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 onerous, 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 decreet.

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

No 11.
letting the lands, that there was paid by the preceding tenants for each acre a great deal more than really was paid. This was found not sufficient to reduce the tack.

years tack for their respective breaches and contraventions of the articles thereof. Kinnaird craved to be free upon the head of dole, circumvention, and extreme lesion *ultra dimidium*, which he qualified thus; that Dean, the time of the bargain, asserted that each of these acres paid him three bolls, whereas now it appears they only paid five firlots; and, on this false insinuation, made him engage to pay L. 25 the acre, which is an unsupportable difference; that, in dunging and bringing in this outfield-ground, he has wared upwards of L. 500 Stering, and yet it does not afford him the half of the rent; that Dean was bound to have stoned the ground, by removing both the heritable and moveable stones, and to have made cisterns for watering the cattle, but has done neither of them sufficiently; and therefore craved to be liberated of so unequal a tack.—*Answered*, Agreements of parties are not to be reversed and rescinded on such pretences; for, though it may be an argument of disingenuity to commend their goods beyond what they know them to be worth, yet pactions are not to be broke, else the most part of bargains must be cast. If, in selling a horse, the seller affirm he stood him L. 20 Sterling, whereas he truly paid but L. 10, that's no ground to repone the buyer; for in all such cases the law says *naturaliter se invicem decipere permittuntur, et caveat emptor;* his eye is his merchant, and there cannot be an exact arithmetical quality observed; and though lesion *ultra dimidium justi pretii* was allowed in the Roman law, yet it has been refused in our practice for the greater freedom of commerce, 23d June 1669, Fairie *contra* Inglis, *voce* SALE.—*Replied*, This was *dolus dans causam contractui*, which renders it *ipso jure* null; and the promoting bargains by lies, is neither consonant to Christian candour and sincerity, nor to be encouraged. Some moved to take trial, before answer, of the motives inductive to the bargain, and the proportion of the lesion. Others thought this opened too large a door to quarrel tacks of any kind; but finding a disposition in both parties to resile, the one craving only his bygone tack-duties, and the other his damages to be repaired; the LORDS named some to try an accommodation and settlement betwixt them.

December 6.—IN the action mentioned, 25th November 1698, between the L. of Dean and Kinnaird; the attempted settlement not taking effect, the LORDS advised the cause *in jure*; and found the reasons of circumvention and fraud, both *in consilio et eventu*, not sufficient to reduce the tack; and that the tenant should have informed himself better what was the true rent, and not have relied on Dean's assertion; and tried the quality of the ground; and his eye being his merchant, he had none to blame but himself, and he had acquiesced two years. But as to the damages by not removing the stones, and not making the ponds, the LORDS allowed a probation, before answer, to both parties on their several allegeances.

Fol. Dic. v. 1. *p.* 332. *Fountainhall, v.* 2. *p.* 19. & 23.