

F R A U D.

S E C T. I.

Fraudulent Concealment.

1629. November 30. KINCAID against LAUDER.

SIR LEWIS LAUDER pursued a declarator of N. Kincaid's liferent, fallen to him by reason that he being his vassal had remained above year and day at the horn; after obtaining whereof, the said N. Kincaid intended a reduction of the horning, in so far as Sir Lewis, his superior, might pretend to have any benefit thereby; for this reason, that he having been denounced at Sir Lewis's own instance, for not payment to him of his feu-duties; the next day after the said denunciation he made payment thereof to him, and obtained his discharge thereupon; in respect whereof, the cause wherefor he was denounced being satisfied long before his liferent fell to his superior; and his superior having fraudulently concealed his denunciation at the time he gave the discharge, of purpose to intangle him; of reason and equity he ought not to reap the benefit by his crafty and subtile carriage. *Answered*, He had done nothing but what was lawful in denouncing him for his contempt, and registering him in the public register; where he might have got knowledge of his being at the horn, and relaxed himself in time; and that his negligence could not prejudice the superior, who by no law was obliged to give the pursuer notice that he had denounced him.—THE LORDS found the reason of reduction relevant, in so far as concerned the superior, *ratione doli et fraudis suæ*.

Fol. Dic. v. 1. p. 331. Spottiswood, (HORNING.) p. 151.

No 1.

A vassal being denounced by his superior for not payment of the feu-duty, paid it the day after, and took a common discharge, the superior having concealed the denunciation from him. The horning was reduced, in so far as concerned the superior *ratione doli et fraudis suæ*.

* * 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. Lermonth.

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.