

1717. *January 31.*JOHN CUMMING and AGNES CUMMING his Daughter *against* ALEXANDER DUNCAN.

By contract of marriage betwixt Agnes Cumming and Alexander Duncan, he contracts the lands of Strathmartin to himself and his future spouse in life-rent and conjunct fee, and to the heirs male of the marriage; which failing, to the heirs male of his body of any other lawful marriage, &c. and in case of heirs of the marriage, the life-rent is restricted to L. 900 of annuity; and there is likewise a provision to the younger children of the marriage, and if only daughters, 10,000 merks to one, 12,000 to two, and 15,000 to three or more.

The wife *alleging*, that she was grievously and cruelly maltreated, did at last separate herself, and he having pursued an adherence, she alleged upon that maltreatment, and the process being brought before the Lords, there was a probation led.

John Cumming the father, having contracted 8000 merks of portion, payable to the husband, he now pursues a reduction of the obligation for the portion and declarator that the same should be subject to the aliment and entertainment of the wife bygone and in time coming, during the separation, and to her life-rent provision, in case she survived; and that the remainder should belong to the three children of the marriage; and insisted upon this ground, that the whole obligations of the contract on the part of the defender Duncan were utterly ineffectual, and the pursuer drawn to contract a portion by fraud and circumvention, in as far as the defender gave himself out to be a man of an estate fit to be provided to the heirs-male of that or any other marriage, as too good to descend to a daughter, with ample provisions to the wife and bairns fully suitable to her portion; whereas, really all the estate he had was a disposition to the land of Strathmartin from the apparent heir of Wintoun of Strathmartin, without payment of any other price, but undertaking the debts of that family, which debts were found to exceed the value, and the estate was sold as a bankrupt's estate, by a process of sale for the debts of Wintoun the ancient heritor.

Duncan having assigned the portion to several of his creditors, who are also called in the process, neither they nor he did compare, yet the conclusion of the summons being singular, the Ordinary did report the same.

And the LORDS having considered the case, and what defences did arise in law to the defender, and his creditors or assignees, they made no difficulty to find, that the portion in the father's hand, ought to be retained or employed, so as to be subject to the wife's life-rent, in case of her survivance. But it appeared more doubtful, how far the portion might be subject to the wife's aliment, bygone or in time coming; *2do*, How far the fraud and circumvention libelled was a relevant ground to affect what might remain of the portion,

No 46.

The non-implementation of provisions to children or heirs of a marriage, will not furnish a defence against payment of the tocher to the husband's creditors, if the wife's life-rent is secured.

A wife having separated from her husband, upon alleged maltreatment, and her husband having no funds, the Lords found the portion subject to her aliment for bygones; and likewise found it subject in time coming, during the separation, in case it were found, that the separation was just, but did not determine whether it should be subject to her aliment, if the maltreatment should not be proved, and that the husband required her to adhere.

No 46.

over and above what might be the liferent, or aliment during the marriage, in so far as the same should be found due.

As to these points, it did occur to the LORDS, that it might be *alleged* for the defender and his creditors, that a wife, how unfortunately soever married, depends on the fate of her husband; and *esto* that she could prove a just ground of separation; and, in that case, the husband might indeed be liable to the payment of an aliment, as the LORDS should modify the same, in which the wife could only come in as a creditor, but could not compete with anterior creditors, who had obtained assignations to the portions duly intimate; and if the husband had no other means to aliment her, she would be necessitate to submit to that misfortune. *2do*, As to the provisions in favour of the children, or daughters of the marriage, they could never compete with the father, much less with his just and lawful creditors; because their right and title was either as heirs of the marriage, or at best their claim was but as childrens provisions, which never could compete with any just and lawful creditor.

‘THE LORDS found, That the pursuer had no title to insist for reducing the obligation to pay the tocher, in so far as the same might be made subject to the provisions in favours of the heirs, children, or daughters of the marriage, in competition with the defender’s just and lawful creditors.’

But as to the conclusion, of subjecting the portion to the aliment of the wife bygone, and in time coming, it did occur to the LORDS, that the daughter, with her three children, having returned to her father’s family, debtor in the portion, not only in respect of the alleged maltreatment, but likewise in regard the husband had no means wherewith to entertain her; the father, with her concourse, had a better title to pursue a reduction of the obligation for the tocher, upon fraud or circumvention, in so far as she was prejudged of a competent mean of subsistence, during the marriage; because the contract was properly betwixt the husband and the wife; and the father contracted the portion upon his daughter’s account *ad sustinenda onera matrimonii*. And since the daughter was drawn into the marriage by fraud, albeit the marriage itself cannot be dissolved, yet, in so far as her portion might be withdrawn from her necessary aliment, the portion might well be declared subject thereto. And by the civil-law, where *dolus dat causam contractui*, the contract was altogether void, which would obtain restitution of the portion, both for her, and her’s. And albeit the LORDS would not so far proceed upon the grounds of equity, as to allow an intire restitution that might be profitable to the heirs of the marriage, chiefly because they were not contractors nor existing, and that the preparative might occasion many debates, in the case of unfortunate marriages, which might happen often; yet there was both law and equity in reponing the wife for her own aliment, she being the proper contracter, in which there could be no preparative.

THE LORDS found the portion subject to the wife’s aliment for bygones; and likewise found it subject in time coming, during the separation, in case, upon

advising the probation of maltreatment, it were found, that the separation was lawful and just, but did not determine whether it should be subject to her aliment, if the maltreatment should not be proven, and that the husband required her to adhere.

No 46.

Fol. Dic. v. 1. p. 596. Dalrymple, No 169. p. 234.

* * * Bruce reports this case.

THE said Alexander Duncan having entered into a minute of contract with Wintown of Strathmartin, whereby the estate was to be disposed to Duncan, and he to pay the sums due to creditors, and the reversion to Wintown; Mr Duncan thereafter marries the said Agnes Cumming, daughter to John Cumming, merchant in Edinburgh, and, by the contract of marriage, was to infest her in a suitable jointure, and was to give 8000 merks of tocher; but, after some years cohabitation, and children procreated, they separated, and she returned to her father's house; and the estate of Strathmartin being carried away by creditors, Duncan assigns the tocher to some of his own creditors, who having charged Mr Cumming for payment, he raised suspension and summons of multiplepoinding, and *alias* summons of reduction of the contract, with respect to the payment of the 8000 merks; and concluding, that the same should be declared disposable by Mr Cumming, for an aliment to his daughter, during the subsistence of the marriage, and, in case of her survivance, for her liferent use, and the fee to the children, &c. in exclusion of Mr Duncan the husband, and his creditors.

In this process, there was no compearance for Duncan; and, therefore, the decision in this case was upon supposition,

1mo, That there was an egregious fraud committed by Duncan, in inducing Cumming to give his daughter to him in marriage, by counterfeiting his circumstances to be very good, though he was a man of no fortune.

2do, That here there was a *causa data causa non secuta*.

3tio, That Duncan had grievously maltreated his wife. These three ~~then~~ being taken for granted, and supposed true in fact, it was *alleged* for Cumming, That the contract ought to be reduced.

And, as to the first of these grounds, *alleged*, *1mo*, Though all mutual contracts imply a conditional consent, if the circumstances be as they are represented on the other side; therefore, when it appears otherways, the consent must be held as not interponed.

2do, *In pœnam* of the fraudulent party, and to discourage such practices, law makes such deeds as are entered into by fraud ineffectual to him by whom the fraud was acted: And thus, by the common law in the case of society, (which has some affinity to contracts of marriage,) 'Societas, si dolo malo aut fraudandi causa coita sit, ipso jure nullius momenti est; quia fides bona contraria est fraudi et dolo;' l. 3. *D. Pro Soc.*

No 46.

And, even in the case of giving tocher, 'Si in dote danda circumventus sit alteruter, etiam majori annis 25, annis succurrendum est; quia bono et æquo non conveniunt, aut lucrari aliquem cum damno alterius, aut damnum sentire per alterius lucrum;' l. 6. § 2. D. De Por. Dat. And though, by that law, every fraud affords not ground for such a reduction, yet certainly the matter is *arbitrio judicis*; and, as to that, the distinction laid down in the title D. De *Ædilitio Edicto*, is very applicable to the present case: 'Si quid tale,' says the Roman Prætor, 'fuerit vitii sive morbi quod usum ministeriumque hominis impediât, id dabit redhibitioni locum, dummodo meminerimus non utique quodlibet quam levissimum efficere ut vitiosus habeatur;' and then enumerates several defects that would give ground for the action *quantum minoris*, but not for the *actio redhibitoria*; now, in the present case, *dolus dedit causam contractui bonæ fidei*; and, therefore, it is null, at least reducible.

It was *contended* also, That the second reason of reduction was relevant; because, the provisions in this contract being mutual, when it appears that the one party is in no condition to perform his part, it is most reasonable that the other should be free of the obligation.

As to the third reason *alleged*, That though this be not the ordinary remedy in law, that being by aliment, yet wives cannot be said to be excluded even from this, since the same rule which entitles them in such a case to a separate aliment, gives them also right to seek back their own from a husband injurious to them: Thus Sande, in his *Decis. Fris. lib. 3. tit. 6. d. 1.* lays it down as a maxim, *ob sævitiam viri mulieri divertenti dos est restituenda.*

And though it might be *objected* against all these grounds of reduction, That marriage having followed, and children being procreated, when the marriage cannot be dissolved (as certainly it cannot) on any of the above mentioned three heads, the mutual obligations in the contract must also stand; and, therefore, that the pursuers could only insist *pro damno*, which, upon the matter, is only a security for the wife's present aliment, and her liferent, in case of survivance; yet it would be considered, that there is a great difference betwixt the marriage itself, which cannot be dissolved but by death or adultery, and the *pacta antenuptialia*, which are regulated in the same manner as any other contract, and reducible upon the same topics; therefore, as any other contract would be reducible upon the grounds above mentioned, so must this contract of marriage.

As to Mr Duncan's creditors or assignees, *alleged*, That the contract was reducible even as to them; and that because, *imo*, His creditors cannot found upon this contract *bona fide*; because the obligation being mutual, whenever they make use of the contract, they must plainly see both the fraud of the author, and that they are under the necessity of implementing his part: Now, the only thing that can put an assignee in a better case than a fraudulent cedent, is his *bona fides*, which in this case can never be pretended; for, since the obligation to pay is in a mutual contract, they can be in no better cas.

than their author; and it is upon this foundation, that reductions on the act 1621 are competent against purchasers, even for onerous causes, from such in whose persons, if the right had remained, they would have been reducible upon that act.

2do, Supposing the creditors had got no voluntary assignation, but had legally evicted the sum; yet, even in that, in competition with them, the contract behoved to be found simply null, as was found in a parallel case, 24th December 1680, Prince against Pallat, No 39. p. 4932. where the LORDS preferred the seller of goods before the buyer's creditors, the buyer, the time of the contract, being conscious of his own insolvency; and though, by law, fraud has no effect against the defrauder's successors *bona fide*, yet that cannot concern the case where *dolus dedit causam contractui*; since there is no consent understood to be interposed more than in deeds extorted *metu*, which are ineffectual even against singular successors, which holds much stronger in the present case, than in the case of *metus*; for *in dolo* there is no consent, in *metu* there is, though it be forced. *Lastly*, Whatever might be said as to lawful purchasers, (which can scarce be supposable in acquiring debts, these not being a proper lawful subject in commerce,) yet, as to creditors, they are obnoxious to whatever exceptions would be competent against their author upon his fraud, as is plain in our law from the above decision, as well as it is consonant to the rules of justice it should be so.

“THE LORDS found the tocher subject to the bygone aliment; and, in case of lawful separation, found it subject to the aliment in time coming, during the separation; reserving to their Lordships, at advising the probation, to consider how far the separation was warrantable; and found it subject, in the like manner, to the liferent provided to the wife, in case of her surviving; but (though here there was no contradictor) yet they found the obligation for the tocher not reducible any further in prejudice of the creditors of the husband.”

Procurator for the Pursuers, *Bosewall.*

Clerk, *M'Kenzie.*

Bruce; v. 2. No 52. p. 70.

1732. *July.*

CREDITORS OF HOPE *against* HIS RELICT.

No 47.

THE husband's creditors, after his death, insisting against his relict for payment of the tocher, the LORDS found, that she might retain it for security of her liferent provision. In this case, though the liferent provision was purified by the husband's death, the relict did not plead the point so high, as to insist for voidance of the contract; she only insisted to have retention for security of her liferent, which the husband had failed to secure to her.—See APPENDIX.

Eol. Dic. v. 1. p. 596.