which depends upon onerous causes done therefor, or according to contracts of marriage, or amongst strangers or friends, on such causes, or for preserving of the ancient estate of their houses and heritages, perfected on both sides, are not revocable by any of the parties contractors their repentance, expressed after the perfecting and subscribing of the contract; from the which the LORDS found the parties contractors cannot resile, but that the same contracts are obligatory against the parties, and cannot be broken by one of them, except both the parties consent mutually, sicklike to the dissolving, as they did jointly together to the making and subscribing thereof; and the LORDS found, that such contracts, mutually subscribed by both parties, were not unlawful, as *pacta de successionibus prohibita* by the civil law of the Romans; but, by the laws of this realm, they were good and sufficient rights, and ought to be maintained as lawful; neither were they found to be *nuda pacta*, but that they were good complete writs and securities, which were obligatory against both parties, being subscribed by them; and also, that they were not innominate contracts, which sort of securities are not to be found in the laws and practiques of this realm; for these writs, mentioned in the treatises of lawyers and doctors, of innominate contracts, are not agreeable to the practise observed here; and so the libelling thereupon, and the argument of repentance, and liberty to resile, was rejected, and not found to be competent to any of the parties contractors themselves, if they were both on life; far less *postquam conditio Talliæ extitit*, was it found to be competent to those heirs who are not begotten of the parties bodies, but are expressly secluded by the will of the contract; neither was the action of *condictio causa data causa non secuta*, found to have any thing to do with this question of tailzie, where either of the parties were alike bound to others, and nothing was done on the one part more than on the other, for which the condictio might take place in favours of one of the parties who had fulfilled his part, for the not fulfilling of the other contractor's part, which held not here *ubi nulla res intervenit, sed utraque pars pari obligatione tenetur*: And as for any breach committed, either by Sir William before his decease, or by Mr John, whereby the pursuer *alleged*, that, by these contrary deeds, they have both receded from the mutual tailzie, the LORDS found, the doing of these deeds, contrary to their obligation contained in the said contract, looses not the tailzie therein contained; but that, notwithstanding thereof, the contract stands effectual and obligatory in itself, according to the tenor thereof; and that Mr John had good action to seek implement thereof, notwithstanding of the deeds alleged done by him against the same; seeing no prejudice nor interest can be qualified to be thereby incurred nor sustained by the pursuers, to whom the contract

No 1.

cannot be fulfilled for the part of Mr John, who being obliged to tailzie to Sir William, and the heirs begotten of his body, by the not existence of any heirs of his body, is liberated from fulfilling his part; and these pursuers, as not being heirs of Sir William's body, are not capable of the perfecting to them of that obligation, to the which they have no right; and if Sir William had lived, and quarrelled the doing of the said contrary deeds by the said Mr John, he would have compelled Mr John to fulfil the tailzie; likeas, there was place to the said Mr John to have fulfilled the same, and to have amended the failzie, by obtaining of infestment of tailzie, conform to the contract, which these parties have no interest to seek; and albeit they could not break this tailzie except both parties had consented thereto, yet the LORDS found, that, in these cases, the contractors may sell and annailzie the lands at their pleasure, notwithstanding of the contract of tailzie; for this contract, or other like contracts, extends not to prejudice the parties, or any of them, in any liberty which they had before the contract, except only concerning the succession to their right, wherein they having agreed upon an election of their succession, and the manner thereof, that was not alterable by them, but by consent, as said is; and these contracts extend to no other thing; so that, as they might dispone on their lands if these contracts were not made, and could not be quarrelled by their lawful succeeding heirs therefor, even so the substitute successors by the tailzie, who can be no better than the principal first person institute, or the lawful heir, where there are no tailzies, cannot hinder nor impugn these deeds; for these contracts extend only to give the right of succession to the persons appointed by the parties, that they may succeed, after the decease of the contractors, upon the conditions contained therein; so that if there be nothing to succeed to, there can nothing be sought by them. But, it may be thought, that, by this liberty permitted to any of the parties to sell, they may elide the force of the contract *in toto*, by making alienations to a stranger, yet to the behoof of another successor than that agreed upon in the tailzie; but, if such fraud be intended, it is in law reparable. See TAILZIE.

Act. *Cunninghame et Burnet.*Alt. *Nicolson et Stuart.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 304. Durie, p. 553.*

No 2.

1636. July 15.

DRUMMOND against DRUMMOND.

A person being decerned, by decree-arbitral, to tailzie his lands to another, after expeding charter, and taking sasine in

By decret-arbitral, pronounced in *anno* 1614, by the Earl of Perth, betwixt James Drummond of Drumdoue on the one part, and Mr David and Malcolm Drummonds on the other part, the said James is decerned, for the onerous causes contained in the said decret, to tailzie his lands of Drumdoue to the said Mr David and Malcolm's heirs-male, failing of heirs-male gotten of his body; whereupon action being intended by the said Mr David, the said defen-