

with the factor for the same; and therefore he *alleged*, That the reason was not relevant. THE LORDS found, that this transaction ought not to be sustained in law, being of the nature of *turpia pacta*, which are reprobated in law, and whereby such pactions are declared to be invalid, to produce any action upon the same; and although the condition of the paction was made, not for selling the office of tutory, but for constituting of the mother of the bairns to be factrix in the office, and that it was also done by the advice of the bairns' friends, yet it was found to be unallowable in law, seeing it was granted for so great a sum, viz. 3000 merks, which behoved to come off the pupil's estate, and consequently behoved to be to their prejudice, and so ought the be rejected; for the LORDS found, that although a tutor might make a factor, yet to constitute one for such a lucrative cause to himself could not be sustained; for it were more to be sustained in law, for the tutor to give reasonable allowance to a factor, for satisfaction of his pains, and as the same should merit, than to sell a factory, which evidently tends to the pupil's lesion; therefore the letters and charges upon that bond were suspended *simpliciter*, it being confessed, that the bond was given for that cause.

Act. Primrose.

Alt. Dunlop.

Clerk, Hay.

*Fol. Dic. v. 2. p. 19. Durie, p. 878.*

No 9.

1680. June 23.

HAMILTON against BORTHWICK.

HAMILTON of Balderston having charged Francis Borthwick upon his bond of 3,500 merks, he suspends on this reason, that the bond was procured *contra bonos mores*, and so is null; for though it bear borrowed money, yet there is a back-bond produced, bearing, that the true cause was for expenses wared out for her, ——— Brown, by the mother, for the charger her husband; and that if the marriage then intended between her and the suspender took not effect, then the suspender should be free; which being five months before the contract of marriage, shows clearly, that the bond was granted to promote the marriage, and to overvalue the expenses, where indeed none is due, the mother in her widowity being obliged to entertain her daughter in bed and board *gratis*, and the suspender since her marriage hath paid her cloths to merchants; and so it was a most unwarrantable deed by a step-father, upon an unjust pretence, to make merchandise of his step-daughter. The charger *answered*, That albeit the backbond had been inserted in this bond, acknowledging the expenses to have amounted to 3,500 merks, it did sufficiently instruct the same, and liberated the charger, all exceptions being renounced by one who was *major sciens et prudens*, who hath gotten above L. 1000 Sterling with his wife; and therefore, though her mother had been obliged to entertain her freely, he might in gratitude and remuneration have given this sum; *2do*, The law allows

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No 10.

*Turpis causa* being alleged against a bond granted by a person in suit of a woman to her mother "for expenses laid out upon her daughter," was sustained only in so far, as evidence of expenses could be given.

No 10.

gratifications *proxenetis* for interposing and promoting of marriage, which is very lawful. It was *replied*, That it is never lawful to the parent, tutor, curator, or the step-father, who is in place of a parent, and who are obliged to be for the woman, to do any thing for any other deserving gratification, otherwise on this pretence, mothers and their husbands, and tutors and curators, would be encouraged to betray their trust, and for gratifications prefer undeserving persons.

THE LORDS would not sustain this bond alone without an astruction of equivalent expense, but would not put the charger to astruct it by probation, but ordained him to condescend on the expenses, and to adduce such evidence as he could, and ordained the mother's bond to be produced, reserving to the LORDS what the probation should operate, as to the modification of the expenses.

*Fol. Dic. v. 2. p. 20. Stair, v. 2. p. 774.*

1696. July 3.

JOHNSTON *against* MURRAY.

No 11.

Objected to a bond, that it was granted by a husband for obtaining the grantees' consent to his marriage. The bond was sustained.

This bond was signed between the date of the contract and the solemnization of the marriage.

HALCRAIG reported, Johnston of Newton against George Murray of Murriewhat, being a pursuit on a 400 merk bond, granted by the charger's sister, Murriewhat's wife, to him; and the grounds whereon he contended the husband was liable for it, were these, that though it was granted by a wife, *stante matrimonio*, yet it was written by the husband, and he was one of the two subscribing witnesses in it, and had paid annualrent for it. *Answered*, Whatever he did to please his wife, yet it was plain, that a bond granted by a wife *vestita viro*, was *ipso jure* null; and *esto* that the husband's being writer and witness therein, imported both his knowledge and consent, yet that no ways validates the deed in law; for a bond granted by a wife with her husband's consent is no more obligatory either on her or her husband, than without it. It is true, if it be in relation to heritage, she may so bind herself, but not *quoad* sums of money. THE LORDS considered what could be the meaning and import of such a bond, which behoved to be either simplicity or design; and therefore to expiscate, if there was any fraud, they ordained the pursuer to condescend on the onerous cause of the bond, to the effect they might consider, if there were ground to examine the other witnesses, and comuners present; and if it was asserted, That her bond was as good as his own, if he wrote it, &c. then the LORDS inclined to find the husband liable.

There was a second debt, for which he was pursued, viz. a 500 merk bond, taken by him from the husband, at the time of the marriage, which was *alleged* to be for obtaining his consent thereto; which is a dishonest and unlawful gratification, being dated betwixt the signing the contract and solemnization of the marriage; and which has been reprobated by the LORDS by several deci-