No 20. was dubious which of the parties would succeed; Alexander Bonnar being one of the same name, though a remoter relation than Ballantyne, who now eventually comes to have it *jure sanguinis*. 2*do*, Ballantyne's ratification after his uncle's death, when there was *jus delatum* to him, takes off all suspicion of circumvention.

Replied, As Ballantyne was deceitfully induced to subscribe the contract, so he was imposed upon to ratify the same, the very day after his uncle's death, while he was ignorant of his having right as heir to the defunct's estate; which was but a continuation of the former fraud.

The Lords, before answer, allowed a mutual probation; Ballantyne to prove the qualifications of circumvention, and Neilson to prove his answers.

And the foresaid qualifications of circumvention being proven, the Lords found the agreement and bond were elicited by fraud and circumvention; and that the same fraud and circumvention was continued in impetrating the ratification; so as it cannot confirm and validate the foresaid fraudulent deeds; and therefore reduced the contract, bond and ratification.

Fol. Dic. v. 1. *p.* 333. *Harcarse*, (Fraud & Circumvention.) *No* 502. *p.* 139.

No 21. 1733. *July* 13. Shearer *against* Somervill.

A husband and wife, during the marriage, having made two mutual onerous deeds in favour of one another, to this import, that the surviver should bruik all; it was *objected* to the wife, by the representatives of the predeceasing husband, That she having privately, without the knowledge of her husband, executed a revocation of the deed granted by her; this, though effectual in law to revoke an onerous deed, was yet an intended fraud, sufficient to bar her from reaping any benefit of the deed granted by her husband in her favour.——The Lords, notwithstanding, repelled the objection. *See* Appendix.

Fol. Dic. v. 1. *p.* 334.

No 22.
A purchaser of lands at a voluntary roup, is not liable to a personal creditor arresting the price; if he prove that the purchase was made on account of the seller.

1743. *January* 19. James Watson *against* David Maule.

Hepburn of Keith having exposed his estate to a voluntary roup, he prevailed on David Maule to offer on his account, for the same, to a certain extent, and by a letter obliged himself, *if the lands fell into Mr Maule's hands, to relieve him of the same*,

It happened that Maule was the highest offerer, so the lands were declared to belong to him; and, in terms of the articles, he enacted himself to pay the price. James Watson being creditor by two bills of Mr Hepburn's, arrested the price of the lands in Maule's hands.

In the furthcoming Maule laid his defence upon the above letter; and insisted that he was only a name, an interposed person for Mr Hepburn himself; and as the letter would stand in bar of any claim that Mr Hepburn himself could have made on his account of this fictitious sale, it behoved to be equally available against any of his creditors. No 22.

Answered, The defence was of the nature of an extrinsic and personal exception, that the defender was bound by the enactment to pay the price; and though, in a question betwixt the parties themselves, they may be mutually repelled *personali exceptione, quia in pari casu potior est conditio possidentis;* yet, where third parties are concerned, the law ought to give no countenance to any paction or agreement that is *contra bonum et æquum*, for that would be establishing wrong by law. And, upon this principle it is, the pactions of this kind, *contra fidem tabularum nuptialium*, have never been deemed effectual. But, supposing the defence should be sustained, it ought not to be admitted, but upon a full indemnification, and payment of the damages and expenses the pursuer has sustained. No man can avoid the obligation to repair the damage which his own fraudulent practices have occasioned to third parties; and it is not upon the arrestment he pleads to be thus indemnified, because the decreet of furthcoming can go no further than the debt upon which the arrestment was used; but that the defender ought not to be allowed to plead this defence, but upon payment of the pursuer's expenses.

Replied, The demand of expenses was contrary to form, and the nature of the action itself; by which nothing can be recovered, but the debt for security whereof arrestment was used; and surely the expense of this process is no part of that debt; nay, if the defence were repelled, there could be no ground for claiming expenses, unless the defender were found calumnious in making it. Besides, there is no reason to believe the defender acted out of any wrong view in the matter: He did not so much as know Mr Hepburn's circumstances, or that the necessity of his affairs required a sale of his estate; neither can the pursuer suffer any thing by what the defender did; for Mr Hepburn is more than able to pay all his debts; and, so far as the pursuer has expended money for recovery of a just debt, he has good action against his debtor for such expenses; nay, he offers to prove, that the pursuer knew, before the date of the arrestments, that the defender had only offered at the roup on account of Mr Hepburn; so that the expense the pursuer has laid out since that time, must be considered as owing to this mistake in law.

THE LORDS sustained the defence, but ordained the reclaiming petition to be answered as to the expenses.

C. Home, No 222. p. 365.

*** Kilkerran reports the same case:

No 22.

The estate of Keith being exposed to voluntary roup, conform to articles, whereof one, as usual, was, 'That Keith obliged himself, that the lands were 'to become the property of the highest bidder,' &c.; and several offerers having appeared, who raised the price considerably above what it had been set up at, they were at last all over-bid by David Maule, who was preferred, and declared purchaser. And the creditors having arrested in Mr. Maule's hands, and pursued a furthcoming, his defence was, That he had been but an interposed person for Keith himself; who, by his letter of the same date with the sale, had desired him to go the length of 27 year's purchase; and if the lands fell in his hands, obliged himself to relieve him thereof.

This defence the Lords 'sustained,' on this ground, that the arresters were only personal creditors, as all Keith's other creditors were; and that none but such as had a real *lien* on the estate could plead a real interest in the roup. But this much this reasoning supposed, and was expressed to suppose; that in any case where creditors have adjudications, an offerer at a roup preferred, could not avail himself of such private release from the debtor; a practice which was much condemned as *contra bonos mores*.

Kilkerran, (Fraud.) *No* 2. *p.* 216.

No 23.
A bond taken in England for more than double the sum lent, on an uncertain condition, was found not usurious; but the advantage being exorbitant, was restricted to the principal and interest.

1745. *July* 13. Dr Abercromby *against* The Earl of Peterborough.

Dr Abercromby of Westminster lent to the Lord Mordaunt, who had attained the age of majority, L. 210 Sterling on a bond for L. 1680 conditioned for the payment of L. 840 with interest, on the death of the Earl of Peterborough, whose grandson and heir-apparent Lord Mordaunt was.

The Earl lived about five years after, and the Doctor pursued his debtor before the Court of Session in Scotland, he having an estate there; where the defence was 1*st*, That the bond was usurious, and consequently void; 2*do*, It was reducible upon the head of fraud and circumvention.

Pleaded for the pursuer; The defender was of age, and not *dolo inductus* of the pursuer to the bargain; but actually solicited him for more advances of the like kind; which were refused, as appeared by his letters in process. There was a chance of his predeceasing his grandfather, and therefore it was lawful to take a profit on that account more than the interest of the money; which exeemed the contract from falling under the statutes concerning usury. Nothing was more common in England, than to lay out money on annuities for lives; and though the value of these was capable of being calculated; yet it would not hinder a bargain of that sort to stand, that it was not precisely equal; if no fraud were condescended on, since parties in these cases judge for themselves.