

* * Durie reports the same case :

No 1.

AN horning being executed by Lauder against Kincaid, for not payment of the feu-duty of his lands, the horning being desired to be reduced at the vassal's instance against the superior, upon this reason, because immediately, viz. upon the second day immediately following the denunciation, he had fully paid the said duty, for the which he was charged and denounced to the superior's self, who then received the same, whereby he was satisfied, and the vassal put *in tuto*, no contempt thereby being done by him against the superior ; and the superior concealing that he had denounced the vassal, to whom it was never imparted by him, not otherwise knowing that he was at the horn, that the concealing it at the payment making was a vehement presumption of fraud, which ought not to give so unjust advantage against the vassal, the payment being made before he was at the horn year and day, and whereby the liferent might fail, and the superior having no prejudice at all. This reason was found relevant, so far as might reduce the horning against the superior only, to take away the liferent from him, but prejudice of the said horning, so far as the King's Majesty, or any other party, might have interest therein *prout de jure*, and also against the superior's donatar constituted by him to the vassal's liferent.

Act. Nicolson & Craig.

Alt. Lermontb.

Clerk, Gibson.

Durie, p. 472.

No 2.

A minor's curators transacted a Lady's jointure of 2500 merks per annum, for 13,000 merks. She having unknown to them a cancer in her breast, died a few months thereafter. The Lords found the concealment of the disease not sufficient to reduce the bond, especially as the curators had homologated the transaction by payment of four years interest.

1687. June.

KENNEDY of Armillan, against BLACKBARONY, Curator of Aberlady, &c.

IN a process at the instance of Kennedy of Ardmillan, husband to the deceased Lady Aberlady, against Blackbarony, curator of Aberlady, for payment of 13,000 merks, conditioned to be paid for the pursuer's wife's liferent of 2500 merks yearly, affecting the minor's estate,

Alleged for the defender ; That the transaction was null ; for that *dolus dedit causam*, in so far as the liferent was bought while the liferenter had a concealed disease of a cancer in her breast, whereof she died within ten months after the bargain ; and the bargain ought to be reduced to a just sum, as the true value of it.

Answered for the pursuer ; That one with a cancer may live many years ; and the liferenter was not above 50 years of age ; *2do*, The pursuer, the husband, was not obliged to divulge his wife's infirmities ; and she having consulted physicians about her case, it was no secret ; *3tio*, The defenders had homologated the transaction, by payment of four years annualrent of the 13,000 merks, after the liferenter's death.

THE LORDS decerned for the whole 13,000 merks; and would not examine witnesses on the dole, as it was qualified.

Fol. Dic. v. I. p. 331. Harcarse, (FRAUD & CIRCUMVENTION) No 503. p. 140.

* * * Fountainhall reports the same case :

THE case of Hugh Kennedy, late of Ardmillan, and now of Baltersan, against Sir Patrick Murray, Sir Alexander Murray of Blackbarony, Fletcher of Aberlady, &c. was reported by Harcarse.—Hugh's first Lady, Seton of Barns's sister, had a jointure from her first husband, Mr John Hay, of 2500 merks yearly out of Aberlady. Sir Andrew Fletcher having bought the lands with this burden, Blackbarony, and the other tutors to his son, make a transaction with Hugh and her, and buy her liferent, and gave them 13,000 merks for it, at least a bond for that sum. That minor dying, his brother and his curators, and Mr Alexander Swinton of Mersington advocate, his father-in-law, raise a reduction of the bond *ex capite minoritatis, et lesionis ultra dimidium*, and upon fraud and circumvention, there being clearly *dolus in re* by giving 13,000 merks, where they would have been only liable in 2500 merks *ad summum*, she having died far within the year; and also *fraus in consilio*, he having absconded, and concealed his wife's condition from them, who was labouring then under a cancer in her breast, whereof she died shortly thereafter, and he intreated her children and friends to keep it quiet from them, she being at a great distance, living in Ayr; and so *ex edicto ædilitio et actione redhibitoria quanti minoris*, he is liable in restitution; and craved, before answer, to be admitted to prove her condition the time of the bargain.—*Answered*, He did not insist on the minor's bond, but on the curators own personal security, who were all *majores, scientes et prudentes*; and it was a fair transaction, like *jactus retis et emptio spei*; and if she had lived long, they would have been gainers, and so took their hazard, and her disease was not mortal; and so soon as they came to discover the latent insufficiency and defect by her death, they should have reclaimed, which they did not, but paid the annualrents for several years, and so homologated it.—THE LORDS, on Harcarse's report, found the qualifications of fraud and circumvention condescended on not relevant to reduce the bond; and therefore, in respect of the homologation, they found the letters orderly proceeded against them.

On a bill given in, they got a hearing in presence, when they qualified these acts of dole to induce them to bargain; *1mo*, His *reticentia*, and concealing it; *2do*, His *jactatio*, and bragging of the advantage he had got; and his giving out to quicken them, that others were in terms with him; both which the President thought usual in bargaining, and tolerable *in hac fæce Romuli in qua vivimus*; *3tio*, That he gave money to Mr William Fletcher advocate, a curator.—This was alleged to be only given for dispatch and to see him secured.—*4to*, That she had a mortal disease, and died shortly thereafter.—*Answered*, It is

No 2. not lethal if they live 40 days, as *Zachias, in quest. medico-legal*, says. And the President minded Thomas Fleming's case, who bought a woman's liferent, and she died within a week; and that law gives only six months for redhibition. THE LORDS adhered to their former interlocutor.

Upon this, Hugh Kennedy having extracted his decret for penalty and all, they gave in a bill, complaining, that he had extracted it for the penalty, whereas they had a most probable cause to suspend.—THE LORDS, on the 27th of July, recalled the decret, and assoilzied from the penalty; which, though materially just, yet was against form, the decret being extracted, and so should have been done by way of suspension.

Fountainball, v. 1. p. 462.

1696. June 5. JAMES WOOD against HARY BAIRD.

No 3.
Money offered at the current rate, after private knowledge of an act of Parliament lessening its value, found to be fraudulent.

WOOD being debtor to Baird in a sum, and hearing that on the 2d of June current, the Privy Council had by an act cried down the 40 shilling pieces from 44, (at which they had passed before) to their old standard of 40 pence; he that same night went and offered payment of the whole sum to his creditor in 40 shilling pieces; and he refusing to take them at their former rate, he took instruments on his offer, and gave in a bill of suspension, *alleging* he ought to be ordained to take them at the rate of 44, in regard the act was not proclaimed at the market-cross, (which is the only thing that puts the lieges in *mala fide*.) till the next day after his offer, and before proclamation the act was not obligatory nor binding.—THE LORDS considered the design of promulgating these acts was to certiorate the lieges; so if they knew before that public intimation, *that* was sufficient to make his offer fraudulent; and so found the creditor was not bound to accept of his private knowledge and fraudulent design. Some urged his oath might be taken if he knew that the act was passed before his offer; but the LORDS thought that needless, because his bill of suspension seemed to acknowledge as much.

Fol. Dic. v. 1. p. 332. Fountainball, v. 1. p. 718.

No 4.
An assignation of a claim of damages, after arrestment of the same claim before it was liquidated, held to be fraudulent.

1744. December 19. WARDROP against FAIRHOLM and ARBUTHNOT.

JAMES GRIERSON and James Gaiens merchants in Edinburgh, brought an action in the Court of Exchequer against John Macnaughton collector of the customs at the port of Anstruther, for an unlawful seizure made by him of some goods belonging to them, and obtained a decree for damages and costs of suit; which fund became the subject of a competition amongst their creditors.