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.

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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;

And if any scruple arose from the unclear conception of the contract, the mist was fully dispelled by the second disposition fully transmitting the fee; *et in claris non locus conjecturis;* and his taking a simultaneous seasine with the institutes was most unwarrantable, he having no right till the failyie existed; as was decided, 14*th January* 1663, *Beg* against *Nicolson.* And here no other could be fiar but either his father or the heirs of the marriage; but it were absurd to suppose the fee pendent, and hanging in the clouds, aye till an heir of the marriage should exist, which is both contrary to the principles of law and the current of our decisions; 12*th December* 1665, *Pearson* against *Martin;* and 23*d January* 1668, *Justice* against *Stirling.* So she being absolute and illimited fiar, and under no prohibitory clause, what hindered her to do a rational deed in favours of her husband, failing children of her body; and to prefer her husband in that case to an extraneous substitute? as was found by that famous decision, 1*st* and 21*st December* 1680, *Anderson* against *Bruce.* And *esto* Mr Bell's substitution were onerous, yet that lays no restraint on the fiar, to impede them from rational deeds; and was so found in a mutual tailyie, 14*th Junuary* 1631, *Sharp* against *Sharp;* and President Newton, *February* 1683, *Bonnar* against *Arnot,* tells, the Lords found a substitution of 30,000 merks evacuated by a legacy of a person that was minor.

Answered for Bell,—Whatever may be pled in gratuitous substitutions, only made for love and favour, he is nowise in that case; for this was his purchase, and he had bought it with his money: it was a real emption and vendition, which must not claudicate and stand singly on the will and arbitrament of the seller. *Bona fides contractuum* will not allow such an inequality, nor permit the first institute to evacuate and elude it, except for most necessary and onerous causes. Muir's contract of marriage is as clear as the sun can make it, and gives him no more but a pure liferent. The subsequent disposition is *donatio inter virum et uxorem stante matrimonio,* and so could never prejudge the onerous substitute, and irrefragably demonstrates no more to have been intended by the contract but a liferent, else what needed the second disposition? And by sundry decisions the Lords have found, that voluntary and unnecessary deeds of institutes cannot evacuate onerous substitutions; as 31*st January* 1679, *Drummond;* and 10*th February* 1685, *The Executors of Mortimer* against *The College of Edinburgh,* in President Falconer's collection; and more lately, 15*th January* 1697, and 18*th November* 1697, *Yorkston* against *Burn and Shiels;* where the Lords annulled a minor's testament, because it crossed her father's substitution, and found she could not prejudge it.

The Lords, in this case of Bell and Muir, found, by plurality of votes, the daughter's disposition could not prejudge the onerous substitute; and so preferred Bell to the acres. *Vol. II. Page* 594.

1710. *November* 8. Hope, Stewart, &c. Creditors of Muirhead of Steinson, *against* The Earl of Orkney and Hamilton of Wishaw.

The Lord Dun, Probationer, reported Hope, &c. against the Earl of Orkney and Colonel Hamilton. Muirhead of Steinson having died in Flanders in 1706, the Earl and Colonel, as his superior officers, intromitted with his money and effects. Hamilton of Wishaw, being creditor to him, takes out letters of admi-