

*Fouler*, recorded by Stair, 16th July 1672; but where it was betwixt an heir of provision and singular successors, the Lords preferred the creditors, unless it were instructed that they were *participes fraudis*.

The creditors were afterwards put to prove the onerous cause of their author's disposition. Vol. II. Page 565.

1710. February 10. COLIN SIMPSON and HENRIETTA PHIN *against* DUNCAN WHITE.

MR Colin Simpson having married Henrietta Phin, he pursues Mr Duncan White, who had married her mother, and was her tutor, to count for her estate and his intromissions therewith: And, after many communings, they enter into a written agreement, whereby Mr Colin accepts of 27,000 merks in full of his wife's claim; and obliges him to give Mr Duncan a general discharge; and being charged thereon, he suspends on thir reasons, That he was grossly circumvened and over-reached, in so far as the foundation of the communing and bargain was an account given in by the said Mr Duncan; which he affirmed to be the true and full state of the affair: And yet Mr Colin has discovered 14,000 merks of Mr Phin's means, which White, her tutor, had most fraudulently concealed; and, if White will add that to his charge, and count for it, he is ready immediately to give him a discharge: for *nemo debet lucrari ex suo dolo*, and, least of all, a tutor, in whom it is theft and robbery.

ANSWERED,—Of all contracts, transactions are the most sacred, where parties, to shun the expense and hazard of law processes in matters doubtful and debatable, remit something of their own right, and tacitly renounce all future questions upon any thing that may accidentally emerge and appear afterwards. So all transactions are *aliquo dato et remisso*; and, if there had not been something quit to Mr Duncan, it had not been a transaction. But, least any should think he has taken undue advantage, he is willing to repone Mr Colin to his former claim, the agreement being dissolved.

REPLIED,—Transactions are indeed the firmest of all pactions, *ut tandem sit aliquis finis litium*; yet they are not so firm as to exclude fraud, which is a general exception in all human actions, *cum dolus suus nemini debeat prodesse*: And he is not to reduce and annul the transaction, to which he adheres, but only craves Mr White may add these omitted articles to his charge; and that this may be done without ranversing the transaction, is evident from l. 19 and 42, C. *de Transact.* where it is said, *Si, de pluribus causis et capitulis, transactiones initæ sunt, illa tantum pars retractetur quæ ex falso instrumento conficta est, aliis capitulis firmis manentibus*.

DUPLIED,—He cannot approbate and reprobate the same writ: he must either accept it *in totum*, or repudiate it; l. 14, *de Transact. et tot. tit. C. si adversus transact.*; and though an account was given in, yet it was not the foundation of the agreement, which was made by slump, and *per aversionem*; and no man enters into a submission but in contemplation of some ease.

The Lords sustained the agreement, especially considering that Mr Colin was unwilling to let the restitution be *in integrum* on both sides.