

"THE LORDS sustained the reason, that the bond by the defender's father was granted *contra fidem pactorum nuptialium*, and reduced that bond."

Act. Sir W. Pringle.

Alt. Horn:

Clerk, M^r Kenzie.

Fol. Dic. v. 2. p. 22. Bruce, v. 2. No 20. p. 24.

* * * Lord Kames account of this case is that given on the margin, which does not accord with Bruce's report. See APPENDIX.

1716. November 22.

The Viscount of ARBUTHNOT *against* MORISON of Prestongrange.

By contract of marriage betwixt the Viscount of Arbuthnot and Prestongrange's daughter, Prestongrange is bound to pay a portion of 50,000 merks; but there being a declaration and obligement granted by the Viscount of Arbuthnot, the day immediately before the contract of marriage, narrating, 'That he was resolved to marry the young Lady, and to enter into a contract, in which there was to be a portion of 50,000 merks provided to him; and that he was to give a jointure suitable to his circumstances, and the marriage-portion; but that he was sensible that Prestongrange would be at great charge by the marriage; and that seeing his friends would have 50,000 merks to be insert in the contract, (albeit Prestongrange had refused to give more than 40,000 merks) it was his earnest desire to Prestongrange, that 50,000 merks should be insert in the contract; but that he obliged himself, upon his honour, to discharge 10,000 merks thereof,' &c.

The Viscount designing to claim the full 50,000 merks, pursues a reduction of the declaration and obligement, as being elicited from him in his minority, without the consent or knowledge of his honourable friends, who were treating for him; and to his lesion, in as far as he gave provisions suitable to the portion, fifty chalders of victual to the Lady in liferent, and if there were but one daughter of the marriage, the Lady's portion of 50,000 merks to that daughter, and proportionally more. if two or more daughters; and the portion of the one daughter is expressed in the contract thus, "To her the mother's portion underwritten:" Which was a manifest lesion, reflection and affront upon the Viscount's friends, who were drawn in to be witnesses to a contract in the lowest terms to which they would acquiesce, and yet that contract to be made ineffectual by private influence upon a minor. *2do*, The said obligement was *contra pacta dotalia*, which is reprobated by the law of this and most nations; as is observed by Voet in his commentary upon the title, *De pactis dotalibus*, and Gronvegan ad l. 4. C. *De dotis promissione*, and Perezius on the title, *De pactis conventis tam super dote*, &c. And thus it was decided in the Parliament of Paris, as is observed by Annæus Robertus, *Rerum judicatarum*, l. 1. cap. 2. where he has the pleading at length, agreeing almost *in terminis* with the present case, being a discharge elicited from the bridegroom of a part that was stipu-

No 31.

No 32.

A discharge of part of the tocher before solemnization of the marriage reduced as *contra fidem tabularum nuptialium*, at the instance of granter himself, who was minor, but without curators, because granted privately without the concurrence of friends whom he had engaged to assist him in the marriage treaty.

No 32. lated *nomine dotis*; and the like also found with us, 1st December 1705, Grieve *contra* Thomson, No 29. p. 9478.

It was *answered* for Prestongrange; The reasons of reduction are not relevant. It is true, the pursuer was minor, but he had no curators, and was *majorannitati proximus*, and was not lesed, because the portion was competent, and it was in his own power to accept the sum offered, in which he needed not the consent of his friends; for it was but a point of respect to them, that he chose rather to deal with Prestongrange privately, than to make any public struggle. 2do, Whatever might be said, if Prestongrange had elicited a bond, declaration or obligation from the Viscount, by proposing the expedient to him, yet the paper bears, and is matter of fact, 'That Prestongrange was prevailed with, at the Viscount's desire, to satisfy the friends in the public contract.' And if he were overtaken, he would be the person ensnared, and not the Viscount, *Et minoribus deceptis non decipientibus jura subveniunt*; and if need be, what is affirmed in the Viscount's declaration is offered to be proved, viz. 'That the defender refused a greater portion than 40,000 merks, and that he agreed to insert 50,000 merks in the contract, and accepted of the Viscount's obligation at his own desire.'

And as to the lesion, by giving greater provision to the Lady and daughters; these are but casual and accidental lesions, which may or may not happen, and restitutions *in integrum* go not beyond the lesion; so that at worst the 10,000 merks could only be subjected to make up that liferent, in the event that the Lady should survive, or that there were only daughters of the marriage.

And as to the other reason of reduction, That the declaration was *contra pacta dotalia*; and the several decisions and citations on that subject; it is *answered*, None of these will quadrature to this particular case; for here there is nobody concerned in the present question, but the pursuer and defender, who came to an agreement in the terms of the pursuer's declaration and obligation at the time of the treaty, and that paper is a part of the bargain, and qualifies the contract *ab initio*; but where contracts are completed, or minutes of contract, and afterwards altered, either before the public contract, in the case of minutes, or after, and before marriage; such deeds are justly reducible, as *contra pacta dotalia*; but where the deed is before the contract expressing the terms on which the contract is extended, and what is truly communed and designed, it qualifies the contract as a back-bond doth a bond. And the applying of that rule, will answer any practick that can be founded upon in our law. And as to the foreign authors, what they say has a special relation to their municipal customs; neither doth our law quadrature with the civil law, in what relateth to portions whereof the property remains with the wife.

It was *replied*; That contracts of marriage are the most solemn contracts, in which the greatest sincerity and integrity are required, and the least enormity is by consequence redressed without mitigation. It was indeed in the Viscount's power to marry without his friends, and without a portion too, if he would;

but then the marriage ought to have been publicly in that method, as by himself, they not concurring; but seeing the pursuer had that respect for his friends, that he would not disoblige, or deal without them, and that they would not comply and concur in other terms than those of the contract; fair dealing would have required, that the defender should have complied with the friends, or openly refused; and then the Viscount was to hear their advice, and either to reject them, and marry without their concurrence; or comply with them, and break the marriage. But to deal privily without their advice, was unfair; and yet more so, in as far as the highest conditions for the Lady, and daughters of the marriage, were obtained suitable to the portion of the contract, as the Viscount's declaration expressly bears, and whereby there was a manifest lesion to the minor. And though, in some cases, reductions upon lesion are restricted to the true damage; yet in others, not; and the just punishment of clandestine dealing in a treaty of marriage, to the minor's lesion, ought to annul the deed *in toto*, upon both the reasons of reduction.

“THE LORDS repelled the defence, and reduced.”

Fol. Dic. v. 2. p. 22. Rem. Dec. v. 1. No 1. p. 1.

1718. February 8. POLLOCK against CAMPBELL of Calder.

No 33.

SIR HUGH CAMPBELL of Calder, in his son Sir Alexander's marriage articles, became bound to provide his estate to his son and the heirs-male of the marriage “free of all charge and burden;” having reserved no power to provide younger children. He, at the same time, privately elicited from his son a promise to grant him a faculty of burdening the estate with L. 2000 Sterling to his younger children; which promise, Sir Alexander fulfilled about two years after the marriage, upon the narrative of the said promise, and that the marriage articles had been entered into in compliance with the bride's friends and lawyers, that there might be no stop of the marriage. Sir Hugh having exercised this faculty granted him by his son; in a pursuit against the heirs of the marriage, for payment of this sum, the LORDS found, that the particular communing betwixt Sir Hugh and Sir Alexander before the marriage was *in fraudem pactorum nuptialium*; and seeing the bond was granted by Sir Alexander, though posterior to the marriage, on the narrative of the said prior communing, and that the marriage articles were only made and granted by Sir Hugh in compliance with the bride and her friends; therefore, that the said bond was not binding on the heir-male of the marriage. See APPENDIX.

Fol. Dic. v. 2. p. 22.