

thereto by his vassal's being at the horn year and day. The Lords found the letters orderly proceeded for entering the charger, he paying to the superior only £24, which was the sub-feu-duty paid to him by his vassal; conform to a practise betwixt the Earl of Nithsdale and the Laird of Tellin, 1630, which was produced and alleged.

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1621. *March.* The EARL of HOME *against* The LAIRD of COLDINGKNOWS ;

AND

1634. *Feb. 22 & 28 ; and March 4.* JAMES HOME *against* LADY DOWN, LADY MAITLAND, and their HUSBANDS.

THERE was the like contract to that of Sir John Sharp's, (See the case, Sharps *against* Sharp, 14th January 1631,) made at London in March 1604, between umquhile Alexander, Earl of Home, and the Lairds of Coldingknows, elder and younger; whereby they bound themselves to tailyie their lands to others, failyieing heirs-male gotten of their own bodies.

There was a reduction of this contract intended by the said Earl Alexander, and insisted in by James Earl of Home, his son, upon this reason, because the contract bore a clause, that it should not be lawful to any of the parties, contractors, to do any deed to the contrary, whereby the said tailyies might be broken; which condition was *strictissimi juris*, so that, if any thing were done by which it were impossible that the contract could be observed and fulfilled by one of the parties, the contract behoved to be dissolved, and both parties put in their own places, *tanquam contractus ob causam, causa non sequuta*; there being no other cause, final nor impulsive, whereupon the said contract could subsist, but in respect of the said mutual observance, and fulfilling of either of the said contractors' parts; but true it was, that Coldingknows had either sold his whole lands, or the most part, for paying of debts, or they were comprised from him, at least they might be comprised from him, for his own debts and cautionary together, whereby he was made unable to fulfil his part of the contract.

This reason, in absence of parties, was found relevant by the Lords: this being added to the reason by the Lord's ordinance, that the debts and burthens were contracted since the date of the contract of tailyie. Whereupon, act of litiscontestation being made, the debts and cautionaries libelled were proven, and decret given reducing the said contract of tailyie, in March 1681.

Thereafter James, Earl of Home, having died without any heirs-male, either of his own body or of his father's; James Home, son to Coldingknows, younger, being served heir to his father, intended a reduction of the said decret reductive of the contract of tailyie, against the Lady Down and the Lady Maitland, and their husbands, upon this reason: That, though the contractors were obliged to do no deed in prejudice of the contract, yet there was no clause irritant contained therein, that in that case the contract should be dissolved; but the farthest that the obligation could infer, was to produce an action for implement, or else for damage and interest, which succeeds *loco implementi*; for, by law,

where parties are mutually obliged to others in a contract, the contravening of one of the parties imports not *distractum*, but only action *ad implementum*, or *damnum et interesse*. But the contract can never be dissolved without the consent of both parties: *Nam contractus iisdem modis dissolvuntur quibus contrahuntur*. And, as to that part of the reason bearing that there was no other final or impulsive cause in the contract, but only the mutual observance, it was contrary to the tenor of the contract, bearing these other causes, *viz.* The continuance of the honour and dignity of his house, in the name of Home; and the gratitudes and benefits done to him by the Earl of Dumbar.

The first thing that was called in question, in this cause, was, Whether or not the first decret reductive, being given upon a reason consisting *in jure*, and found relevant by the judge, (who is obliged in duty to look to the relevancy of a reason, though the defender be absent,) might ever thereafter be quarrelled. Which the Lords, all in one voice, found might very well be, the party defender being absent.—*22d February 1634.*

Thereafter it was alleged by the defenders, That the pursuer was served heir-male to the said James, late Earl of Home, in whose favours the decret reductive was given, and so could never quarrel the same decret. Replied, The decret being given in prejudice of the heirs-male, and in favours of the heirs of line, he, as heir-male, might very justly quarrel it; and that so much the more, as there was no execution to follow upon this decret. The Lords repelled the allegiance *hoc loco*, reserving it to be discussed whenever the pursuer should intent any action whereupon execution might follow.—*28th February 1634.*

After this, the defenders passed from their compearance; and the Lords advised the reason, which they found relevant and proven, after mature deliberation and reasoning among themselves.—*4th March 1634.*

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1634. *March 5.* ALEXANDER BLACK *against* The LAIRD of PITMEDDEN.

ALEXANDER Black having comprised certain lands, charged the Laird of Pitmedden, superior thereof, to infest him. He suspended upon this reason, That he was content to undergo his debt, and come in his place, which he might do by virtue of the Act of Parliament, Ja. III. Parl. 5, c. 36. Which reason the Lords sustained.

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1634. *March 26.* DOUGLASS *against* DUNBAR.

THE like found, (as in the case Ross against Robertson, 25th June, 1629,) between Douglass and Dunbar, bailie of Taine;—for, when one is convened *ex proprio delicto*, there needeth no other to be summoned thereto.

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