The second defalcation craved was of £2889 Scots, as the value of the teind; seeing they produced no heritable right thereto, but only some short tacks that would expire in a few years: and it is known teinds are subject to many hazardous accidents and diminutions which the stock is free of; and yet he is charged to pay twenty years' purchase for them as well as for the stock. And in a decision, marked by President Gilmor, *28th June* 1664, and by Stair *24th June*, *Black* against *Moffat*, the Lords found, in the price of goods the warrandice must be absolute, to make the right sufficient.

ANSWERED,—The offer at the roup was indefinite, without distinguishing the teind from the stock; otherwise they would have kept the price much higher. And the tacks are not so short; and he may get prorogations thereof. And with thir deductions he dwindles the price almost down to the half; whereas emption vendition is *contractus uberrimæ fidei*, to be regulated *secundum bonum et æquum*; and this were to pay the price by logic.

The Lords thought he behoved to have some allowance both for the short rental and the defect of the teinds; and granted a conjunct probation to either party for constituting the same.

The heirs made a farther offer, seeing he complained so grievously, they were willing to take the bargain off his hand, and refund him his expenses, *cum omni causa*, if he would put them in their own place; seeing they would get Pitlurg and others, who, without any vexatious pleas, would give them more than he had offered. And that this has sometimes been practised by the Lords, appears from the foresaid cases, cited by themselves; and again in *March* 1684, *Sutherland* against *Sutherland*.

ANSWERED,—These capitulations were very good in friendly communings, but were founded on no law, and much less here; they coveting to grasp at some meliorations he has made. And this was offered lately by *Major Chiesly to Bailie Brand*, for the lands of Dalry, and betwixt *Murdoch and John Allan*, and always refused.

The Lords did not think fit to interpose; but left the parties to move in these overtures as they pleased. *Vol. II. Page* 742.

July 30.—Charles Menzies of Kinmundy gave in a protest for remeid of law against Menzies his nieces, and John Muir; because the Lords had refused him a deduction from the price on account of the short tacks of the teinds.

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1712. *Feb. and June.* WILLIAM CLARK of TILLICORTHY *against* SIR SAMUEL FORBES of FOVERAN.

February 14. William Clark of Tillicorthy being a neighbour of Sir Samuel Forbes of Foveran, and under some debt; Sir Samuel designing a purchase of his lands, he transacts with some of his creditors, and takes a bond from him in December 1701, obliging him not to sell his lands, or grant bonds whereon they may be adjudged, without the said Sir Samuel's special consent, or making the first offer of these lands to him; and, if he be willing to buy them, Clark obliges himself to dispone the same to him, he giving as good a

price as any other person truly and really would give. And, if Clark contravene, he is to pay £1000 of penalty. About a year after this, Mr Clark gives a simple and absolute irredeemable disposition of his lands to the said Sir Samuel; but it is afterwards qualified by a backbond, bearing, that, in regard Sir Samuel had not yet paid the price, therefore he reserved the said William and his wife's life-rents, and also his son's, he always being capable of enjoying and possessing the said lands, and living peaceably, soberly, sensibly, and discreetly; and obliges himself to procure the ward-holding changed on Tillicorthy's expense, and interest from the date of its outgiving; and to pay 1800 merks for each chalder of the old and free rental. Tillicorthy, thinking himself over-reached by this transaction, and being charged to implement, raises suspension and reduction, on thir two heads of fraud, at least of trust, in so far as it exceeds a security to Sir Samuel of the sums truly expended for him; which he is willing instantly to pay him at the bar, and, on his refusal, to consign in the clerk's hands; so he shall not lose a sixpence.

ALLEGED,—This is a disingenuous procedure, after he has fairly sold his lands to him, to go and make a second bargain with Bailie Cruickshanks, to create him unnecessary trouble and expense; for, though his disposition be clogged with a backbond, that shows Sir Samuel's honest design not to take any unjust advantage of the man; but he is willing to fulfil his obligements in every point: and none will say but eighteen years' purchase is an adequate competent price for ward-lands in that part of the country. And where lies the circumvention, to take him obliged to make him the first offer of his land, and give him the preference, he paying as much as another? And, however strange and extraordinary that clause about his son may appear at the first view, yet all that mist will disappear and evanish when the matter of fact is put in its true light; which is, that Tillicorthy's son was fatuous and furious, so there is a provision made for him if he should reconvalesce and turn sober. So there is neither fraud nor trust here: but a true and real sale on the conditions of the backbond; which he is willing to fulfil.

ANSWERED,—The main design Tillicorthy had was, to get his bad holding changed; and to give Sir Samuel security forth of his lands for that, or any other debts he should pay for him. He does not deny but Sir Samuel had other views and designs; *first*, To fetter the poor man by the bond of servitude and slavery, that he should sell his lands to no other bidders and purchasers, that he might get it at his own price; next, to fetter and incumber the conveyance of the lands by an obscure, extravagant, and inconsistent backbond, the style whereof is to be found nowhere but in Sir Samuel's style-book. So the most it can amount to was a design of buying the lands, but no consummated bargain. And a parallel case is observed by Stair, *9th February* 1670, betwixt *Scot, Christy, and Thomson*, where an assignation was reduced, because impetrated on an insinuation that he was much fitter to manage it than the cedent, who was known to be a very simple person, and the assignee subtle, crafty, and designing. Just so here: this bargain proves Tillicorthy, the granter, to be a silly ignorant man, and Sir Samuel to be very artificial, and to have a good mind to the lands; but with such a variety of views that hindered his fertile invention to determine whether it should be an absolute sale or only a security; and therefore, in such ambiguous clauses, that sense is to be embraced *qui vitio caret, qui rei gerendæ aptior est, et qui benigniorem præbet interpretationem*; which,

in this case, can be no other but that the disposition was only for security of his money; and all beyond that is a trust, or else a cheat. Neither is the fixing a price any cure: for, 1*mo*, It is manacled it shall be what others truly and really would give. Here is a large field to quibble on the sincerity of other men's offers. 2*do*, It is eighteen years' purchase by the old rental. How many sessions might it take to know what is meant by that cautelous adjection? So here is a seed-plot for endless pleas to force the man out of his little estate.

The Lords, finding two grounds, one of fraud and the other of trust, did take it by the easiest handle; and found the disposition was to subsist as a security for repayment to Sir Samuel, of principal, annualrent, and expenses he could charge Tillicorthy with; and for refunding what he wared in changing the holding, with annualrent from the debursing, and to keep him *indemnis cum omni causa*; which being done, found the disposition satisfied, extinct, and null, as to any other effects. *Vol. II. Page* 723.

February.—Sir Samuel Forbes of Foveran protests against the interlocutor, *supra*, 14th February 1712. By this number of appeals, we see they increase every year, to the great impoverishing and detriment of this nation.

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June 25.—In the action betwixt Clark of Tillicorthy and Sir Samuel Forbes of Foverane, mentioned *supra*, 14th February 1712; it having been referred to Tillicorthie's oath, that the disposition was absolute without any trust; and he having deponed *negative;* a bill was given in by Tillicorthy, craving expenses, in regard the allegeance was calumnious; and no less was given in than an account of £1000 Scots and more.

ALLEGED,—That there was a *probabilis causa litigandi*; seeing the relevancy was *in apicibus juris*, and carried only by a scrimp plurality; and several of the Lords thought it a real sale, and saw neither fraud nor trust in it.

ANSWERED,—The very backbond carried its own dittay *in gremio*, and the trust resulted *ex facie scripturæ*; and so many shifts used to procrastinate the plea, and disappoint the commission, by tampering with the judges named, and taking oaths at his own hand to contradict what Tillicorthy was to depone about; that such unusual unprecedented actings were not to be passed without some notice and censure.

Some thought Bailie Strachan and the Sheriff of Aberdeen out of their duty in refusing to execute the commission; and that all the subjects of Scotland were bound to obey the Lords' orders sent to them. Others said, that all inferior judges were precisely bound to execute these commissions; but, as to country gentlemen, it was *actus voluntatis* to accept or not. Next, it was moved by some that, *quoad* all expenses debursed preceding the interlocutor finding the disposition a trust, Foverane was *in bona fide* to defend, and could only be condemned in the expenses since. But the Lords, abstracting from this distinction, stated the vote, Expenses or not? And it carried in the affirmative. The next vote restricted them to £15 sterling; though some voted only for £5, and others were for more than £15. *Vol. II. Page* 748.