

liferent, and to the heirs of the marriage in fee ; whilk failing, to John Cunningham of Enterkin, her brother ; with this quality and provision, that it should not be in the power of the said Elisabeth or her husband to alter, innovate, or prejudice the foresaid destination in favours of his wife, children, and substitute foresaid ; and how oft the same should happen to be uplifted by the husband, it should be reëmployed by the advice, and at the sight of the Lords of Session, in session-time, and the three Lords on the bills in the time of vacance, in the precise terms and for the uses foresaid. The husband having bought a post in the army, and needing money, he and his wife gave in a bill to the Lords, representing that he is fiar of the sum, and has the power of uplifting ; and that he has bought an advantageous place, to enable him the better *ad sustinenda onera matrimonii*, and needs this money to pay his debts contracted ; and that he has lodged a bond in the clerk's hands in terms of the former bond, in favours of the bairns and substitutes, his wife consenting to the uplifting ; therefore craves the Lords may interpose their authority, and allow him to raise the money on the security he has consigned.

The Lords found they were made overseers and administrators of this money by the conception of the bond, and so their trust obliged them to see it secured ; and they thought his personal bond, who designed to live abroad, was too thin and slender a security for the bairns and substitutes to rely on ; and that the least he could offer was to find caution for its reëmployment, in the terms of the present bond. Which not being offered by him, the Lords thought they could not consent to his uplifting of the money ; and therefore refused the bill, without so much as giving it to see and answer. But if to his simple bond he offer caution, then they would consider it, when it should be so made.

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1711. November 29. RHYMER *against* BALFOUR.

ANDERSON, maltman in Couper, being heritor of six acres adjacent to that town, and dying without children ; Rhymer, his sister's son, being next heir, Balfour (who was his nephew) applies to Rhymer, and tells him he hears that Anderson, his uncle, had made some right or conveyance of these acres to a third party ; but if he would dispone the half of them to him, he, by his friendship and favour, would warrant him against any such deeds. And on this suggestion he induces Rhymer to enter into a contract with him, by which he obliged himself to serve heir, and then dispone three of these acres to him, and he became obliged to secure and relieve him of any prior rights his uncle had made. Rhymer, having made inquiry, finds there were no such disposition made by his uncle ; and thinking himself circumvened, he raises a reduction, *ex capite fraudis*, and that *dolus dedit causam contractui* ; in so far as he offered to prove, by Balfour's oath, that the true inductive cause of his entering into that minute, was Balfour's asserting to him that his uncle had disposed these acres, and he would defend him against that right ; and he acknowledging that it was the procatartick cause, then Balfour must prove the being of such a disposition, otherwise it was a mere snare and contrivance to trick him out of his three acres.

ALLEGED,—*Nullo modo relevat* that my telling you such a report was the mo-

tive inducing you to enter into that agreement with me, unless you add this farther qualification, that, notwithstanding of my suggestion, yet I knew there was no such right nor disposition made by your uncle; without which addition the first part is noway relevant to reduce such a plain and clear agreement.

ANSWERED,—There is no just onerous equivalent cause here so much as pretended, and so fraud is the more easily presumed; and you was *in pessimo dolo* to induce me, by affirming there were rights made by my uncle, unless you instruct the reality and existence of such rights; for *affirmanti incumbit probatio*; and now, after a course of years, no such thing appearing, law presumes there never was such a disposition; for *non esse et non apparere æquiparantur in jure*. It is true, *lesio ultra dimidium justii pretii* does not annul bargaining with us; but that holds only in sales, that trade may not be embarrassed: but in other affairs it is most consonant to the practice of all the civilized nations of Europe. Fachinæus, *lib. 2. Controvers. cap. 26*, says, *dolus ex rei evidentia* is the same with *dolus in proposito*. And A. Gayll, *lib. 2, Observ. 147*, concurs that *dolus ex enormi læsione rescindit contractum*; and Mascardus, *vol. 1, Conclus. 531, 532*, is very large on this; especially where one induces another by affirming what is afterwards found to be false. And however tender the Lords were at the beginning, as to the manner of probation of fraud, yet now being turned so common and familiar, the Lords should take all methods for expiscation. And Balfour can give no rational or so much as a probable account, why I should dispense the half of my small heritage to him, without any visible ground or cause.

REPLIED for Balfour,—That Anderson's wife, his aunt, having contributed much, by her industry, to the bettering his estate, and having no children, it was but just and reasonable that she and her friends should have a share of the conquest; and that none of the common grounds of law for quarrelling deeds occurred here, such as minority, idiotry, interdiction, &c. but is a contract entered into *inter majores, scientes, et prudentes*; and Rhymer under no legal incapacity, he might dispose of his own as he pleased; and his uncle is a witness to it. And he is ready to depone that he heard a rumour of such a disposition made by Anderson; and nothing can bring him under the compass of fraud, unless they can prove that he forged the story split new, without any ground or rise. Now, *dolus non præsumitur*, and obligations arise *ex variis causarum figuris, et nil magis congruum fidei humanæ quam pacta servare*. And the hazard of relieving him of all his uncle's debts was an onerous cause, though there had been no more.

The Lords had a great jealousy of the fairness of this bargain; and therefore, before answer to the relevancy, allowed a conjunct probation what was the cause of the said agreement; and if he had any just ground to assert that Anderson was previously denuded by a disposition, to induce Rymer to quit the half of his heritage, to secure him against a non-ens.