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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.*

No 10.

PILTON *against* The CREDITORS of the LORD SINCLAIR.

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

own proper debts, mentioned in the right; and took a bond for an annuity of 8000 merks, first in the name of John Watt, and thereafter the said bond being given back, he did take another bond for the said annuity during his lifetime, in the name of George Cockburn of Pilton; whereupon the said George did diligence by comprising and otherwise, against the said John Sinclair of Hermiston; and did also take the said John Sinclair's liferent escheat. And upon the grounds foresaid, and a suspension of double pointing against him, diverse creditors of the Lord Sinclair did question Pilton's interest upon the foresaid bond, as being fraudulent, and a contrivance to frustrate creditors, and to secure so considerable an interest for the use of the debtor, contrary to the act Parliament 1621.

THE LORDS, notwithstanding, preferred the said George Cockburn, as having right to the duties of Hermiston's estate, by virtue of the said gift of escheat; reserving to the creditors their declarator of trust, or reduction upon the said act of Parliament; and accordingly, the whole estate of Hermiston being set in tack thereafter, the tack-duty is payable to Pilton, and the other creditors in order, conform to the said decret.

The tacksmen being charged at the instance of Pilton, did suspend upon double pointing, pretending they were troubled by other creditors of the Lord Sinclair; and the said creditors compearing, did *allege*, That they ought to be preferred to Pilton, in respect his interest *ab initio* by the said bond for the annuity foresaid of 8000 merks, was a fraudulent contrivance, in prejudice of the Lord Sinclair's creditors, that the foresaid annuity might be secured to him in the person of Pilton, his friend and relation, and thereupon might live plentifully, his creditors being defrauded, and suffering in the mean time; and that the gift of escheat of Hermiston's liferent, being granted *intuitu*, and upon account of the said interest, *laborat eodem vitio*, and was in effect to the behoof of the Lord Sinclair.

It was *answered* for Pilton; That though the said bond was granted to him without an onerous cause, yet *intuitu* of the same, and thinking that he was thereby secured, he had *bona fide* alimented my Lord Sinclair, and had paid to himself, and had engaged to others for him, to pay diverse sums of money, before any interruption made by the creditors; so that before any diligence done by them, his right became onerous, and the gift of escheat of Hermiston's estate was taken by him, to secure himself as to his relief; and that the King and Exchequer did, and might give the said gift to him upon the consideration foresaid; and thereupon, in the former decret of multiplepointing, he was preferred to all other creditors; and that his Majesty had also gifted the liferent escheat of the said Lord Sinclair, to Mr. George Gibson, upon a back-bond, that thereby he and the other creditors therein mentioned being satisfied, the surplus and benefit of the said escheat should be applied for the aliment of the said Lord Sinclair; and therefore, though Pilton should not have right as he had to the said tack-duty, the foresaid annuity and gift of escheat of Hermiston's life-

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burden of debts mentioned in the right, and took a bond of annuity, first in name of one person, then in name of another. This bond was challenged as a fraudulent contrivance to disappoint creditors. The creditor in the bond did diligence against the disponent of the estate, and obtained a gift of his escheat. He had alimented the disponent, and paid him sums of money. His bond, diligence, and gift of escheat were found effectual.

No 10. rent would accrue to Mr George Gibson donatar, to the uses foresaid, and fall under his gift.

It was *answered* for the Creditors; That they were content the Lords should modify an aliment for the Lord Sinclair; and that Pilton's interest should be sustained effeiring thereto; the superplus being applied, as it ought to be, for their satisfaction.

THE LORDS for the most part inclined to find, That George Cockburn's right to the said annuity was oærous, in so far as he could instruct that he had paid to, or for the use of Lord Sinclair, any sums of money before the creditors' diligence.

Yet some were of the opinion, That the Laird of Hermiston having married my Lord Sinclair's daughter, and having given the said bond for the annuity, during my Lord Sinclair's lifetime, was a downright contrivance, contrary to the act of Parliament 1621, to the end that the right to the said annuity, which, if it had been taken in the person of my Lord Sinclair himself, would have been liable to his creditors, might be so conveyed in the person of another, that it should not be liable to the said Lord Sinclair's debts; and being *ab initio* fraudulent, it continued still; and Pilton's applying any part of the same for the use of my Lord Sinclair, was so far from purging the fraud, that by the act of Parliament it was a clear evidence and probation of the same.

And yet they thought, That Pilton having, out of respect to his friend, lent his name inconsiderately, he might thereafter, for his security take, and the Exchequer might give, Hermiston's liferent escheat, upon the account foresaid; and the same cannot be thought to be to the behoof of my Lord Sinclair, unless it had been either procured by my Lord Sinclair, or granted expressly for his use. And as to my Lord Sinclair's own liferent, his Majesty and Exchequer might qualify the gifts as they thought fit; and his Majesty might have been concerned, upon many considerations, that my Lord Sinclair should not want an aliment; and might either have detained his liferent in his own hands, in order to his aliment, or given the same *sub modo*, and with the burden thereof; and the said gift was given as to the superplus foresaid, for the Lord Sinclair's aliment, not to be modified by any other, but by the Exchequer, and at their sight and direction, as the said gift bears.

Upon the grounds foresaid, the LORDS did prefer Pilton conform to the former decret.

For the Creditors, *Sir David Falconer, &c.*

*Alt. Dalrymple.*

*Dirleton, No 198. p. 87.*

No 11.

An heritor affirmed to his tacksman, at

1698. November 25. HENRY NISBET *against* JOHN KINNAIRD.

WHITELAW reported Henry Nisbet younger of Dean, against John Kinnaird, his tenant in the park beside the Coltbridge, being mutual charges on a 40