pronounced sentence, by imposing a fine, and the usual censure of standing at the church door and recanting. To the *second*, The Commissaries did no wrong; for though they repelled Sir Andrew *ab agendo*, yet, *ne delicta maneant impunita*, they sustained process *ad interesse publicum* at their procurator fiscal's instance.

The Lords heard the two parties scold a while upon one another, in their own presence, for their diversion. *Vol. I. Page* 197.

1682. *November* 30. JOHN LIDDEL *against* LAW.

JOHN Liddel, minister at Scoon, pursues an action against one Law, for £1000 Scots contained in a bond granted by Law, his wife's former husband.

The Lords, on Forret's report, reduced the bond, and found it satisfied, on this inartificial and conjectural probation; 1*mo*, That it appeared, by the pursuer's oath, that the cause of the granting it was in lieu, contemplation, and recompense of her moveables and plenishing she brought with her; (though the bond in its narrative did not bear this cause;) and that the husband's children were forced to give her back again all these moveables, and she evicted them from them, because the marriage betwixt that husband and her had dissolved before year and day, without children, and so the bond was *causa data causa non secuta*. 2*do*, That the cause of the bond being merely gratuitous, and his whole estate being but 2000 merks, he could not give away £1000 of it to his wife, in prejudice of his children their legitim.

The Lords sustained thir two reasons of reduction; and found them proven, and so on pregnant presumptions took away this bond. *Vide* a similar case, 15*th Dec.* 1681, *Mercer*. *Vol. I. Page* 198.

1682. CORNELIUS NIELSON *against* JAMES BONNAR'S HEIRS.

January 11.—THE case betwixt Cornelius Nielson, merchant in Edinburgh, and the heirs of James Bonnar, upon the circumvention, was debated, wherein the lawyers expatiated learnedly on *dolus incidens et dolus dans causam contractui*; which being mistaken by some, has made me set down their definitions here.

Joan. Bockelmannus, in his learned *Compendium Institut. tit. De Actionibus, p.* 246, defines *dolum dantem causam contractui, quo quis inducitur ad contrahendum qui alias contracturus non fuisset; dolus vero incidens dicitur, non quo incidit in contractum, sed quo aliquis circa contractus incidentia decipitur; veluti cum vilius vendit et carius emit.*

Struvius, *in Syntagm. Juris, vol.* 1, *p.* 257, defines them from Cæsar Borgalius, *de Dolo*, thus: *Dolum incidentem esse, quando quis omnino, sua sponte, alterius calliditate non inductus, contrahit, et in re de qua initur conventio, (v. g. circa rei valorem, qualitatem, &c.) seu in modo contrahendi, fraudulenter decipi-*

tur ; and therefore it does not annul the contract *ipso jure*, but only produces an action *ad damnum resarciendum.*

Dolus incidens being no more but extreme lesion, though even *ultra dimidium justi pretii, ex l.* 2 C. *de Resc. Vendit.* if it be only eventual, and not *dolus dans causam*, does not in our law annul the contract, or reduce it; and was so found, Dury, 4*th July* 1635, *Monymusk. Vide infra*, 24th March 1682, *Stewart ;* and 7th December 1682, thir same parties. *Vol. I. Page* 169.

1682. *December* 5, 6, and 7.—Between Cornelius Nielson, late bailie in Edinburgh, and James Bonar's heirs, (*vide* 11th January 1682 ;) the Lords, having advised the probations, assoilyied Cornelius from the reduction *ex capite fraudis et circumventionis ;* and, without determining whether *pactum corvinum super hæreditate viventis* be valid with us or reprobated, (see Dury, 6*th July* 1630, *Aitkenhead*, where the paction is allowed,) they sustained the disposition to Nielson, in regard of the ratification made of it after James Bonar's death : though it was alleged, against this ratification, that it was a part of the cheat ; and that Ballantyne was taken sworn not to seek advice, nor discover it ; and so he was fraudulently bound up ; and the ratification is dated before Bonar was buried, and so was *nimia et præpropera diligentia.* Yet the Lords, who were for assoilyieing Nielson, said, that George Dallas the writer, and the witnesses, (but it was objected against them, that they got a part of the prey,) deponed, that the thing was deliberately done, and read to them ; and argued, that weakness and levity of mind does not hinder men from disponing their rights, unless they were either interdicted, or declared idiots, or on death-bed. Yet some thought, that such a simplicity as this ought to be like a minority, to repone them when they are lesed.

This being decided in the afternoon, the Chancellor, and some Lords, then absent, got it stopped the next day ; and urged a review and reconsideration of the affair ; and so they having resumed it on the 7th of December 1682, the Lords quite altered their interlocutor ; and it was found a mere circumvention and cheat ; and therefore reduced it, and restored the parties to their own rights, notwithstanding of the ratification.

For all the Lords were convinced of an unhandsome machination and design ; but some of them thought it was not such as was reparable in law, *in foro humano ;* and they were now so displeased with Cornelius Nielson's carriage in it, that the king's advocate got an allowance and warrant from the Lords, to pursue him criminally before the Secret Council for it ; as also, for seeking a sight of a bond for £1000 Scots he was owing to umquhile James Bonar, and throwing it in the fire, and burning it at his own hand, pretending that the defunct, knowing it to be paid, had allowed him to cancel it. As this discourages cheats, so it will, on the other hand, render persons afraid to bargain, meddle or transact with needy people, who, without any modesty, though they have got the full value, will clamour they are cheated.

Some contended that the ratification was null, because a cheat cannot be ratified ; and *non entis nulla sunt accidentia ;* but others cited an excellent law, *l.* 78, § *ult. D. ad S. C. Trebellian.*, where a cheat as ill as this may be transacted ; for *dolus futurus tantum, non præteritus, nequit transigi.*

But there was a great tract, series, and concatenation of knavery here ; and Sir George Lockhart asserted, that, in all the instances of the lawyers he had

read, he had not found so pregnant an example of a contrived and complicated cheat as this was. *Vol. I. Page* 199.

1682. *December* 8. WILLIAM PATON *against* STIRLING of ARDOCH.

WILLIAM Paton, writer, against Stirling of Ardoch, is reported by Forret. The Lords, notwithstanding all the objections against the decreet *in foro*, did religiously adhere thereto, and would not loose the same. *Vol. I. Page* 200.

1682. *December* 13. THOMAS WILSON *against* JOHN and JAMES MUIRS.

THE case between Thomas Wilson and John and James Muirs, is reported by Drumcairn. The Lords, in regard he was holden as confessed, refused to repone him presently; but found the letters orderly proceeded, superseding extract for eight days, to see, if, in a reduction to be raised by Muirs, they could purge their contumacy. *Vol. I. Page* 200.

1682. *December* 21. SIR JAMES TURNER *against* JAMES PILLANS.

THE competition between Sir James Turner and Mr Pillans about the lands of Craig, being reported by Boyn; the Lords found that Mr James, though a compriser within year and day, yet ought not to come in *pari passu* to a share of the maills and duties with Sir James; because Mr James, having intromitted already, had got part of his annualrents, whereas Sir James had got none: and therefore allowed him to possess till he were as far forward as Mr Pillans was: and then allowed them after that to come in *pari passu*.

This was reclaimed against by Mr Pillans, (who had not spread his informations before reporting,) as not the equality meant by the 62d Act Parliament 1621, seeing *vigilantibus jura subveniunt;* and all that Sir James could claim was by an action to repeat his proportion; and, even in that case, he would defend himself that he was a *bona fide* possessor, as the Lords found in 1675, *Baird and Johnston*.

But the bill was refused 15th March 1683, and the Lords adhered to their former interlocutor. *Vol. I. Page* 203.

1682. JAMES PILLANS *against* DAVID PLENDERLEITH and ANDREW BURN.

January 24.—THE competition between Mr James Pillans, late one of the Regents of the College of Edinburgh, and David Plenderleith, writer, being reported by Tarbet, Lord Register; the Lords found, that David Plender-