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.*

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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.*

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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

No 19.
He disponed his estate to one of them, with power to alter. The disponee sent his son with the disposition to Denmark, where the disponer was, who recalled the former disposition, and granted a new one in favour of the son. The Lords found this transaction fraudulent.

in favours of Mr John and his spouse; which agreement 'both parties did swear 'to observe and fulfil.' Patrick did dispone the lands to the Doctor, 'with 'power to him to alter during his life;' but thereafter, the Doctor, to elude his agreement and oath, sent his son to Patrick, who was then General-adjutant in the Danish army; and he, by a postscript, recalled the former disposition in favours of the Doctor, and dispones the same in the like terms in favours of his eldest son. Mr John pursues the Doctor to denude conform to his foresaid agreement and oath, and refers the same to his oath of verity. The defender *alleged* absolvitor, 1*mo*, Because the alleged agreement being 'to denude of 'the right of lands,' which requireth writ to perfect the same, *est locus penitentiæ*, before the writ be subscribed, and either party may resile, likeas the Doctor doth resile. 2*do*, The case libelled holds not, for albeit the lands were once disponed to the Doctor by Patrick, yet he reserved a power 'to alter dur-'ing his life,' and accordingly did alter and dispone to the Doctor's son; whereby it is become *factum imprestabile* to the Doctor, being already denuded in favours of his son, not by his own deed, but his author's. The pursuer *answered*, That albeit in bargains requiring writ, there be place to resile, yet that is only *re integra*, and there is no more but an agreement; but here there is an oath interposed, whereby the matter is not entire, and the Doctor cannot resile *sine detrimento animi;* for the law of all nations holdeth oaths to be inviolable in things lawful; and that they take off any thing not essential to the deed; and therefore minors cannot revoke, when they have sworn 'not to come in the 'contrary,' when they may be easily imposed upon and deceived; much less can majors, where no deceit can be pretended; and if any party were entrusted to acquire a right for another, and were pursued to denude upon that trust, having acquired, he could not pretend place to resile, because his denuding required writ, seeing it proceeded *ex anteriori causa*, requiring no writ, viz. 'the trust;' and, in this agreement, there was a mutual trust, whereby the pursuer acquiesced; and did not interpose with the brother for a right, which they were liker to obtain in favours of the sister-german and her husband, than the brother *ex uno latere*. 'The Lords found, that there was no place to resile in respect of the oath.' The defender further *alleged*, That Patrick had denuded himself, and disponed in favours of his son, by the reservation in his first disposition to the defender, which is all one as if the first disposition had never been granted. The pursuer *answered*, That the second disposition was procured *pessimo dolo*, to evite the performance of the oath, and must be presumed to be the Doctor's deed, having sent his son to Denmark with the disposition, and therefore *pro possessore habetur, qui dolo desiit possidere*. The Doctor having evacuated his own right by fraud, he might denude with warrandice against the disposition to his son. It was *replied*, That fraud is not presumed, and the Doctor denies that he procured the alteration; but it was his brother's deed, who would not let the lands go out of the family. It was *duplied*, That fraud is here inferred *ex evidentia facti*, the Doctor having sent his son with the disposition; and it

was a fraud not to tell Patrick of the mutual agreement and oath, which could have no design but to make Patrick alter his disposition. No 19.

THE LORDS found the reply relevant, "That the Doctor sent his son with the disposition to Denmark, and that the brother altered the same there," to infer fraud, to evite the Doctor's oath; but if Patrick had been alive, it is like the Lords would have taken his oath how he made the alteration. *See* LOCUS PENITENTIÆ.

*Fol. Dic. v. 1. p. 333. Stair, v. 2. p. 890.*

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No 20.
An heir of line agreed with a remoter relation to divide whatever should fall to either, through the death of the uncle of the former. The agreement contained a submission to an arbiter named. This contract was ratified by both parties the day after the decease of the predecessor. The heir of line, on whom the estate devolved, obtained reduction of the contract, upon proving that the arbiter had imposed upon him, by falsely representing that the defunct had a great inclination to make the other party, his heir, and that when he ratified the contract, the arbiter concealed from him that the succession had devolved to him.

1682. *November.* BALLANTYNE *against* NEILSON.

BALLANTYNE having entered into a contract with Alexander Bonnar, whereby they obliged themselves to divide equally betwixt them, whatever means should fall to either through the decease of James Bonnar, uncle to Ballantyne; and submitted any difference that might arise, to the determination of Cornelius Neilson; to whom for his pains they granted a bond, whereby they obliged themselves, that a fourth part of what they should succeed to in manner foresaid, charges deducted, should belong to him; which contract and bond were ratified by both parties the day after James Bonnar's decease. Cornelius Neilson having afterwards acquired a right to Alexander Bonnar's half, he charged Ballantyne upon the agreement and bond to denude thereof, and of the foresaid fourth part; who raised suspension and reduction upon the reason of fraud and circumvention, qualified thus: That Ballantyne was grossly imposed upon, under pretence of friendship, by Neilson, to go into so disadvantageous a contract, about the succession to his uncle's estate, with one who was nothing related to the defunct, but only one of his name, and had not the expectation of a sixpence from him; by reasons falsely representing the succession transacted as a thing uncertain, in so far as James Bonnar had a great inclination to make Alexander his heir; and that Neilson had deceitfully elicited the bond in favour of himself, without any onerous cause, for his pretended pains in securing James Bonnar's means to one or other of the contractors; and to palliate the contrivance, had caused them transcribe and direct a letter to him from a copy wrote by himself, for drawing of the contract, and take an oath of secrecy not to discover what was done to any body; nay, further, had endeavoured to bribe Ballantyne's friends to desert him in the affair; and one of the witnesses in the contract did not remember that the papers were read at subscribing. Again, such a contract is *pactum de hæreditate viventis*, which law reprobates as *contra bonos mores;* albeit an agreement with a person concerning the future succession to his own estate is allowed, as in the case of tailzies and contracts of marriage.

*Answered* for Cornelius Neilson; That Ballantyne being major, *sciens et prudens*, might enter into such a contract; which was rational at the time, when it