

1739. December 19.

RUSSEL against GORDON.

No 34.

In a case similar to Pollock against Campbell, No 32. p. 0489, a bond of provision was reduced, tho' it did not go upon the narrative of a promise elicited from the granter before his marriage, but then it appeared by a letter written by the father to his correspondent, along with his son's contract of marriage, which he had signed, that he had given instructions to his correspondent not to deliver up the contract until he should get a private obligation from the son to grant a bond of provision to his brothers and sisters.

By contract of marriage between John Gordon, son of Robert Gordon of Halhead, merchant at Boulogne, with consent of his father, and Amie Bondler, with consent of Thomas Bondler of London, her father, signed at Boulogne and London in January 1729, Robert Gordon, in consideration of the marriage and tocher agreed to be paid, became bound "to resign his estate in Scotland therein mentioned, in favour of his said son in liferent, and the heirs-male of the marriage in fee, and to the bride for her liferent therein mentioned; and became bound to free the said estate of all incumbrances."

The day after the solemnization of the marriage at London, John the husband, on the narrative of the said contract of marriage, whereby his father had become bound to resign his whole estate, and that it was just his brothers and sisters, the other children of the said Robert, should be competently provided, became bound within a year after his father's death, to pay the sum of L. 20,000 Scots to the four younger children of the said Robert, in such proportions as he should appoint.

In the action at the instance of one of the younger children for her proportion of the said sum, it having been made appear by the letters of Robert Gordon sent along with the said contract of marriage to his correspondent at London, that he had directed him not to deliver up the contract, till his son should grant the foresaid obligation, cautioning him to say nothing of it to Mr Bondler, the Lords "found that the said bond was *contra fidem tabularum nuptialium*, and therefore is of no effect during the subsistence of the marriage between John Gordon and Amie Bondler, or the existence of children of the said marriage."

The circumstance of the bond's being dated after the marriage was not regarded, as it was granted *so de recenti*, and that Robert having discharged the giving up the contract till his son had agreed to his proposal, he was supposed to have engaged to grant the bond before the correspondent had given up the contract; and as to the legal effect of *pacta contra fidem tabularum nuptialium*, or relevancy of the objection, though it was urged for the pursuer that it could in this case neither lie to the wife nor children, whose respective interests of liferent and succession to the estate were absolutely secured, so it could not lie to the husband the defender, against his own voluntary deed; yet the Lords found as above.

They considered the objection to lie not only to the wife and children, but to the granter himself; otherwise the effect of voiding such pactions would be eluded: That every one must be sensible that the father of the bride would as little have agreed to his daughter's marriage, if, by a restriction of, or burden on the settlement made by the father of the bridegroom, his fund for subsisting his family was lessened during the subsistence of the marriage, as he would

have done had his daughter's liferent or the childrens provisions been to be thereby affected. It was indeed said, that it might be a question, Whether such a deed would be effectual against the husband himself, should the marriage dissolve by the death of the wife without children? But as that was not the case at present, there was no occasion to give judgment upon it; mean time, with respect to that point, a distinction may seem not improper, that if it was an imposition by the father upon his son, who being once engaged in affection to the bride, would rather comply with any terms than be disappointed of the marriage, even the son might in that case reduce as he might on any other ground of concussion; but if the case should appear to be not a concussion upon the son, but which often happens, a fraudulent contrivance between father and son, to deceive the bride and her friends, the case might receive a different consideration.

N. B. There is a petition against this interlocutor not advised; but as it is only laid upon the point of fact, without controverting the relevancy, this is a judgment on the point of law.

Fol. Dic. v. 2. p. 22. Kilkerran, (PACTUM ILLICITUM.) No 1. p. 361.

1740. December 23.

LUNDIN against LAW.

FOUND, That the exception against a deed as *contra fidem tabularum nuptialium* was perpetual, and therefore competent even after the lapse of forty years, where the prescription of the claim itself had been interrupted by minority.

Fol. Dic. v. 4. p. 30. Kilkerran, (PACTUM ILLICITUM.) No 2. p. 363.

S E C T. VII.

Pactum super hæreditate viventis.

1630. July 6.

AIKENHEAD against BOTHWELL.

THE LORDS found it not unlawful to Mr James Aikenhead to sell to his brother, Mr Adam Bothwell, all the gear that his wife should happen to fall by the decease of Adam Bothwell her father, notwithstanding of the civil law alleged *quod pactum sit illicitum de successione viventis*.

Fol. Dic. v. 2. p. 23. Auchinleck, MS. p. 21.

No 34.

No 35.

No 36.