first wife, had no interest in any part of his wife's moveables, but was secluded by the second contract.

There was a second point started by the pursuer, but, not being fully debated, was not considered by the Lords at that time; and it was this, that the second contract being entered into *stante matrimonio*, it was *donatio inter virum et uxorem*, and could not impair nor restrict her matrimonial provisions; as she outlived her husband, she would have fallen to have the half of his moveables, and the half of his conquest, which would mightily exceed her 2000 merks of jointure provided to her by the second contract; and her father's consent could not prejudge her from reclaiming; and craved to be reponed against such evident lesion. *Vol. II. Page 585.*

1710, *July* 29.—An Appeal to the British Parliament was given in by Johnston of Garmoch against the interlocutor of the 12th current, mentioned *supra*, finding the second contract passed betwixt Sir Thomas Moncrief and his first lady, cut off any pretence her executors had to a share of his moveables or conquest. *Vol. II. Page 594.*

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1710. *July* 27. ROBERT NEILSON *against* JANET COUTTER.

LORD Forglen reported Neilsons against Coutter. James Neilson, merchant in Rucan, in May 1701 dispones his goods and debts to Janet Coutter his spouse, with the burden of several legacies to his friends and relations, having no children; and particularly of £40 sterling to James Neilson, his brother's son, under the express quality and condition, that the said James being then abroad, if he should, after getting information of the said legacy, and of his death, come personally, within seven years after the testator's death, and demand it, then he should have it; but, failing of that, then he appointed the legacy to accresce to Robert Neilson the testator's brother, with annualrent during the not-payment. The testator dies in 1701, and the seven years elapse without hearing from James, to whom the £40 sterling was left; whereupon Robert Neilson supposing his right of substitution now existed and took place, in regard James, the first institute, had not claimed his right within the seven years, and so had forfeited the same, and being devolved to him, he pursues Janet Coutter to pay the legacy to him.

ALLEGED,—The first legatar's right is not irritated nor fallen; because the seven years cannot run from the testator's death, but from the time he got notice and information of it: but, *ita est* they produce a letter from him, dated in June 1709, from Maryland in America, bearing that he had accidentally met there with a Scotsman, that had acquainted him of what his uncle had left him of his death, and the conditions annexed to it; and if it were absolutely necessary, he would come home and receive it; and desired her advice. And it is plain, by the principles of all laws, that, so long as he was ignorant of the conditions, it was impossible for him to purify the same; for *non dicetur conditio deficisse ubi conditioni parere non potuit.* And you, Mr Neilson, the next substitute, ought to have sent him notice thereof, and not suffer the time to elapse; and if

you have taken that advantage of him, *nemo debet ex suo dolo lucrari,* nor have benefit arising from his own fault.

ANSWERED,—They are founded in the precise words of the legacy, which gives him seven years to claim his right; and that being now elapsed, *est locus substituto;* and it was not my province, being debtor, to certiorate him, but it was incumbent on you, who pretend right to the same in the second place; and I can never be *in tuto* to pay till it be determined whether you or he has the best right to the principal sum.

The Lords considered this case to be decided *secundum bonum et æquum;* for here is a legacy left under two conditions,—the first is *conditio casualis,* and the other *potestativa.* The *first,* of his getting information, did not depend on him, nor was it in his power; the *second,* of his coming personally to claim the legacy, was clearly potestative, after he came to the knowledge of it, a competent time being allowed for the distance he was at; and it shocks natural equity for the substitute to grasp at the advantage of his absence and ignorance. And the Lords remembering that in such cases the Roman law introduced a remedy, by the *cautio Mutiana,* whereby the party found caution to refund if the condition failed; therefore they allowed James yet a year to return to Scotland, (in respect it would take a long time to advertise him in Maryland, few ships going there,) and claim his legacy; and ordained Coutter, the relict, to find sufficient caution to pay it to any who shall in the event be found to have best right; and if he returned in that time, allowed him to be heard why he had not forfeited his right; and if he came not home then, ordained her to pay it to the substitutes; and found it bore annualrent from the testator's death.

*Vol. II. Page 593.*

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1710. *July* 28. PATRICK BELL *against* HUGH MUIR.

BELL and Muir. James Lawson, merchant in Glasgow, in 1665, dispones six acres of land to his two daughters and the heirs of their body; and, for a considerable sum of money undertaken for him by Mr Patrick Bell, he, failing of his two daughters and their heirs, dispones the acres to the said Mr Patrick his heirs and assignees. He reserves his own liferent, and, in case of necessity, or being reduced to poverty, a power to dispose on a part of the acres for his own relief. On the procuratory both the daughters and Mr Patrick are infeft *nominatim.* Margaret, one of the daughters, being married to Mr Hugh Muir, she, in her contract of marriage, *in anno* 1681, dispones these acres to her husband *nomine dotis,* but in the subsequent clauses it seems to be restricted to a liferent in his person. For clearing up this dubiety, there is a new disposition given by her *stante matrimonio,* conveying the fee of these acres to her husband. The said Margaret deceasing without children, Mr Bell, as the next substitute, and standing infeft, pursues maills and duties against the tenants and possessors of the acres. Wherein compearance is made for Hugh Muir, a son of the said Mr Hugh's by another wife; and founds on his father's right, that Margaret being undoubted fiar, she had disponed the same to his father in her contract of marriage; and *causa dotis est favorabilis, et in dubio pro dote est respondendum;* and a tocher given *ad sustinenda onera matrimonii* can never be called gratuitous;