

PACTUM ILLICITUM.

S E C T. I.

A Son cannot be his Father's Interdictor, nor a Wife her Husband's.

1622. *January 18.* L. SILVERTONHILL *against* His FATHER.

THE young Laird of Silvertonhill gave in this day a supplication to the Lords, craving inhibition against his father, upon this ground, viz. There was a contract of marriage made betwixt umquhile President Provand and his daughter Elizabeth Baillie, on the one part, and the old Laird of Silvertonhill, and his son, on the other part, for a marriage to have been made betwixt the two young folks; wherein it was appointed that young Silvertonhill, and Elizabeth Baillie, his spouse, should be infest in conjunct-fee, and the bairns procreated betwixt them, heritably in the lands mentioned in the contract, and bearing a clause for interdicting of the foresaid young Laird to his father and good father; and now after the decease of the father-in-law, and of the old Laird Silvertonhill, who were contractors, this young Laird Silvertonhill, who is eldest son and apparent heir, begotten of that marriage, gave in his supplication, craving inhibition against his father, that he should not annailzie any of the lands contained in the contract, wherein he and his wife were appointed to be infest in conjunct-fee, and the bairns heritably, as said is, alleging that clause to be expressly introduced in his favour, and so that he might competently seek inhibition thereupon; which was refused by the Lords to be granted, seeing the parties contractors, who might lawfully seek execution upon the contract, were

No 1.

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No 1. all dead except the supplicant's own father, against whom it was sought, and that the supplicant could not seek it upon that clause.—See PROVISION TO HEIRS AND CHILDREN.

Fol. Dic. v. 2. p. 18. Durie, p. 10.

1663. February 27. Lady MILNTOUN against Laird of MILNTOUN!

No 2.

A wife cannot be her husband's interdictor.

THE Lady Milntoun pursues the probation of a tenor of a bond granted by Maxwell of Calderwood, her husband, bearing, that in respect of his facility, he might be induced to dispose of his wife's liferent, and thereby redact them both to want and misery; therefore he obliges himself not to dispose thereof without his wife's consent, seeing he had no means but what he got by her: Hereupon she used inhibition, which she now produces as an adminicle, and craves the tenor of the bond to be made up by witnesses. The defender having *alleged*, That there behoved here to be libelled and proven a special *causus omissionis*, because albeit it were proven that such a bond once was, yet unless it were also proven how it was lost, it must be presumed to have been given back to the husband, granter thereof, whereby he is liberated, and this is the course observed in the tenors of all bonds of borrowed money. The pursuer *answered*, That this was not like a bond of borrowed money, the intent whereof is, not to stand as a constant right, but to be a mean to get payment; but this bond, by its tenor, was to stand as a constant right, to preserve the dilapidation of the liferent, and so cannot be presumed to have been quit, by redelivery thereof, albeit it had been in the husband's hands.

THE LORDS, before answer to this dispute, ordained the pursuer to condescend what the effect of this writ would be, if it were made up; for if it have no effect, there were no necessity to make it up.

The pursuer condescended upon the effect thereof thus, that it would be effectual as an interdiction published by the inhibition, to annul and reduce the disposition of the pursuer's liferent, made by her husband, without her consent, in favour of Milntoun, her step-son; *2do*, This bond being accessory to the contract of marriage betwixt the same, and the marriage is *pactum dotale*, and must have the same effect, as if it were included in the contract of marriage, and so is a provision for securing of the pursuer's liferent to herself, and that no deed by her husband, without her own consent, should be effectual. The defender *alleged*, That none of these condescendences could be effectual, not the first because if the aforesaid bond were an interdiction, it would have no effect, unless it were instructed that the granter thereof were *prodigus*, and if it were instructed that he was *rei suæ providus*, it could take away the effect thereof, because an interdiction is nothing else but *constitutio cartitorum prodigo*, where albeit it is done of course *periculo facientis sine causæ cognitione* with us, yet if it be on a false ground and narrative, it is ineffectual; *2dly*, Though it could be