

1745. July 3.

AITKIN *against* GOLDIE.

No 5.

A purchaser of an estate from an heir not infeft, having made up his titles, by a charge to enter, and adjudication, instead of infesting the seller, it was found he could not compete with an heritable bond and infestment granted by the seller, of which he knew at his purchase.

JOHN AITKIN of Ryes gave an heritable bond for 5000 merks to James his second son, on which infeftment followed, and afterwards sold the estate to Alexander Goldie writer to the signet, who, observing his author was not infeft, made up his titles, by charging him to enter heir to his predecessor, and thereon adjudging and obtaining himself infeft.

James Aitkin also charged, in order to adjudge; and Mr Goldie appearing to oppose him, the Lord Ordinary ordained them to dispute as in a competition.

THE LORDS, 21st June, pronounced this interlocutor, 'It appearing to the Lords, that the transaction between the father and the purchaser was a contrivance to disappoint the son of the payment of his bond, they therefore found that the purchaser could not upon his adjudication, and charter and infeftment, compete with the son, or prejudge his bond.'

Pleaded in a reclaiming bill, That the purchase was real and onerous, and the design of making it no ways in order to disappoint the bond, which at the same time was an imposition upon the father, and the question whether it could be effectual at present in dependence; that in point of law the two rights, viz. an heritable bond and a disposition were not of that sort as to infer fraud in the granter, as they might stand together; and with regard to the purchaser, there was nothing to hinder him, upon observing the incumbrance, to make up his titles in such a manner as not to be affected by it, *Brown against Smith*, No 76. p. 2844.; *Bell against Gartshore*, No 80. p. 2848.

That the price was not paid up so as it might be run away with, but made payable in the first place to the creditors that might be on the estate, and the remainder to the seller and his wife in liferent, and to his children in fee, according to a division to be made by him.

The interlocutor therefore ought to be reversed, or at least the point superseded till it appeared if the bond could be set aside, which was a question depending in this process, and if so determined, would make the present one useless.

'THE LORDS adhered.'

Reporter, *Lord Elchies.*

Act. *H. Home.*

Alt. *Graham sen.*

Clerk, *Gibson.*

D. Falconer, v. I. p. 112.

1749. July 11.

HOGGS *against* JOHN HOGG.

No 6.

A person, in his son's contract of marriage, fraudulent.

JOHN HOGG younger of Cammo made a proposal of marriage to Barbara Musgrave, sister to Sir Philip Musgrave of Edinshall; and to facilitate the compliance of the Lady and her relations, John Hogg his father laid before them a

state of his affairs, which appeared afterwards to have been fallacious, considerably enlarging his funds, and diminishing his debts.

The marriage was agreed to, and a contract was executed, disposing the estate to the son and his heirs male; a jointure of L. 150 Sterling to the Lady; the sum of L. 2500 to be divided betwixt three or more daughters, if there should be no heir-male; reserving to John Hogg elder his liferent of part of the estate, or an annuity of L. 150 Sterling, with power to burden with L. 500, and under the burden of L. 1000 to John Hogg's younger children, payable at his death, of which 9000 merks Scots to a daughter who predeceast her father, and which in that case was stipulated to return, so that there was no question concerning it; the interest of 3000 merks as an alimentary provision to another daughter during her life; and 6000 merks to a son who died pending the process, which John alleged fell to his representatives, but they not being brought into the field, there was no determination given thereon.

The deficiency was found during the subsistence of the marriage; and John Hogg elder renounced his power of burdening further, and restricted his annuity to L. 90, and John younger died, leaving four daughters, who insisted in an action against their grandfather and his younger children, for having it found, that the annuity and burdening provisions could not compete, on the estate disposed to their father, with them onerous creditors; as it was in the view of the provisions made to them that the marriage was contracted, and their mother's portion paid; especially as there was a fund for paying them only L. 1000 of their portions, and they behoved to lose the remainder, and even that made up in part of extraneous acquisitions of their father, not flowing from his.

THE LORDS, 1st December 1748, 'found the provisions in the contract of marriage in favours of the daughters of the marriage, were preferable to the reserved liferent of the defender, and to the provisions to his younger children; reserving to the defender to be heard, how far he is entitled to plead the *beneficium competentiæ*.'

On bill and answers,

'THE LORDS adhered, with regard to the pursuer's preference to the defender's liferent, reserving to him to be heard on the *beneficium competentiæ*; and to Margaret, how far she could compete on her alimentary provision.' See No 4. p. 1392.

Reporter, Drummore.

Act. W. Grant et Lockhart.

Alt. R. Craigie et A. Murray.

Clerk, Gibson.

Fol. Dic. v. 3. p. 241. D. Falconer, v. 2. No 80. p. 86.

* * * Kilkerran reports the same case :

JOHN HOGG elder of Cammo was generally thought to be a rich man, nor was his own family let into the secret, that it was only so in appearance; for, when, with his consent, John his eldest son made proposals of marriage to Bar-

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lently concealing his circumstances, the provisions to the wife and children were found preferable to his reserved liferent.

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bara Musgrave, daughter to Sir Christopher Musgrave of Edenhall in Westmorland, the said John Hogg elder, by a writing under his hand, set forth his real estate in land and houses in Edinburgh to be about L. 860 Sterling yearly, and his moveable effects to be about L. 5000 Sterling, and that his debts did not exceed L. 8300. Upon the faith of this representation, the marriage was concluded; and, by the contract, the estate real and personal was disposed to his said son, and the heir-male of the marriage, whom failing, to his other heirs-male, burdened with an annuity to the bride, in case of her survivance, of L. 150 Sterling, with all his debts already contracted, L. 1500 of provision to his younger children, and an aliment of L. 100 Scots to an infirm daughter, reserving also to himself a liferent of L. 200 Sterling. And in the *last* place, in case there should be only daughters of the marriage, John Hogg younger to pay them, if three or more of them, which was the event that happened, L. 2500 Sterling at the first term after his death.

Soon after the marriage, John Hogg the son came to discover he had been imposed upon; for besides that the rental of the real and extent of the personal estate had been much exaggerated, the debts, instead of L. 8000, were about L. 14000; and in a word, such were the circumstances, that he was obliged to sell first a part, and soon after what remained of the land estate; to which sales the Lady consented, upon security being given her for her annuity, in case of her survivance, upon certain old tenements in Edinburgh, which were part of the real estate; and to which sales John Hogg elder also consented for his right of liferent, which he restricted to L. 90 Sterling, and accepted a security for it *secundo loco* upon the foresaid houses in Edinburgh, which, in the event the Lady's liferent should take place, were scarce able to answer it.

The event soon happened; the young man died, leaving his Lady and only four daughters; and all the fund that remained for the Lady's annuity, the old man's restricted reserved liferent, and the daughters' provisions, being the said houses in Edinburgh, and L. 1000 Sterling remaining of the price of Cammo, a process was brought at the instance of the daughters, for having it found and declared that they were preferable for their provisions to the reserved liferent of their grandfather, and to the provisions to his younger children.

And accordingly the LORDS 'so found, reserving to the said John Hogg to be heard, how far he is entitled to plead the *beneficium competentiae*?'

This was an uncommon case; there have been many instances of *pacta contra fidem*, sometimes by a constraint on the bridegroom, sometimes with his concurrence; but here was something of a very different nature, a father disposing all he had without any secret reservation, but a reservation open and agreed to, though what his estate could not afford, the extent whereof he had misrepresented from pride and vanity, a motive idle and foolish, rather than, properly speaking, fraudulent; yet, as by means of this false state and unfair representation of his fortune and estate, from whatever motive it had proceeded, he had induced the Lady and her friends to enter upon the treaty of marriage, whereby

they had covenanted as for the Lady's liferent, so for the issue of the marriage, it was thought just, that since there was a shortcoming of the funds, which he had averred himself to be possessed of, the deficiency should rather land upon the reservations he had made for himself and his other children, than upon the daughters of the marriage; and it was thought that the like plea might have lain to the son John Hogg younger himself, that the reserved liferent, faculties and burdens, had been submitted to on supposal of a full estate, such as was given out, which therefore could not be claimed without making good the fund out of which they were to be paid. See No 4. p. 1390.

Kilkerran, (FRAUD.) No 5. p. 218.

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1785. June 21.

JEAN LISK, and her *Curator ad litem*, against Her HUSBAND and his CREDITORS:

JEAN LISK, who enjoyed from a former husband a terce yielding annually L. 600, was courted by a gentleman pretending to be possessed of a free landed estate of L. 240 per annum. By the marriage articles, the whole effects belonging to the parties were to accrue to the survivor, Mrs Lisk at the same time having it in her power, in case of her predecease, 'to burden the subjects 'in communion, *etiam in articulo mortis*, to the extent of what she brought 'with her.'

Instead of being in a condition to fulfil the above-mentioned agreement, Mrs Lisk's husband, at the time of the marriage, was irretrievably bankrupt. A sequestration of his effects soon took place; when she brought an action against him, and the trustee for his creditors, for having it found, that he had no right to the rents of her terce-lands. It could not well be said, that the marriage-contract contained an express exclusion of the *jus mariti*; but Mrs Lisk offered to prove its having been her expectation, and that of her friends, that she was to enjoy her estate independent of her husband; from which, joined to the deception practised with regard to his situation in point of fortune, she

Pleaded; The matrimonial engagement, so far as relates to the union of the married persons, is indeed indissoluble from considerations of a pecuniary nature. In its effects, however, on the estates and property of the parties, it is to be viewed as an ordinary contract, and to be regulated by those principles of justice which influence other agreements. Where these have been brought about by fraud, it is the province of courts of equity to give relief, by annulling, them; or where a mere voidance would not afford an adequate reparation, by imparting that effect to the contract which the injured party was induced to expect from it; Dict. *voce* Fraud; Principles of Equity, b. 1. c. 1. § 1. 2.; Bacon's Abridgment, *voce* Fraud.

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A woman induced by fraud to marry an insolvent person, not entitled to withdraw her effects from the *jus mariti* of her husband.