No 16. debt, which was greater than the goods delivered in price and value extended to; neither was it respected where the pursuer replied that it was a disposition *omnium bonorum*, done to a conjunct person betwixt a brother-in-law, and the disponer retaining possession thereof, while the night before he fled, and done *in meditatione fugæ*, and voluntarily without diligence or compulsion, and done to the prejudice of all other creditors, who were abused by the fraud of their debtor, keeping still his wares in his public booth, whereby they were put in security, while that mid-night before the day immediately wherein he fled, he delivered the said goods; which abuse, and clandestine doing was not at any time lawful; for such acts ought not to be useful to the receiver, by the common debtor's preferring of him voluntarily to the rest, who were deceived by the said clandestine deed; the disposition never being registrated, nor possession apprehended, by instrument or order of law, nor in due time convenient thereto; the pursuer by the contrary having done diligence by arrestment, upon the first day following the night of tradition, and that same day when the debtor fled; which reply was repelled, and the exception sustained, seeing neither before the disposition nor tradition, the pursuer nor no other creditor had done any diligence against the common debtor, in any manner of way; and the common debtor was never charged, nor rebel, at the disponing or tradition foresaid, without which preceding diligence, the act of divory met not the case.

Act. *Advocatus et Nicolson.* Alt. *Stuart et Mowat.* Clerk, *Gibson.*

Durie, p. 471.

1671. *December* 1.

Crichton *against* Crichton and Carruthers of Holmains.

No 17.
Fraud practised in filling up the endurance of a tack which had been left blank, found not to affect a singular successor, ignorant of the fraud.

Mr George Crichton being a minister in Ireland, and being long out of the country, and having interest by wadset in some lands possessed by the Laird of Holmains, he gave a tack of the said lands to John Crichton, wherein the tack-duty is twelve pennies Scots, and the years of endurance insert with a several hand from that which writes the body, and is fourscore one years; and there is a back-bond of the same date with the tack, bearing, that though the tack-duty was but twelve pennies Scots, yet the tacksman obliged himself, so soon as he attained possession, to pay yearly L. 6 Sterling, which back-bond bears in the narrative, that the tack was set for nineteen years, and these words, nineteen years, are insert with another hand in a large blank. The said tacksman coming to Scotland, did transact with Holmains, who possessed the lands upon another title, and paid him a sum of money, for which he assigned the tack. Now, Mr George Crichton having assigned his right to John Crichton, his goodson, he pursues a reduction of the tack against the said John Crichton tacksman, and against Holmains, on this reason, that the tack when it was sub-

scribed and delivered, was blank in the time of endurance, and so was null, at the least it ought only to be holden as for the space of nineteen years, which was the time communed and expressed in the back-bond. Upon the debate, the Ordinary in the outer-house ordained the writer and witnesses insert to be examined, and the setter of the tack himself, whether the tack was blank when it was delivered, and whether the communing was for nineteen years: The minister and witnesses insert, whose designations bear them to be his servants, depone affirmative. The cause now coming to be disputed, the defender *alleged*, That as to Holmains's right, the tack must stand valid, because whatsoever may be founded upon the back-bond against the tacksman subscriber thereof, or upon any communing contrary to the tack, the same cannot prejudge a singular successor contracting *bona fide* for an onerous cause; because the foresaid back-bond and communing being of the same date with the tack, is a most fraudulent contrivance, and could have no other intent or effect than to deceive a singular successor contracting *bona fide;* as the Lords did most justly find in the like case, where a bond being granted by one party to another, and he having granted an absolute discharge thereof of the same date, an assignee to the bond pursuing thereupon, and the debtor excepting upon the discharge, the LORDS repelled the exception in respect of the fraud, that the discharge was absolute and of the same date with the bond*, so here there can be no just intent pretended that the tack should have been altered in the substantials by a back-bond, or that it should have been delivered blank in the endurance; for, though the tacksman might, contrary to his communing or his back-bond, have filled it up; yet the setter of the tack did evidently give the snare to the singular successor by delivering the tack of another date than was communed or blank; seeing he might and ought to have filled up the time of endurance in the blank before he delivered the same; neither can this blank be taken away by witnesses, who cannot prove the contrary of any substantial of the tack; much less can the oath of the pursuer or his author operate any thing in their own favours; nor the testimonies of witnesses who were the setter's servants; and, though they were taken *ex officio*, of course in the outer-house, it is entire to the defender to allege that his tack cannot be taken away by witnesses. The pursuer *answered*, That his reason stood most relevant; but if any fraud was, it was in the tacksman, who contrary to the back-bond and agreement, filled up the tack; whereunto the setter being a stranger, not having been in Scotland since his youth, and being wholly ignorant of the forms of writs, was deceived by the tacksman; whose fraud is *vitium reale* and annuls his right, and all rights founded thereupon in consequence; whose *bona fides* in a voluntary act hath no effect, as it might have in payment or any other act to which the party might have been compelled; and not only the back-bond, but also the witnesses making it appear, that the tacksman had filled up the endurance unwarrantably contrary to the communing; the same ought not to be without effect, though ordinarily witnesses be not received to take away writ; neither can

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* *See* Sect. 4. *h. t.*

No 17. Holmains pretend *bona fides*, seeing the endurance of the tack was extraordinary, and was filled up with another hand, and so in effect without witnessses. The pursuer *answered*, That though fraud might annul the tack as to the tacksman, yet our law extends the effect only to the partakers of the fraud, and not to contracters *bona fide* for an onerous cause; but especially where the granter of the tack was either in *dolo* in the contrivance with the tacksman, or at least in *lata culpa*, delivering a blank tack without any just reason, wherefore the same was not then filled up, and so gave the occasion to the tacksman to cheat the defender; who had no just ground to suspect the tack, knowing that the setter valued it not, and never intended to follow it, being a minister residing in Ireland, where tacks of longer endurance are ordinary; and for the filling up of the endurance with another hand, there is nothing more ordinary; and the expressing the writer of the body of the writ is sufficient, and the witnesses are presumed to have subscribed the writ as it was filled up; and any decision in the contrary would overthrow the most important writs in the kingdom. Likewise, the nineteen years in the back-bond is filled up with a several hand from the writer of the body.

The Lodds found the defence proponed for the singular successor relevant, and that the reason of reduction could have no effect against him, unless it were proven that he knew, and so were partaker of the fraud.

Stair, *v.* 2. *p.* 15.

*** Gosford reports the same case:

In a reduction of a tack of the teinds of some lands belonging to Holmains, upon this reason, That the tack was granted to John Crichton, Holmains's author, and was blank the time of the subscription, as might appear by a back-bond of that same date, bearing, that albeit the tack was granted for payment of sixpence yearly; yet, that the said John, whensoever he attained possession, should pay L. 80 yearly; whereupon it was offered to be proven by the witnesses insert, that the tack was subscribed blank as to the years of endurance, which should have been filled up with 19 years only, whereas it did bear 81 years. It was *answered* for Holmains, That the reason was not relevant, because the tack being filled up with 81 years, as the endurance thereof, when he acquired right from the tacksman, any private back-bond granted to the pursuer could not take away the same, nor the depositions of the witnesses; otherwise it would open a door to all fraud and circumvention; upon which account, the Lords did find lately in a case between ——— and ———, that back-bonds of declarations made and subscribed the time of a disposition could not prejudge the same.

The Lords did assoilzie from the reason of reduction; and found, that the tack being subscribed and delivered blank, and entrusted to the tacksman to

No 17.

fill up the years of endurance, that he could never make use of any back-bond against a third person, who was in *bona fide* to acquire a right thereto.

Gosford, MS. No 411. p. 207.

1672. *June* 20.

BANNERMAN *against* CREDITORS of Mr ALEXANDER SEATON & GRAY of Haystoun.

No 18.
A father in implement of his daughter's contract of marriage, assigned a bond to her. The father's arresting creditors were preferred to the assignees of the daughter, tho' the assignation was intimated before the arrestment.

MR ALEXANDER SEATON granted assignation to his daughter, who is his only daughter of that marriage, for implement of the contract of marriage; whereby he was obliged in case there were only heirs-female, or daughters of the marriage, to pay to them such a sum at their age of fourteen years; and therefore assigns her to a bond of L. 5000 due by Haystoun; which assignation came by progress in the person of Bannerman of Elsick: The Creditors of Mr Alexander Seaton arrest in Haystoun's hand; the competition arises betwixt the assignation to the daughter, which was long anterior, and intimated before the arrestment; and the father's creditors, who were creditors to him before the assignation to the daughter, alleged that the daughter's assignation being betwixt most conjunct persons, was fraudulent and null, and could not prejudge the father's creditors; and that the implement of the mother's contract of marriage was never sustained as a cause onerous, to prefer children to creditors; who in that case could never be secure, if such latent causes might prejudge them; especially where the time of the assignation, the father had no other means, and thereby became insolvent. It was *answered*, That albeit clauses in favour of heirs of a marriage importing that they must first be heirs, can have no effect against creditors; yet here they are only designed heirs, as being they who might be heirs, if their father were dead; but need not be actually heirs; because their sum was payable to them at their age of fourteen years; which age they were past before the assignation; and so they might have pursued their father for payment of the sums.

THE LORDS preferred the creditors arresters, the mother of this daughter being alive the time of the assignation, albeit it was alleged she was past sixty.

Stair, v. 2. p. 86.

1681. *July* 15. Mr JOHN CAMPBELL *against* DR MOIR.

No 19.
A gentleman being abroad, and having no children, two of his relations agreed privately, that if his estate was disponed to either of them, the other should have a share.

UMQUHILE Patrick Moir having right to the lands of North Spittel and South Spittel, as heir of his father's second marriage, and having gone abroad to the wars, Mr John Campbell, who married the sister-german of that marriage, and Doctor Moir, who was his brother of a former marriage, did agree betwixt themselves, that if Patrick should dispone these lands to his sister and Mr John her husband, that they should freely denude themselves in favours of the Doctor of the one of these lands; and the Doctor agreed, that if Patrick disponed the same lands to him, he should denude himself of the other of the said lands