

1630. *January 24.* JOHN SHARP *against* The GUDWIFE of PITLECHIE and the GOODMAN of BURGIE'S SON.

THERE was a contract of mutual tailyie betwixt Mr John Sharp and Sir William Sharp, his brother, with consent of Sir John, their father, whereby ilk one of them were bound and obliged to resign their lands wherein they were infeft, and which they should acquire by the money left to them by their father, and to take infeftment thereof to themselves and the heirs to be gotten of their own bodies ; which failing, to their father's, Sir John's, nearest and lawful heirs whatsoever. Sir William performed not this contract in his lifetime ; but conquest some lands and tenements, and, but respect to the contract of mutual tailyie, took infeftment to himself and his heirs whatsoever. He dies, and leaves behind him a son, who, after he was served heir to his father, deceased minor ; yet, before his death, Mr John Sharp obtained the contract transferred against him. The Gudewife of Pitlechie, who was sister-german to the said umquhile Sir William, and the son of the Gudeman of Burgie, son and heir to his mother, who was another sister-german, serve themselves heirs-portioners to Sir William his son, John Sharp, in all the lands wherein he died vested and seised ; and Mr John Sharp transfers the contract of tailyie against them, and charges them to fulfil the same. They suspend, and intent reduction, upon sundry reasons ; *1mo.* That the said contract was but *nudum pactum nullius rei interventu vestitum*, seeing, that none of the said parties did any thing for fulfilling of the said contract, and that it was *pactum de futura successione*, which is null of the civil law. To the which it was answered, That this was a contract of mutual tailyie, which was ordinary and lawful by our law and practise ; in respect whereof the Lords repelled the first reason. *2do.* That this contract was not obligatory, and that Sir William could not have been compelled to fulfil the same *specifice* ; for, although inhibition had been served upon this contract, yet he might have disposed all his heritage *bona fide* ; and the lands disposed by him could not have been reduced *ex capite inhibitionis*. To the which it was answered, That Sir William would have been compelled to fulfil *specifice*. *3tio.* The contract is reducible, because, it being reciprocal, and the final impulsive cause thereof was the mutual tailyie, made or to be made by Mr John to Sir William ; if the said Mr John's part was not fulfilled to the said William, nor his son, in their lifetimes ; but, by the contrary, Mr John did contrary deeds, and took infeftments to himself, not conform to the contract of tailyie ;—the said contract did become void and dissolved ; and both parties became in their own places, *tanquam contractus ob causam, causa non secuta* ; and produced a practise which appeared *in terminis* of the like contract of tailyie, reduced by the heirs of John Spence of Condie, against the heirs of umquhile Mr John Spence, advocate, *anno* 1580, for the same reason. To the which third reason it was answered, That, notwithstanding of either of the parties' breach to others, yet, either of them may compel the other to fulfil ; and the breach did not dissolve the contract ; and, as to the practise, it was a colluded cause betwixt two parties, whereof neither of them had any right to succession by virtue of the said contract. *4to.* The contract is *innominatus*,—*do ut des*,—*et in hujusmodi contractibus locus est penitentiae* ; and as Sir William might have repented him, so may his heirs ; neither can the pursuers of this reduction, as heirs to Sir William, fulfil this contract but according to the strict terms of the contract, *viz.* to infeft themselves and the heirs of their

bodies; which failing, Mr John and his heirs. To the which it was answered, to the first member of the said reason, That this contract is *innominatus*, but a contract of tailyie, wherein there is no *locus penitentiae*. And to the last member, it is answered, That it is possible for the pursuers to fulfil, by resigning the lands in favours of Mr John; and that they should have any benefit of succession by virtue of this contract, it is expressly against the meaning thereof. The cause being disputed by writ, the Lords absolved the defenders from all the reasons of reduction and found, That their mutual contracts of tailyie were so obligatory, as none of the parties, without consent of others, might constitute their heirs to that heritage contained in the contract; but, notwithstanding of the same, although inhibition was served in these contracts, yet any of the parties might sell and dispoise lawfully the lands, but might not make any other tailyies in prejudice of the said contract.

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1630. January 25. MARGARET ANDERSON *against* GILBERT LAWDER.

A DECRET, obtained at a party's instance, wherein the defender is proven to be heir, by production of a seisine bearing the defender to be infest in certain lands, as heir to his father, albeit the said decret be gotten for null defence, yet, so long as it stands unreduced, may be used for proving of the said defender to be heir, and in another action pursued at another man's instance.

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1630. January 26. ——— *against* ———.

AN incident being sought for proving of an exception of payment, by discharges granted to the defender's father, which were alleged either to be in the hands of the persons that were tutors and curators to the defender, or in the hands of him that got the gift of the defender's ward;—to which it is answered, That now the defender is not minor, but major, and thir discharges ought to be accounted his own evidents, and he should have, since his perfect age, sought and recovered them, and therefore ought not now to have an incident. The Lords would not sustain an incident, but granted to the defender a long day, he making faith that he had not the alleged discharges.

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1630. January 29. SIR JAMES SCOTT *against* The TENANTS of KINGSBARNES.

SIR James Scott, having an assignation of a certain victual out of the King's-barns, granted to him in pension by King Charles, convenes the tenants for payment to him thereof, or of a certain price for the bolls of the said victual. It is alleged by the tenants, That they ought not to pay a greater price to a pensioner nor the price set down by the Exchequer. Which the Lords sustained.

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