No. 116. who is declared to have his right forfeited, or to be excluded from the succession.

The Court decerned in the declarator.

Lord Ordinary, *Polkemmet.* Act. *Hay, Cathcart.* Agent, *Ja. Gibson, W. S.*
Alt. *H. Erskine, Campbell.* Agent, *Ro. Hill, W. S.* Clerk, *Menzies.*

F. *Fac. Coll. No.* 136. *p.* 303.

SECT. VI.

Tailzie, when revocable?

1631. *January* 14. SHARP *against* SHARP.

No. 117. The Lords found, That although a simple tailzie, not depending upon any onerous preceeding cause, was alterable by the maker, as being *donatio mortis causa;* yet that a mutual tailzie, done by way of contract, is not revocable by repentance of any of the contracters, without mutual consent; and found that such contracts were not unlawful, as *pacta de successione viventis*, seeing such pactions by our law, are valid; neither was such a contract found to be *nudum pactum*, but a complete security, obligatory on both parties; *Lastly*, That such mutual contracts of tailzie were not *contractus innominati*, these sorts of securities not being known in this kingdom; nor did they find the doing of deeds by either party, which were contrary to the said contract, did loose the tailzie therein contained, but that notwithstanding thereof, the contract stood effectual.

In the same action the Lords found, That though neither party could break the tailzie without the other's consent, yet that the contracters might sell and dispose on the lands at their pleasure, notwithstanding the contract, which does not prejudge the parties in any liberties they had before the same, excepting only concerning the succession to their right; and if there be nothing to succeed to, there can be nothing sought by them; and although thereby the force of the contract might seem to be elidable, by making alienations in favours of a stranger to the behoof of another successor; yet if such fraud were intended, it was in law repairable.

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

*** 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, 1*mo*, The bond was not obligatory in law, being *nudum pactum, neque traditione, neque ulla alia re vestitum*; 2*do*, 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 disponed 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; 3*tio*, 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.

No. 118.
In conformity with the above.

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