

not like a fraudulent deed done by a tutor in favours of his pupil, to whom he was not debtor. And the decision, Paton *contra* Paton is not to the purpose, for there the bond was taken by the father from his son without a preceding onerous cause.

Triplied for the pursuers; A tutor who is debtor to his pupil, acquiring to him fraudulently in satisfaction of that debt, puts his pupil in a worse case, than if the tutor were not debtor; because, a tutor who is debtor is under stronger temptation to do so, than one who is disinterested; and a tutor bankrupt cannot by partiality prefer his pupil to other creditors. A tutor who is also debtor to his pupil, *duplicem personam gerit, et ego non sum ego*; and though he cannot authorise his pupil *in rem suam*, yet when he *qua* debtor *mala fide* disposes to his pupil, *perinde est*, as if he did *mala fide* acquire from another for his pupil, which acquisition would be reducible upon the tutor's fraud.

THE LORDS repelled the defence, that the disposition in favours of the children of the second marriage, was made by the father with the pursuer's consent, for an anterior onerous cause in their mother's contract of marriage; in so far as would extend to the sums provided by the said contract; in respect of the obligation in the pursuer's contract of marriage, to make up the estate disposed to be worth 8,000 merks of yearly rent out of the father's other lands and estate; and therefore sustained the reason of reduction.

Fol. Dic. v. 2. p. 21. Forbes, p. 313.

1716. July 20. GORDON'S *against* SIR WILLIAM GORDON of Lesmore.

DUFF of Drummuire having contracted his daughter with the eldest son of Sir James Gordon of Lesmore, the whole estate of Lesmore, without reserving any thing, saving a yearly aliment to Sir James, was disposed in the contract, and Drummuire paid a suitable tocher; but the day before the marriage, there was a private paper granted by the son to his father Sir James, wherein he obliges himself to grant bonds of provision to his younger brethren and sisters, for such a sum of money as his said father should think fit to bestow upon them, payable at what terms the father should determine. The son having died without making these bonds, Sir James himself, in supplement thereof, granted bonds of provision to his said younger children: And now Sir William the grandchild, being pursued upon the said bonds, repeats a reduction upon this head, that they were granted 'contra fidem tabularum nuptialium et pacta dotalia,' both in relation to Drummuire the father, who paid the tocher, and Sir William the heir of the marriage.

Answered for the pursuer; That the obligation granted by the son is no ways derogatory to the contract, it not being provided in the contract, that the estate shall not be burdened with the children's provisions; for, though it be not expressed that it shall be, yet there is a great difference betwixt doing

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A father disposed his whole estate in his son's contract of marriage, reserving an annuity to himself; but before the marriage, the son became bound to grant suitable provisions to the other children. The Lords found that, in regard there was no obligation in the contract of marriage to relieve the son of the younger children's provisions, the bonds libelled.

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so far as rational provisions, were not granted in fraudem factorum.

deed whereof there is no mention in the contract ; for, had it contained an express clause burdening the father with the children's provisions or the like, then the latent obligation had been indeed *contra fidem* ; for that imports contrary to what is pactioned ; but here there is no such provision : And therefore, *2do*, As a consequence of this, where father and son are not expressly tied up by the contract, they may do rational deeds ; and it is a very rational deed to provide younger children ; nay, it was *debitum naturæ* upon the father, and consequently upon his son and heir, *præcipiens hæreditatem* by the contract ; and since Drummuire knew there were younger children *in familia*, and unprovided, he could not think but that the father and son might, notwithstanding of the contract, reasonably provide for them ; and what is rational cannot be said to be fraudulent.

Replied for Sir William Gordon ; That the marriage-settlement being fairly stipulated, and it being therein agreed, that the lands enumerated should be disposed, without any other reservation than the father's aliment ; and the tocher being accordingly paid ; therefore, as Drummuire could elicit no deed from his apparent goodson, prejudicial to the contract, no more could Lesmore the father : *2do*, Here Lesmore younger was plainly concussed, the paper in question being elicited before signing the contract, for he was thereby put under a force either to go into any terms his father should propose, or suffer the marriage to be deserted : *3tio*, The paper was subscribed without the presence or knowledge of Drummuire, or any of his friends.

To the *second*, *replied* ; That though it was reasonable Sir James should provide his younger children, yet, in common honesty, these provisions ought to have been proposed at communing about the marriage : Thus Voet, speaking of *pacta dotalia*, and clandestine frauds which may be used in prejudice thereof, says, ' Non enim fraudibus hisce, quibus mortales etiam prudentissimi capi, decipi, ac circumveniri, facile possent, indulgendum est ;' and Groenwegen, *ad l. 4. C. De dot. promiss.* putting the case betwixt public and private marriages, says, ' Ita et clandestina, quæ, insciis propinquis, aut altera parte super dotibus et donariis, adversus publicos contractus ineuntur, pacta, nostris, et aliorum, moribus adeo improbantur, ut publicis tabulis standum sit, et secreta pactio paciscentibus non suffragetur :' And the Lords' decisions do here agree. Thus, 29th Nov. 1626, Scot against Scot, *voce* PROVISION TO HEIRS AND CHILDREN ; and Paton against Paton, No 26. p. 9475. the present case is almost decided *in terminis* : And Margaret Grieve against John Thomson, No 29. p. 9478. the Lords reduced a discharge, granted by a bridegroom to his father, of a sum he had engaged for in the contract, as being *contra fidem tabularum nuptialium* : So that the very keeping up of the said debts, or exacting an obligation of the above nature to grant provisions to the younger children, where there was no other fund for their payment than the estate disposed, was an express violation of the contract.

"THE LORDS sustained the reason, that the bond by the defender's father was granted *contra fidem pactorum nuptialium*, and reduced that bond."

Act. Sir W. Pringle.

Alt. Horn:

Clerk, M^r Kenzie.

Fol. Dic. v. 2. p. 22. Bruce, v. 2. No 20. p. 24.

* * * Lord Kames account of this case is that given on the margin, which does not accord with Bruce's report. See APPENDIX.

1716. November 22.

The Viscount of ARBUTHNOT *against* MORISON of Prestongrange.

By contract of marriage betwixt the Viscount of Arbuthnot and Prestongrange's daughter, Prestongrange is bound to pay a portion of 50,000 merks; but there being a declaration and obligement granted by the Viscount of Arbuthnot, the day immediately before the contract of marriage, narrating, 'That he was resolved to marry the young Lady, and to enter into a contract, in which there was to be a portion of 50,000 merks provided to him; and that he was to give a jointure suitable to his circumstances, and the marriage-portion; but that he was sensible that Prestongrange would be at great charge by the marriage; and that seeing his friends would have 50,000 merks to be insert in the contract, (albeit Prestongrange had refused to give more than 40,000 merks) it was his earnest desire to Prestongrange, that 50,000 merks should be insert in the contract; but that he obliged himself, upon his honour, to discharge 10,000 merks thereof,' &c.

The Viscount designing to claim the full 50,000 merks, pursues a reduction of the declaration and obligement, as being elicited from him in his minority, without the consent or knowledge of his honourable friends, who were treating for him; and to his lesion, in as far as he gave provisions suitable to the portion, fifty chalders of victual to the Lady in liferent, and if there were but one daughter of the marriage, the Lady's portion of 50,000 merks to that daughter, and proportionally more. if two or more daughters; and the portion of the one daughter is expressed in the contract thus, "To her the mother's portion underwritten:" Which was a manifest lesion, reflection and affront upon the Viscount's friends, who were drawn in to be witnesses to a contract in the lowest terms to which they would acquiesce, and yet that contract to be made ineffectual by private influence upon a minor. *2do*, The said obligement was *contra pacta dotalia*, which is reprobated by the law of this and most nations; as is observed by Voet in his commentary upon the title, *De pactis dotalibus*, and Gronvegan ad l. 4. C. *De dotis promissione*, and Perezius on the title, *De pactis conventis tam super dote*, &c. And thus it was decided in the Parliament of Paris, as is observed by Annæus Robertus, *Rerum judicatarum*, l. 1. cap. 2. where he has the pleading at length, agreeing almost *in terminis* with the present case, being a discharge elicited from the bridegroom of a part that was stipu-

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A discharge of part of the tocher before solemnization of the marriage reduced as *contra fidem tabularum nuptialium*, at the instance of granter himself, who was minor, but without curators, because granted privately without the concurrence of friends whom he had engaged to assist him in the marriage treaty.