No 50.

no way to the prejudice of the pursuers, as they had no claim to the subject. He might have taken the deed with the burden of Mr Seton's liferent, which burden might afterwards have been quarrelled, to his own and not the pursuer's profit; this he did not do, but gave it for an equivalent.

A case something like has been decided by the Court. William Dundas of Airth and Catharine Elphinston his spouse gave a bond of provision for 20,000 merks Scots to five younger children *nominatim*, subject to the granter's power of division; three other children were afterwards born, and the only method in the power of the parents to provide them, was by giving a larger share to such of the five elder as would consent that part of their provision should go to the unprovided children. The Lords sustained the division, and yet in that case what was given was out of the pocket of the five elder children; and here it comes off the defender.

The Lords thought there was here no proof of a corrupt bargain.

'They repelled the reasons of reduction.'

Reporter, *Elchies*. Act. *Lockhart*. Alt. *R. Pringle*. Clerk, *Gibson*.

Fol. Dic. v. 3. *p.* 245. *D. Falconer, v.* 2. *No* 130. *p.* 156.

SECT. VIII.

Facility and Lesion, without condescending on acts of Circumvention.

1696. *November* 27. Alison *against* Bothwell.

No 51.

The Lords advised the debate in the declarator of circumvention pursued by James Alison against Harry Bothwell of Glencross, for causing him, a simple young man, to renounce an infeftment of annualrent of 2500 merks he had well secured, and give down 200 merks of the principal, and take a personal bond for the rest, and a penalty of 500 merks on him, that his adjudication contained the whole sum. It being proven to the Lords, that he was a very weak young man, they reponed him against the failzie of 500 merks, and any other advantages taken of him; for though there was not *dolus dans causam contractui*, yet there might be *dolus in re*, and every inequality in a bargain ought

No 51.

not to annul; therefore the LORDS named two of their number to see his damage repaired, and adjust the matter without reducing the transaction *in toto*.

Fol. Dic. v. 1. *p.* 337. *Fountainhall, v.* 1. *p.* 738.

1697. *December* 23. SMITH *against* NAPIER.

No 52.
A reduction of a disposition was raised upon the grounds, that the disponer being a facile person, had denuded himself of the fee of his estate; that the disposition was not read to him; and when he scrupled to sign it, the disponee advised him to do it, for it contained nothing to hurt him. The Lords assoilzied the defender.

DAVID SMITH as heir, and having right by disposition, raises reduction of a right by the deceased Liddel of Craigannet, of his lands, to Mr Francis Napier, his uncle, on these qualifications, that he was a simple youth, and denudes himself of the fee of his estate, without power to contract a sixpence of debt though it had been to ransom him from the Turks, only redeemable by his heir-male; and that it was not read to him at the time; and when he scrupled to sign it, Mr Francis bade him do it, for it contained nothing that did hurt or prejudge him; whereby it appears the tenor of the disposition has not been understood by him.—*Answered*, These qualifications have nothing of relevancy in them to infer the least suspicion of fraud, circumvention, or extortion; for though a wise man would not have given such a right, yet the Lords are not curators to all who in this manner dispose upon their rights; and though it was not then read, yet it might have been read by him of before; and Mr Francis, in telling him it wronged him not, made no lie, for though it wronged his heirs, yet it did not prejudge himself. If he had disguised the thing, and called it a factory or an assignation to the rents, that might have imported dole; but nothing of that is pretended.——Some of the LORDS were for expiscation, before answer, of the youth's facility, and any acts by which he seemed to be imposed upon; but the plurality thought it hard to put the parties to the expense of a tedious probation upon so weak presumptions and probabilities of being over-reached, and therefore assoilzied from the reduction and qualifications of fraud condescended on as noway relevant; seeing probation is not to be allowed even before answer, save where there is some probable appearance of some relevant allegeances, which being proven, may induce a judge either to condemn or assoilzie; otherwise the common brocard takes place, *frustra probatur quod probatum non relevat;* though this does not impede the Lords in some cases to leave the relevancy undiscussed till they have the probation of the matter of fact likewise before them, that they may consider all together with one breath, without any anxious and precise anatomising the point of relevancy, which sometimes lies *in ipsis causæ visceribus*, and is set in a better light by the probation, where the allegeances seem contrary and are intricate, or involved in the matter of fact. But this method of making acts before answer is a branch of the *officium judicis nobile et inter casus arbitrarios*.

Fol. Dic. v. 1. *p.* 336. *Fountainhall, v.* 1. *p.* 804.