

\* \* Spottiswood reports this case :

No. 117.

Sir John Sharp caused draw up a bond between his two sons, Mr. John and Sir William, whereby they were obliged to tailzie their lands each to other, failing heirs-male of their own bodies. This bond was sought to be reduced at the instance of Helen and Margaret Sharps, sisters and heirs of line to Sir William, upon these reasons, *1mo*, The bond was not obligatory in law, being *nudum pactum, neque traditione, neque ulla alia re vestitum*; *2do*, It was *contractus innominatus*, whereof he might have repented himself at any time before his death; for it could be no more effectual than if charter and sasine had followed on it; in which case, there is no question but he might have altered the tailzie, or sold and disposed his lands; and that which Sir William might have done in his own time, the pursuer's may now do, being come in his place; *3tio*, As he might have repented himself of that bond, and revoked it, so *re ipsa* he did it by taking of infeftments after that to himself, and his heirs whatsoever, which was a tacit revocation of the former deed; likeas, on the other part, the defender, Mr. John, did the like; so that they both had consented to the revoking of it; which deeds, on both sides, were sufficient to reduce the said bond of tailzie. "The Lords, after long advertisement, having four days together considered this process, which was given in by answers and replies, &c. in writing, found, That this bond was not *nudum pactum*, but a perfect stipulation between the two parties, whereof none of them could repent themselves, without the other's consent;" for they thought not charter of tailzie and a bond alike, seeing, by a charter and infeftment of tailzie, the party granter thereof is not bound to him whom he makes heir of tailzie; but it is only done between the granter and his superior, without the knowledge often of him in whose favours it is granted; and therefore may be revoked at the granter's pleasure, (with consent always of the superior) since he was not bound to the other; but in a bond of tailzie, wherein one is bound to the other expressly, it is otherwise; and for the selling of his lands, there is no question but the granter of the bond may do it, notwithstanding thereof, because, by the bond, he was not bound not to sell his lands, but only to infeft the other as heir of tailzie in such lands, as he should die vested and seised of;—"And so the defender was assoilzied from the whole reasons of reduction."

*Fol. Dic. v. 2. p. 430. Spottiswood, p. 331.*

\* \* Durie's report of the same case is No. 1. p. 4299. *voce* FIAR, ABSOLUTE, LIMITED.

1634. March 4.

HUME against HUMES.

James Hume of Coldingknows pursues action of reduction against the two daughters, the only bairns alive, of umquhile Alexander Earl of Hume, and

No. 118.  
In conformity  
with the  
above.

No. 118. against Lord Doun and Lord Maitland, their husbands, for reducing of a sentence obtained by umquhile James Earl of Hume, the defenders' brother, by the which sentence the contract was reduced, made betwixt the said umquhile Alexander Earl of Hume and Lord Coldingknows, goodsir to this pursuer, and also betwixt the pursuer's umquhile father, whereby the earldom of Hume was tailzied to his said father and goodsir, and their heirs-male, failing of the heirs-male gotten by the said umquhile Alexander of Hume's own body; and so the living of Coldingknows was tailzied to the said umquhile Earl of Hume, failing of heirs-male of their own bodies; and both parties, by this contract, were obliged to do nothing to prejudice that tailzie, or whereby their said successors should not succeed to their said livings, except so far as concerned a certain special sum agreed upon, with the which it was permitted to the parties *hinc inde* to burden these lands *respectivè*. This contract being desired to be reduced at the instance of umquhile Alexander Earl of Hume, party contracter, and he dying after intenting of the action, before liti-contestation, and thereafter the same action being tranferred in umquhile James Earl of Hume, his son, and his tutors and curators *activè*, and in this now pursuer, as heir to his said umquhile father, who was deceased since the intenting of the principal action, and the same principal cause being wakened, and insisted on betwixt the said parties, and also wakened against old Coldingknows, goodsir to this pursuer, against which goodsir the said principal cause was first intended, and who was living at the time of this sentence reductive, which is now craved to be reduced; the reason whereupon the said contract was reduced by that sentence was, because the contract contained a mutual tailzie, as said is, with the foresaid express clause, "that none of the parties should do any thing," as said is, "to others prejudice therein;" and so that being the final cause thereof, the failure of any of the parties in fulfilling their part, and the contravening thereof, ought to reponè the other party against the contract, and put him in his own place against the same; whereupon he subsumed, that Coldingknows had failed, and, since the contract, had sold all his lands irredeemably, and had contracted debts, by the which all his lands might be comprised, and so had rendered himself altogether unable to fulfil his part, which was the final cause of the contract. This reason, in absence of the party, was found relevant and proved, and the contract reduced, and the Earl of Hume reponed against the same; which decret was now desired to be reduced, after the death of the said umquhile James Earl of Hume, the only heir-male of the said Earl Alexander, who was contracter, as said is, and whereby the condition of the contract began to take effect in the person of this pursuer, the heir of the other party contracter; the reason of which reduction was, that that first reason of reduction was not relevant *in jure*, for the one party's failing in his part of the contract was not a reason *in jure* relevant to reponè the other party, and so to dissolve the contract, there being no irritant clause therein, but only that the other party had, in law, action competent against the other party breaker, and his heirs, for implement of the contract, or for damage and interest, specially seeing that mutual tailzie made by Coldingknows (against which it was then first libelled, he

had contravened, by burdening or selling the lands, as said is) was not the final cause of the contract, as the reason bore, there being other causes by the said tailzie, viz. that the Earl of Hume made the said tailzie for preservation of the honour of the house of Hume, and the ancient dignity and estate thereof, and that it might remain with the name of Hume, and for great gratitudes done to the Earl by the Earl of Dunbar; and albeit he had subjoined also these words, "for the causes under-written," in the words of the contract, yet that ought to be understood but as a signification of his thankful mind, and not that the other party's tailzieing of his lands should have been the only final cause of the Earl's making of the tailzie, as the reason bears: Which reason being considered by the Lords, they found the same relevant to reduce the first sentence reductive; and found, that the Lords themselves were judges competent to consider of the first reason reductive, if it was then relevant or not, and if it was proved or not, by that contract, that the mutual tailzie was the final cause of the making of the tailzie by the Earl of Hume upon his part or not; and found, that they might discuss that reason now in this process, if it was relevant and proved, (as the Lords, by this first process, had found the same relevant and proved); the finding whereof, seeing it was so found and done in absence of the party defender, the Lords found to be no impediment in this second instance, but that it might be found otherwise, if they should find reason so to do, albeit the same reason did consist *in jure*; and whereby it might be thought, that that Judge which found once a reason (being *in jure*) relevant, could not find it again to be irrelevant, albeit that same contract, being considered then by the Judge, was found to prove the mutual tailzie to be the final cause, cannot now be used to prove the contrary, seeing the said sentence, and litiscontestation so finding, cannot hinder to examine and try, in the second instance, if it was well done there; and which the Lords found they might and ought to do, without any imputation to the Judge in the first sentence, seeing it was given *parte non comparente*, in which course of process, in absence of the defenders, the Judges' decreets are not so exactly examined as when both parties compare; and the Lords, after mature deliberation, having considered of this reason, and the foresaid first reason in the first instance, they found that reason nowise to have been relevant to have reduced the foresaid contract; and therefore they reduced that sentence reductive; for they found, that the contravening of their part of the contract by this pursuer's father and goodsir, who were contracters on the one side, (as the reason bears), was no cause to reponne the other party to the contract; but the most that in law might follow upon the doing of contrary deeds to the contract, was only to seek implement thereof, or else damage and interest for not implement, and no further; and that a mutual contract, being once perfected, could not be dissolved by a breach done by the one party, but only by consent of both: And also they found, that the foresaid contract, bearing, "to be made for the causes within mentioned," meant not that the tailzie made by Coldingknows was the final cause for which the other tailzie was made by the Earl of Hume; therefore they reduced, as said

No. 118. is. This decret was given, the defenders being absent; for after they had compeared, and proponed some defences, viz. dilatories, that the reason of the summons was eiked, altered, and mended, in substantial points, in respect whereof the procurators for the defenders, viz. the King's Advocate and Stuart, alleged, that they ought not to answer, until they were of new summoned; and which allegeance was repelled, and a short day, viz. ten days, thereafter, was assigned to them to answer to the summons, and reason as it was mended; thereafter they passed from their compearance, and the sentence was given, the defenders not compearing.

Act. *Nicolson & Craig.*

Clerk, *Gibson.*

*Fol. Dic. v. 2. p. 430. Durie, p. 706.*

1695. *December 31.* INNES *against* INNES.

No. 119.

In a competition betwixt an heir-male and an heir of line, an old tailzie being produced by the former, bearing, That the estate had always been conveyed to heirs-male, therefore the granter obliges himself to his father to provide the same, in like manner, to his heirs-male, &c. the Lords found this tailzie onerous, and so not revocable.

*Fol. Dic. v. 2. p. 430. Fountainhall.*

\*.\* This case is No. 386. p. 11212. *voce* PRESCRIPTION.

1701. *December 9.*

BURNET of Monboddo *against* The HEIRS of LINE of SIR ALEXANDER BURNET of Craigmyle.

No. 120.

A person having executed a tailzie, and thereafter a revocation of it, binding himself to cancel the tailzie, it was found, that it was revoked by the posterior deed, altho' he had not cancelled it.

Sir Alexander Burnet of Craigmyle signed a bond of tailzie, in the year 1686, in favours of himself, and the heirs-male of his own body; which failing, to Thomas Burnet, his uncle, and the heirs-male of his body; which failing, to James Burnet of Alagaiven, also his uncle; and failing of him, to Robert Burnet, his third uncle; and the heirs-male of their bodies, in their order; which all failing, to his own nearest heirs-male whatsoever.

The said Sir Alexander did thereafter, in the year 1688, sign a declaration and obligation, at Edinburgh, narrating certain onerous causes and considerations known to himself, and which, for the respect he bore to his uncle under-written, as being his own so near a relation, and, lest the same should thereafter be reputed a reflection upon him or his family, he thought not fit to express, or make known to the world; therefore he altered, revoked, rescinded, and annulled a disposition or bond of tailzie formerly granted by him in favours of Thomas Burnet, his uncle, his sons, and their heirs-male, or any one or other of them, of the lands therein