*** Durie reports this case:

No 36.

ADAM BOTHWELL being obliged, in the contract of marriage betwixt Mr James Aikenhead and his daughter, to make her a bairn of his house at the time of his decease, diverse years after there is a contract made betwixt the eldest son of the said Adam Bothwell, brother-in-law to the said Mr James, and the said Mr James, whereby the said Mr James dispones that clause of the said contract, and all benefit which he might have thereby, or by the decease of his said father-in-law, to his said good-brother, who is obliged therefore, by his particular bond, to pay Mr James 8000 merks, at the first term after his father's decease; which bond being desired to be reduced at the instance of the said Adam Bothwell's son, upon this reason, because it was *pactum contra bonos mores factum super hæreditate viventis*, which is forbidden in law, for thereby the good-son sells his partage of the goods, which he may succeed to, or fall to him, by his father-in-law's decease: This reason was not sustianed, but an absolvitor was given therefrom, because the civil law in this case (albeit also it receive diverse constructions and limitations, as if such pactions be made, *consentiente eo, de cujus hæreditate paciscuntur, tunc pacta sic facta tenent*, and sundry others) has no place, according to the laws of Scotland, as in tailzies and renunciations of the bairns' part of gear, and others; and this was a disposition of that which was provided by the father-in-law to his good-son, in his contract of marriage, which might be in law disponed upon by him, in whose favours it was conceived.

Act. *Advocatus & Mowat.* Alt. *Nicolson & Stuart.* Clerk, *Gibson.*

Durie, p. 525.

1708. *July* 15. RAGG *against* BROWN.

No 37.
A disposition by a remoter heir, conveying to the disponee his hope of succession to an estate, when the nearest heir was yet, and many years thereafter, alive, was sustained, though it was alleged to be *pactum corvinum de hæreditate viventis.*

JOHN WILLIAMSON, sheriff-clerk of Perth, and his posterity, being deceased, Alexander Ragg, whipmaker in London, being the said Williamson's sister's son, takes brieves out of the Chancery for serving himself heir to his uncle in the lands of Barnhill, and a house in Perth. Isobel Brown, relict of Borthwick of Hadside, *alleging*, she is descended of the said John's uncle's daughter, raises advocation of Ragg's brieves, on this reason, that though your relation seem nearer than mine, yet I must be preferred, because I offer to prove, that Ragg, your father, being one of Oliver Cromwell's soldiers here in Scotland, during the usurpation, pretended to marry Margaret Williamson, sister to the said John, of which you was born, and yet had a wife then living in England, and was censured for taking two wives in one of their military judicatures they had at that time, and so you being an adulterous bastard, I, as

next in blood, have raised advocation of your service, and taken out brieves for myself; and the witnesses to prove his being then married, being very old, as this affair is *in re antiqua*, she craved the witnesses might be examined to lie *in retentis*, till the declarator came in by the course of the roll. *Answered*, This allegeance of bastardy, in having two wives at one time, is a mere dream and chimera, and can never be proven; but, on the contrary, Ragg offers to prove, by the whole neighbourhood of Perth, that his father and mother cohabited together as man and wife during their whole lifetime, and were habit and repute such, and never any question nor controversy moved about it; and craved a commission for examining the witnesses thereupon.——THE LORDS advocated Ragg's service to their macers, of consent of both parties, and named two of their own number for assessors, to assist them in any objections that should be made, why neither of the services should proceed till the probation of bastardy on the one side, and of cohabitation as man and wife on the other, were taken. No 37.

1708. *July* 29.—IN the cause, Ragg *contra* Brown, mentioned *supra* 15th July 1708, it was *objected* against Ragg's service, that without a procuratory no man living without the kingdom, as he did, could be served; and as to the procuratory produced, it was null, being a disposition made by Ragg to David Smith, Methven's brother, in 1700, now eight years ago, conveying to him his hope of succession to Clerk Williamson's estate, when the nearer heirs were yet, and for many years thereafter, in life; which is the *pactum corvinum de hæreditate viventis* reprobated by the Roman law, as inducing *votum captandæ mortis alienæ*; and it was *contra bonos mores* to dispose on her succession who lived seven years after that disposition, containing a procuratory to serve him heir to her whenever the succession should devolve and exist; and whatever an apparent heir may do, yet a remote presumptive heir cannot till their right exist. And now, after so long time, it may rationally be presumed, that he is dead, in which case his property is dead with him. *Answered*, That the Romans, a jealous people, much given to poisoning, did restrict such bargainings, but our law has repudiated these niceties, and sustained such pactions, as Durie observes, 6th July 1630, Aikenhead *contra* Bothwell, No 36. p. 9491.; and a mandate to be executed *post mandantis mortem* subsists, 18th January 1678, Gray *contra* Lady Ballegernoe, *voce* TUTOR and PUPIL; and friends may be empowered to divide an estate among children, and take it from one to another, as was sustained in the Laird of Dundas's case; and, by the 113th act Parl. 9. Jas I. no exception is received against the breif of mortancesty; and nothing hinders a person having no present right to resign and dispone what he has remotely *in spe*, and the supervenient title will accresce to the receiver. And so, by the same rule, a conditional procuratory may be granted, to take effect when his right exists; and though it be some years ago, yet still *præsumitur*

No 37. *vivere*, unless they offer to prove dead.—THE LORDS sustained the procuratory as sufficient to carry on Ragg's service.

Fol. Dic. v. 2. p. 23. Fountainhall, v. 2. p. 453, & 459.

*** Forbes's report of this case is No 23. p. 5260. *voce* HEIR APPARENT.

No 38. 1746. *July 9.* WRIGHT and RITCHIE *against* MURRAY.

THE liferent of a subject being left to a woman, with a power to her of disposing of the subject, at her death, to any of certain persons named, she desired one of the nominees to get a disposition drawn in his own favour; but stipulated, that her husband should have the liferent. The nominee agreed with the husband to give him a certain sum in lieu of the liferent, and took the disposition simply to himself. A reduction of the disposition being brought by the other nominees *contra bonos mores*, the LORDS repelled the reason of reduction.

Fol. Dic. v. 4. p. 30. D. Falconer.

*** This case is No 50. p. 4952. *voce* FRAUD.

SECT. VIII.

Contravention of a deed by collusion of the depositary.

No 39. Found that the depositary of a bond, could not propone compensation, upon a bond for aliment, which, while in the knowledge of the debt in the bond entrusted to him, he had taken in contravention of it.

1724. *January* 28.

ELIZABETH LAUDER *against* KATHARINE BROWN, and her Husband.

THE Representatives of William Brown were pursued by Elizabeth Lauder, as executrix confirmed *qua* nearest of kin to Mary Seton, for payment of a bond for 500 merks, granted by William to the said Mary, dated 23d of March 1706.

In this bond it was expressly provided, 'That the said Mary Seton should 'not have it in her power to uplift or assign the foresaid sum, or to contract 'debt, or do any other fact or deed that might affect the same, without con-'sent of David Forrest and William Lauder,' &c. And for Mary Seton's further security, the bond was depositated in the hands of the said David Forrest.

The defence proponed was compensation, founded on a bond for L. 450 Scots, granted by Mary Seton to the said Forrest, and by him assigned to the