if so, that there were not here two tacks, but one tack, and which was clothed with possession;" it was stated, in addition to the former argument, that this was contrary to the decision, *Laird of Corsehill* against *Wilson*, 11th March, 1626, where it was found, 1*st*, That a bond to renew a tack, contained in the end of a tack, makes no part of the tack, but is a separate obligation. 2*dly*, That such a bond, however binding on the granter, is not effectual against a singular successor,—as was also found, *Hamilton*, 2d March, 1626.

On advising this petition with answers, the Court *altered* their first interlocutor, and returned to that of the Lord Ordinary.

Lord Kilkerran says,

"The reasoning went on this, that there was no argument from a tack for nineteen years, and five years thereafter, and after that for five nineteen years, that because all that was one tack, *ergo*, the obligation founded on in this case made the years for which it was granted to be one tack with the former endurance. I had no occasion to give my vote, being that week in the chair, but had it come to my casting vote, I had been for altering."

This case is reported by Elch. (Tack, No. 5.) and Fol. Dict. 2—17, (Mor. 9444.)

1737. *February* 16. SIR JOHN INGLIS of Cramond and OTHERS *against* ROYAL BANK OF SCOTLAND, as Creditor to Joseph Cave.

IN October, 1734, Cave purchased from the pursuer a quantity of barley of that year's crop. The price was made payable some time after delivery. On 21st January, 1735, Cave, whose affairs had gone into disorder, executed a disposition *omnium bonorum* to trustees for behoof of his creditors.

By this time, 538 bolls of the barley had been delivered to him in different parcels, part of it having been delivered on the very day above mentioned, when his bankruptcy was announced.

Upon this, the pursuers brought an action before the Sheriff of Edinburgh against Cave, and the trustees for his creditors, concluding for restitution of the barley, upon the ground that Cave having bought it at a time when he knew himself to be insolvent *dolus dedit causam contractui.*

The barley being measured over, by order of the Sheriff, it appeared that 156 bolls were still extant without any alteration, and that 221 bolls had been made into malt.

The case having been advocated, the Lord Ordinary ordered memorials on these two points, 1*st*, The relevancy of the libel, or claim of the pursuers for recovery of the victual sold and delivered by them. And, 2*dly*, upon the effect of the specification, as to so much of the barley as has been converted into malt.

In order that the question of law might not be embarrassed by disputes as to the fact, it was agreed that it should be assumed in the argument that Cave knew himself to be insolvent in October, 1754, when the bargain was made for the sale of the barley, upon the understanding that, in the event of the Court deciding the

question of law in favour of the pursuers, they should prove the fact if it was then disputed.

PLEADED, for the pursuers, that delivery of goods sold did not transfer the property to the buyer, unless the price was either paid, or *fides habita de pretio;* that it was only in consideration of the price that the seller parts with the property of his goods; that when one buys goods upon trust, and receives them on condition of paying the price at a day certain, if he knew himself to be insolvent, and takes the trust when he is conscious that he is unable to pay, he is guilty of a fraud; and it is a rule in all contracts, that *dolus dans causam contractui* annuls the contract.—*Voet,* Lib. vi. tit. 1. § 14; *Gaill.* Lib. ii. Obs. 15. No. 6; *Stair,* tit. *Reparation,* No. 14.; *Prince* against *Pallat,* 22d Dec. 1680; *Main* against *Maxwell,* 18th Jan. 1715.

As to that part of the grain which had been made into malt, it was argued, 1*st,* that no new species was thereby created; and, 2*dly,* that supposing it were otherwise, it is only where the operation is performed *in bona fide,* that the property is altered by a specification, and here Cave was *in mala fide.*

ANSWERED.—Mere insolvency is not a sufficient ground for annulling contracts made by the party insolvent, unless there is proof of a fraudulent intention, and in both the cases referred to by the pursuers, the Court required and found evidence of such intention.

As to the specification, they referred to *Inst.* lib. ii. tit. 1. § 25, and to *Voet.* lib. xli. tit. 1. § 21.

On advising the memorials, 16th June, 1736, the Court "find it not relevant to reduce any bargain entered into betwixt Joseph Cave and the pursuers, for the purchase of barley in October, 1734, that it appears by his books, that at the time of the sale he was insolvent; since, he continued his trade until the 21st of January thereafter, and his bankruptcy was not discovered till that time."

LORD KILKERRAN has the following note upon this part of the procedure.

"After this memorialist has argued the case very reasonably, giving it up that the case of *Prince* against *Pallat* is in point against what he pleads, only supposing there may have been circumstances that do not appear in the debate, which is *gratis dictum;* but there appears to me one difference, from the very fact as stated in the decision, that Pallat, immediately after shipment of the wines, got notice that Udney was like to break: so much is said, and that circumstance of Pallat's advising his correspondent, before the ship arrived with the wines, to stop the delivery of them, shews it to have been so. Whether this circumstance, joined with the after breaking, might not have influenced, I shall not say; only this much I must observe, that the laws and lawyers all speak of a *near* breaking, *mox, biduo, cominus,* and the like; and in that case, compare it to *furtum,* as argued from the L. 3 *de pignorat. act.* which law is, indeed, in the case of what is in a manner a direct *furtum,* and a fraud *mox, cominus,* instantly committed; and, indeed, this decision carries the thing farther than any law or authority that I have seen, if it shall be supposed that a mere breaking, three months after, will presume the fraud so as to annul the contract. In Maxwell's case, as marked by Bruce, the very next day after Maxwell had weighed over the tobacco to Simpson's wife, he caused (they being still in the weigh-house) cellar them as for himself. In short, I take the question to turn upon the point of time; the principle

is just that *dolus dans causam*, &c.; but it must be *mox* that the *dolus* appears. Let me suppose goods bought, *e. g.* bullocks; they graze for ten months; the buyer breaks, and it appears that at the time he bought, he was *lapsus; an ergo*, will the seller be preferred on the extant bullocks to the buyer's creditors poinding?"

The pursuers petitioned against this interlocutor; and, in addition to their former argument, they maintained *separatim*, that supposing the circumstance of Cave being insolvent at the date of the sale in October, were not sufficient to annul the bargain, yet, as this was a sale *ad mensuram*, the contract should not be considered as complete till the delivery and measurement; and if, at the time of the delivery of any part of the grain, Cave was thinking *cedere foro*, the contract should still be annulled; and they contended that this should affect the whole quantity delivered, and not merely what was delivered after Cave knew that he could not continue his trade.

The Court were of opinion, that the date of the delivery was to be considered as the date of the bargain; and that if the bankrupt did, soon before his bankruptcy, receive any part of the grain, the contract was so far void. But upon the question *how far* this was to be drawn back from the bankruptcy, they held that it must be confined *to three days*. They, at the same time, adhered to the interlocutor reclaimed against, in so far as it found that the circumstance of Cave knowing himself to be insolvent at the time of the sale in October, should not annul the contract.

The interlocutor was, "the Lords having heard, &c. they adhere to their last interlocutor, with respect to the barley delivered before the 18th of January, 1735, bnt find the bargain void as to any barley delivered that day, and afterwards."

Lord KILKERRAN has the following note on this part of the procedure.

"The decision in the case of Prince and Pallat receded from; indeed I always thought that decision was imperfect in reciting the fact, for when it is said that his circumstances grew suspicious at Bourdeaux, which occasioned the writing the letter which came to Scotland before the ship arrived, it shows that some circumstances which may have moved the Lords, are omitted in stating the fact."

"The interlocutor adhered to, as to all the bear delivered before the 18th of January, but altered as to what was delivered after,—the ground was, that *dolus dedit causam traditioni*. That *dolus dedit causam* is the ground of reduction, whether that be *contractui* or *traditioni:* Whether this was to be carried only to the 18th of January, or farther back, was the state of the vote, and carried the 18th, as said is, being *triduo* from the bankruptcy."

N. B. This case is reported by KAMES, (Fol. Dict. 1.—335. Mor. 4936.) and by ELCHIES, (*voce* Bankrupt, No. 9.) who states, in regard to the question of *specification*, that it was held that the specification by malting did not bar the reduction.

1737. *February* 18. CUNNINGHAM *against* LIVINGSTON.

THIS case is reported by C. Home, (see *Morrison*, p. 11660.) by whom the circumstances are stated at length. It is also noticed by Elchies (*Legacy*, No. 4.) Lord Kilkerran's note upon it is as follows:—