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An eldest son, to whom a father, in his contract of marriage, had become bound to make over the substance of his effects, granted a private deed, before solemnization, enabling his father to burden the property with provisions to younger children. The deed reduced.

1700. June 21.

ELIZABETH WALKER *against* DAVID WALKER.

My Lord Crocerig reported Elizabeth Walker against David Walker, her nephew. Mr George Walker, Clerk to the Regality at Dunfermline, disposes, in his eldest son Thomas's contract of marriage with Elizabeth Beton, some tenements and acres of land, with absolute warrandice; but, at the same time, he takes a private back-bond from his son, whereby he consents that his father shall burden the lands disposed to him with L. 1000, for a tocher to his sister Elizabeth. Mr George and his son being now dead, and Elizabeth pursuing David, her brother's son, as heir to his father, for payment of that sum, at least to have his tenements declared liable and affected therewith; he raises a reduction thereof *ex capite doli*, and on the act of Parliament 1621, and as a private clandestine deed, expressly contrary to the solemn paction and agreement in his father's contract, and that the LORDS have oft annulled such bonds, as fraudulent, *et contra fidem tabularum nuptialium*; and, particularly, 16th July 1672, Duff *contra* Fowler, *voce* PERSONAL and REAL; and Sir George M'Kenzie's Observations on the act 1621. *Answered*, The father having settled his whole estate on his eldest son, it was but reasonable that he should secure his sister in a small and moderate tocher; and seeing the boy is served heir to his father, he can no more quarrel it than his father could have done. THE LORDS thought such voluntary and gratuitous deeds, granted in manifest derogation and prejudice of the solemn *pacta dotalia*, (which are *maximæ et aberrimæ fidei*.) are most unfavourable, and can never subsist against the relict, to exclude her life-ferent; so if he be served heir of line to his father, he cannot come against his deed; but if he be only served heir of provision, or heir of the marriage, he, as a creditor, can quarrel and impugn the same; and referred to the Reporter to try the matter of fact, or, if he was yet minor, in which case, he might revoke and reduce his service and retour as heir general.

Fol. Dic. v. 2. p. 21. Fountainhall, v. 2. p. 98.

* * Dalrymple reports this case.

1701. June 27.—MR GEORGE WALKER disposes to Thomas Walker, his son, and Elizabeth Beaton, then his future spouse, and to the heirs of the marriage, a tenement in Dunfermline, and ten acres of ground; and Thomas is bound to infest his future spouse in life-ferent, and the bairns in fee, in a tenement belonging to himself, worth 4000 merks, and provides the conquest during the marriage in the same manner.

During the communing, and two days before signing the contract of marriage, Thomas grants a bond to his father, narrating the terms of the contract, and that, seeing his father might be necessitated to contract debt for providing

his children, or otherwise, therefore, he obliged him, either to become cautioner for the sum of 1000 merks, or that it should be in the father's power, to burden the said acres therewith.

The father assigned this obligation to Katharine Walker, his daughter, for her provision, who thereupon pursues David Walker, as representing Thomas the granter, for payment of 1000 merks, with annualrents, at least declaring, that the said acres or conquest, during the marriage, are liable to be affected for payment thereof.

It was *alleged*, That the bond being granted during the communing, and contrary to the terms of the contract, was reducible, as *in fraudem tabularum nuptialium*.

The pursuer *answered*, The defender was heir of line served and returned to his father, and could not quarrel his deed whom he represents.

It was *replied*, The defender is still minor, and his service as heir general was to his lesion; because, he was heir of provision by his mother's contract, and, as such, had interest to quarrel any deed done in fraud of the contract, contrary to the provisions thereof.

The pursuer *duplicated*, *imo*, There was no fraud in granting the obligation libelled; because, the defender's grandfather having disposed his whole estate to his eldest son, leaving no fund for providing his other children, it was a just and reasonable act of administration, that the eldest son should grant, and his father accept, of a bond for securing younger children in a small sum, not exceeding 1000 merks; *2do*, The defender succeeds to his father, not only in the tenement and ten acres, specially provided in the contract to the heirs of the marriage, but likewise in a considerable conquest, whereof a condescendence is given; and, therefore, the pursuer ought at least to affect the conquest.

The defender *answered*, *imo*, An heir of provision is, indeed, liable to all onerous or rational deeds of administration; and if, after the contract, his father had fairly and openly granted the bond libelled, it might have been considered as a just and reasonable act; but the defender insists chiefly on this ground, that the bond was a private latent paction betwixt the father and the son, at the time of the contract, to burden the provisions in favour of the heirs of the marriage, which, if sustained, might have been a foundation to enervate the contract: And it is of most dangerous consequence to give the least encouragement to private transactions betwixt father and son, in prejudice of the wife and heirs of the marriage, whose friends rely upon the faith of the public contract; *2do*, Albeit there be a more ample power to dispose of, or burden conquest, than of special sums or rights provided to heirs of a marriage; yet, in this case, the reason of reduction militates equally against both, *viz.* that the bond was a private latent transaction, contrary to the public communing with the wife's friends: Neither are such bonds reckoned altogether free upon the husband's part, because of the influence that a father hath upon his son,

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and that the father disposes his estate in the son's contract of marriage, according to communing, and so hath it in his power to exact from his son privately what he pleases, against which the law most justly provides.

"THE LORDS reduced the defender's father's obligation, as in fraud of the contract, and that not only in so far as the same might affect the tenement and acres specially disposed, but also in so far as it might burden the conquest; and found the defender's service, as heir of line, reducible on minority and lesion."

Dalrymple, No 23. p. 28.

1705. February 21.

GRIEVE against JOHN THOMSON.

No 29.

In a contract of marriage, a father bound himself to pay a sum to his son and his wife in conjunct fee and liferent; but, prior to the contract, he took a discharge from his son, declaring, that, though his father should be bound in the contract, yet the sum was never to be exacted. The discharge was reduced, as *contra fidem pactorum nuptialium*.

By minute of contract of marriage betwixt John Thomson and Margaret Grieve, John Thomson elder provides 500 merks and certain tenements, and John Thomson younger provides 1000 merks of his own to the future spouse in liferent, and to the children in fee; and, by a contract of marriage posterior, these sums and tenements are provided in the same way.

John Thomson younger disposes all he had to his wife; and, after his death, she charges John Thomson elder to pay the said sum of 500 merks: He suspends, and *alleges*, That his son, who was fiar in the sum, had discharged the same posterior to the minute; and because there was a contract to be extended, the discharge bears, that though his father should afterwards be bound in the contract, yet the sum was never to be exacted.

It was *answered*; The discharge was null, as *contra fidem pactorum nuptialium*, and fraudulent; *2do*, The obligation in the contract was posterior to the discharge, and introduced a new obligation, whatever the discharge might otherwise import.

It was *replied*, The charger hath no interest in the sum, except for her liferent, as to which, he will not obtrude the discharge; but for the fee, her title is only as assignee by her husband, who was the fiar, and might freely discharge the same; and both law and equity do favour the pursuer in exacting the same, because he was drawn to exorbitant terms for his son's satisfaction, whom he saw to be a tender weakly person, not likely to survive the marriage long, as it happened; he got but a small portion, which was to return, failing heirs of the marriage; and she also impetrate from the husband a disposition of all he had, in prejudice of the suspender's numerous family; and the discharge does expressly declare, that the contract to be made shall not be effectual as to that sum.

It was *duplicated*, That the circumstances of the contract and any deed done in the charger's favour, could all be justified, if needful; but the point of law