

THE LORDS, by a great majority, found, " That the creditors were not barred from affecting the rents of the terce-lands belonging to the pursuer, and falling under her husband's *jus mariti*."

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Lord Reporter, *Ankerville.*
Campbell, Abercromby.

Act. *Wight, H. Erskine.*

Alt. Lord Advocate

Clerk, *Orme.*

C.

Fol. Dic. v. 3. p. 244. Fac. Col. No 212. p. 331.

S E C T. II.

False Representation.

1670. February 9.

JOHN SCOT *against* ALEXANDER CHEISLY and DAVID THOMSON.

JOHN SCOT pursues a declarator of circumvention against Alexander Cheisly and David Thomson, bearing, that Alexander Cheisly having a process against the Magistrates of Glasgow, for alleged hindering the executing of a decreet, and imprisoning him; and being in an evil condition in his means, he proposed to the said John Scot, his good-brother, that he must make use of his name as assignee to that process, lest his creditors might affect any thing that might be obtained thereby; and that John Scot should give a back-bond, declaring that his name was put in the assignation upon trust. Instead of which back-bond, he caused draw up a bond, bearing that for so much as Alexander Cheisly had assigned John Scot to a process against the Town of Glasgow, therefore and for other good causes and considerations, John Scot obliges him to pay to a blank person 3850 merks; in which bond, Alexander Cheisly filled up David Thomson's name; and which bond was obtained by Alexander Cheisly by gross circumvention upon the absolute trust the said John Scot reposed upon the said Alexander; for clearing whereof, he condescends on these points, viz. that the said John Scot was good-brother to the said Alexander Cheisly, had been his apprentice, and the said Alexander was his curator; and, the said John Scot is known to be a simple person, and the said Alexander Cheisly to be a subtle person, ready to take advantage; likeas, it is evident, that he did take advantage of the said John Scot, about that same time, pretending that he was more able to act in John Scot's affairs than himself, he procured assignation from John Scot, to bonds of 28,000 merks, and put in the assignation a clause of absolute warrandice; albeit by a back-bond of the same date, it be clear that the assign-

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Circumvention found instructed, not only against the circumventer who obtained a bond blank in the creditor's name, but also against a third party whose name was filled in the blank; who acknowledged that at the time the bond was delivered to him and his name filled up as creditor, the circumventer did not owe him a sum equivalent to that in the bond.

No 8. nation was only granted for love and favour, and for agenting the matter, and that the one half should belong to Cheisly for his pains, and the other to Scot, but prejudice to Scot's obligations in the assignation, which could be no other but the warrandice; whereby, albeit Cheisly knew that a part of the debts were paid to Scot's father, and a part was insolvent, and that Scot, who was assignee by his mother as executrix, had no more himself but warrandice from her deed, yet by the absolute warrandice he intended to be sure of the one half of the sums, although it is known that hardly the half will be recovered, whereby Cheisly should have all, and Scot, who freely granted the assignation should have nothing, but less than nothing, by being obliged to make up the half, though so much were not recovered of the whole. *2dly*, All the pretence of the plea against Glasgow could never amount to 3850 merks, yet the bond is conceived for absolute payment of that sum, albeit it was a mere plea, depending many years, and debated without success. *3dly*, Cheisly himself did ever keep the process and assignation, and did transact the plea, or a great part thereof with the Magistrates of Glasgow, and got payment. In this pursuit there was no compearance for Cheisly, but it was *alleged* for David Thomson, That whatever had passed betwixt Cheisly and Scot, no ground of circumvention betwixt them could be relevant to take away his right, who seeing the blank-bond filled up with his name by Cheisly, before it was brought to him, and given to him for debt due to him by Cheisly, and he being noways *particeps fraudis*, Cheisly's fraud or circumvention cannot prejudice him; for albeit extortion *vi majori* be *vitium reale*, that follows the right to all singular successors; yet fraud is not, and reaches none but *particeps fraudis*, both by the act of Parliament 1621, and by the civil law.

It was *answered* for Scot, That albeit it be true that an assignee for an onerous cause cannot be prejudged by the oath of his cedent, and consequently by no circumvention probable by his oath; yet, in personal rights, an assignee is in no better case than the cedent, *nisi quoad modum probandi*; but what is relevant against the cedent, and competent to be proven either by writ or witnesses, is competent against the assignee; so that the circumvention against Cheisly being inferred by pregnant evidences and witnesses, and not by his oath, it must be effectual against Thomson, whose name being filled up by Cheisly, is in effect Cheisly's assignee, for so all blank-bonds are commonly found by the Lords to have the same effect with an assignation. *2dly*, Assignees without an onerous cause, even as to the oath of the cedent, or any other consideration, are in no better case than the cedent; but here there is no onerous cause appears, for which Cheisly transmits this right to Thomson, for the bond bears not that for sums of money due by Cheisly to Thomson; or any other cause onerous on Thomson's part, that Scot should be obliged, at Cheisly's desire, to pay Thomson; but only that because Cheisly had assigned a process to Scot, therefore Scot becomes obliged to pay to Thomson. *3dly*, As there is no cause onerous instructed on Thomson's part, so his own oath *de calumnia* being taken, renders

the matter most suspicious ; by which he acknowledges he got the bond from Cheisly, and that Cheisly was not then his debtor for so great a sum as in the bond ; but that, by payments made to him and for him, thereafter he became his debtor in an equivalent sum ; but depones that he hath nothing to instruct the debt, nor no note thereof in his compt-book, though he be an exact merchant and factor ; so that there is no evidence or adminicle of an onerous cause instructed. And *lastly*, Albeit parties getting blank-bonds bearing borrowed money from the blank person, whosoever's name is filled up, the bond then bears the sums borrowed from him, whose name is filled up, and cannot be taken away but by his writ or his oath ; but this bond bears only a process assigned by Cheisly, and no borrowed money or other cause by Thomson ; and Thomson living in the same town with Scot, whom he knew, and is commonly known to be a simple person, and Cheisly a subdalous ; he ought, before accepting of the bond, to have acquainted Scot of the filling up of his name ; and if he had any thing to say, and cannot now pretend that he acted *bona fide*, but either must be *in dolo* or *in lata culpa, quæ dolo æquiparatur*.

THE LORDS found, That having considered the tenor of the bond and Thomson's oath, Thomson was in the same condition as to the relevancy and probation of the reasons of circumvention against Cheisly, and therefore found the libel relevant against them both to annul the bond, the apprisings and infestment, and all that had followed thereupon,

Stair, v. I. p. 669.

* * * Gosford reports the same case :

IN a declarator of circumvention pursued at Scot's instance, against Alexander Cheisly, who had elicited a bond blank in the creditor's name, and filled up David Thomson's name therein for the sum of 4000 merks or thereby ; the said Alexander having been his master and tutor, and the bond bearing the cause thereof to have been an assignation made by Cheisly to Scot, of a plea depending at his instance against the Magistrates of Glasgow, whereof Scot made never any benefit, but on the contrary, Cheisly himself had transacted the same ; it was *alleged* for Thomson, That albeit Cheisly had been guilty of any fraud, yet that was only a ground of a personal action against him, but could not be a ground of a declarator against Thomson, who was in *bona fide* to accept of that bond, being a lawful creditor to Cheisly. THE LORDS having taken Thomson's oath, who declared that he was only creditor to Cheisly in a small sum when his name was filled up in the bond, but that thereafter he paid out for him sums equivalent to the whole sums contained in the bond ; as likewise, that he had never any dealing with Scot, but that Cheisly had used all execution upon the said bond, they sustained the declarator against Thomson, as being *particeps fraudis* ; albeit, they could not find, that *dolus* and circumvention was *vitium reale*, which did affect a singular successor. Which interlocu-

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tor was hard, Thomson being a true creditor, and doing nothing but suffering Cheisly to use execution to his own behoof.

Gosford, MS. No 249. p. 103.

1671. *January 19.* Mr ROBERT DICKSON *against* JAMES GRAHAM.

No 9.

It was found sufficient to reduce a bond granted to a merchant who had furnished money at Venice, that there was no agreement before hand, by which the merchant might take what rate of exchange he could get; and that after the money was furnished, he had affirmed to the pursuer, that the exchange to Venice was higher than he knew it really was.

MR ROBERT DICKSON advocate having granted bond to James Graham, for a sum of money furnished to his brother upon an account; he raises reduction of the bond as to a part thereof, upon fraud and circumvention; *alleging* that the true cause of the bond was the causing answer his brother money, and that he had made an agreement before the hand, for so much the French florin; but his brother having some monies answered in Venice, without any agreement before the hand; when the parties came to account, James Graham being wholly trusted by the pursuer, did give an account, and did affirm to the pursuer, that the rate of answering money in Venice was at that time so much dearer than the same truly was, if it had been only answered in France; wherein he now understands he was deceived; because it was equal or less value to furnish it in Venice than France; and offered to prove the value of the money by witnesses, and the rest by oath. The defender *answered*, That it was lawful for him, being a merchant, to take what value for the florin he could agree; and that it would be of evil consequence, if bonds upon merchants accounts were reducible, and they held as circumveners, if they had taken a greater rate than the ordinary rate at that time; especially here the agreement of the rate being with a prudent party and a lawyer. *2dly*, The pursuer had homologated the bond by paying a part of it, and could not quarrel the rest.

THE LORDS found the reason of circumvention relevant; in these terms, that there being no agreement before the hand, wherein the merchant might take any rate he could get; but after the money was furnished, the defender had fraudulently affirmed to the pursuer, that the furnishing of the florin to Venice, was more than the furnishing of it to France; although he knew the contrary at that time; but would not find the main error in that article of the rate to be relevant; and they repelled the homologation, because the pursuer might be deceived in one article, and not in the rest.

Fol. Dic. v. I. p. 332. Stair, v. I. p. 704.

1674. *November 30.*

PILTON *against* The CREDITORS of the LORD SINCLAIR.

No 10.

A person disposed his estate with the

THE deceased Lord Sinclair having married his daughter with John Sinclair younger of Hermiston, did dispoise to him his estate, with the burden of his