

not have been, he being then denuded of the superiority before. This reason having been found relevant against John Stewart, it was alleged, for Robert Douglas donator, That it could not militate against him, because John's escheat was disposed to him before the date of the commission 1627, whereupon he had obtained general declarator before it likewise; so that John Stuart, after that, by his surrender, could not prejudice his donator who had not submitted, and who, by virtue of his gift, stood ever in the right of the superiority before the Act of Parliament 1633. Replied, He being donator, and, by virtue of his declarator, having right to Wedderburn's liferent, (who, being rebel past year and day, his liferent fell to John Stuart, and, by consequence, to his donator, who had got it declared also,) he might and had right to intromit with the mails and duties of Wedderburn's lands, and so could never have sought his infestment to be reduced for not payment of the feu-duty; seeing the rebel could not have been bound to pay the same, if the donator had used his right, and sought possession; which if he had neglected, *sibi imputet*; and it is more proper that he should yet seek it in that way, than to have the pursuer's infestment reduced. The Lords repelled the exception, and sustained the reason of reduction against the donator.

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1634. February 11. REYNARD CASSINBROOTE *against* CAPTAIN IRVINE.

REYNARD Cassinbroote, Dutchman, pursued Captain Irvine for payment to him of 500 guilders, conform to his bond. Alleged, The bond was null, wanting witnessess. Replied, Referred the verity of the subscription to the defender's oath. Duplied, Not sufficient, except it were referred likewise to him, whether it was truly owing or not. The Lords thought, that, in respect the summons bore that he had given bond for such a sum, which rested yet unpaid, the defender could not give his oath upon any one part of the libel, but upon the whole as it stood; and that therefore he should depone as well upon the verity of the debt, as of the subscription.

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1634. February 15. ALEXANDER HAY of MONKTON *against* LORD YESTER.

THE Goodman of Monkton held some lands feu in Tweddale, of the Lord Yester, which he feued again to a sub-vassal. Alexander Hay of Monkton, having right thereto by the decease of the said Goodman of Monkton, charged the Lord Yester to infest him therein. He suspended on this reason, That he ought to pay him a year's rent of the land before he entered him. Answered, He was content to pay £24, which was all he got from the sub-vassal by year. Replied, He must have the full rent of the land, being a thousand merks yearly; seeing his vassal could not feu the lands to another in prejudice of him, but, whatever such a casualty would have imported before the sub-feu, it must be of the same condition presently; especially seeing the charger, all these years bygone, might have intromitted with the whole rents of the lands, and had right

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, fail-yeing 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,