

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-

der *alleged*, That he had satisfied the said decret, in so far as he had perfected a charter of tailzie under the Great Seal, to Mr David and Malcolm, and their heirs-male, &c. which charter he produced, and sasine conform thereto. And the pursuer *replying*, That the charter was ineffectual, in respect, since the date thereof, the defender had sold the lands to the Earl of Perth, whereby he had rendered the profit of the tailzie void, and made the right of succession by the tailzie to evanish, and therefore, at least, he ought to have his own money again which was given for the making of the tailzie; the LORDS found the exception relevant, and proven by the charter of tailzie and sasine produced, and found, that the defender ought not in law to be compelled to render again the money alleged paid for the making of the tailzie, as being made unuseful to the pursuer, by the alienation of the lands made by the defender; for it was found, that, notwithstanding of the tailzie, the party obliged to tailzie might sell the lands, and the alienation, however it took away from the pursuer the hope and benefit of succession any ways, by virtue of that tailzie, yet it was found not to impede the party obliged to sell, upon urgent and just causes, the lands; and there was no fraud or guile qualified upon the part of the seller against him, which might make it appear that it was done to frustrate the tailzie directly, (which, if it had been alleged, might have had its own consideration); neither bears the decret any such clause, prohibiting the party to sell the lands, nor has the party obliged himself not to sell them, nor to contract debt in his urgent affairs; nor is inhibition served thereon; neither is the defender obliged, nor decerned in the decret to refund the money, nor is it reasonable that he should refund it, he having done all that he was decerned to do, viz. to make the tailzie, which although it should be unprofitable, yet that is upon hazard, *quia emit quasi spem et factum retis*, therefore the LORDS assoilzied, *ut supra*.

This cause being called again upon the last of February 1637, it was so decided as it is here.

Act. *Gilmere.*Alt. *Nicolson.*Clerk. *Gibson.**Fol. Dic. v. 1. p. 304. Durie, p. 815.*

No 2.

terms of the charter, sold the lands to a third party. The sale was sustained, in respect the decree-arbitral bore no prohibition against selling, and no fraud on the part of the seller was qualified.