

No 14. of Ludovick Gordon *contra* Sir Harry Innes, No 51. p. 715, *voce* ARRESTMENT; but as he was a poor porter, whose name was put into the bill without any trust undertaken by him, the Lords justly considered Napier to be the person in whose hands arrestment was to be used.

*Fol. Dic. v. 3. p. 242. Kilkerran, (FRAUD.) No 6. p. 220.*

1758. August 3.

JAMES ANGUS Writer in Dunse *against* The REPRESENTATIVES of JAMES WEMYSS, late Clerk of the Post-office at Edinburgh.

No 15.

In implement of a contract of marriage, the father of the wife paid to the husband a part of the tocher, but the husband dying, and likewise the wife without issue, the rest remained unpaid. In an action at the instance of a creditor of the husband, against the wife's father's representatives, for payment of the balance, the defence, that the husband, at the time of his marriage, was bankrupt, and so had it not in his power to implement his part of the contract, was repelled.

By contract of marriage between Patrick Lindsay tenant in Wester Deans-houses, and deputy wardrobe-keeper of the palace of Holyroodhouse, and Margaret Wemyss, dated 22d February 1742, James Wemyss, her father, became bound to pay to Patrick Lindsay, his heirs or assignees, the sum of L. 300 Sterling, in name of tocher. Of that sum, L. 50 was made payable at Whitsunday 1742, L. 50 at Martinmas thereafter, L. 50 at Whitsunday, and L. 50 at Martinmas 1743, and the remaining L. 100 at the first term after Mr Wemyss's decease. On the other part, Lindsay became bound to provide the like sum of L. 300, and to secure the same, with the said portion, to himself and his future spouse, in liferent, and the children of the marriage in fee; and in case of no children, he obliged himself, and his heirs, to pay L. 100 Sterling, being the last moiety of the tocher, to his wife, or any person to whom she should assign the same; under a proviso, That in case she should not execute that power of disposal, the obligation upon him as to this last L. 100 should determine.

In pursuance of this contract, the two first moieties of the portion, making L. 100 Sterling, were paid by Mr Wemyss to Mr Lindsay. James Angus being creditor to Lindsay in a small debt, used arrestment in Wemyss's hands, before any more payments were made; and soon after, Lindsay granted an assignation to Angus of the L. 50 Sterling due at Whitsunday, and the other L. 50 of the portion due at Martinmas 1743, which was acknowledged to be in security of Angus's own debt, and of some other debts due by Lindsay, in which Angus was trustee.

In July 1743, James Angus charged Mr Wemyss with horning for payment of the sums assigned; upon which Wemyss obtained a suspension, which for several years lay over undiscussed.—In the mean time, Patrick Lindsay joined in the rebellion, and was convicted and executed at Carlisle in the 1746. His wife survived him for some years, as did also the only child of the marriage; but both died before the suspension was wakened; and Mr Wemyss having also died, an action was at length insisted in against his representatives.

The chief defence stated for them, was, That Patrick Lindsay had never implemented the obligations upon him, contained in the marriage-contract; and that he was even *obærat* and bankrupt at the time of entering into the contract, which ought therefore to be set aside *ex capite fraudis*. The parties differed as to the fact of his bankruptcy, or insolvency; but the debate turned upon the relevancy of the defence, before any proof was allowed.

*Pleaded* for the defenders, *imo*, In mutual contracts, where the obligation prestable by the one party is the cause of what is prestable by the other, neither of them can maintain an action for implement of what is prestable to them, without performing their part of the contract. The civil law was express upon this point; and the same is the opinion of Lord Stair, title, OBLIGATIONS CONVENTIONAL. Nor is there any difference in this respect between articles of marriage and other contracts. The principles of law and justice are the same in both; and so this point has been determined in a variety of cases collected in the Dictionary, title, MUTUAL CONTRACT; particularly in the case of the Creditors of Watson *contra* Cameron, 4th July 1732, *voce* MUTUAL CONTRACT. The husband's inability to perform, ought therefore to operate a total dissolution of the contract. Nor can this exception be removed by the supervening death of the wife, and child of the marriage; for if no action would have lien for the portion while they were living, there is no good reason, why it should do so after they are dead, seeing the contract on the husband's part is still not implemented. And,

*2do*, The defence does not rest merely on the husband's inability to perform; it resolves into a reduction of the contract on the head of fraud. The bride and her father were *dolo inducti* to enter into this contract, upon the faith and belief, that Patrick Lindsay was then in condition to perform what he undertook; whereas, at that time, he knew himself to be utterly insolvent, and for a number of years had been distressed by captions and other diligence; upon some of which he was apprehended, and on others absconded. *Dolus dans causam contractui*, is relevant to reduce the contract *in totum*. In the late case between Carfin and the assignee of William Telfer\*, a proof of fraud was allowed for reducing a marriage-contract, after the marriage had dissolved by the predecease of the wife without issue; and though judgment eventually went in favour of the assignee of the husband, it did so, in respect that Carfin failed in proving the fraud. A proof of the bankruptcy should therefore be allowed here, as relevant to reduce the contract, as fraudulent on the part of the husband.

*Answered* for the pursuer, *imo*, It is just, that, in common contracts, where the obligation on the one party is the mutual cause of what is prestable by the other, neither of them can maintain an action for implement to them, without performing their own part of the contract. But marriage-contracts are at-

\* See General List of Names.

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tended with different circumstances. In common cases, a contract can be reduced, and parties restored *in integrum*; but that cannot be done after marriage has followed on a nuptial contract. Again, in marriage-contracts, the mutual prestations are not the adequate causes of each other. The marriage is properly the cause of all the stipulations on either side, which are only conventional settlements in place of the legal rights arising from marriage. A man may provide his wife, though she brings no portion: and the wife's want of it will not prejudice her legal rights. A contract of marriage is not like a bargain of sale, that cannot subsist without a price, the marriage itself being an onerous cause for the whole provisions. The greatest length therefore that decisions have gone as to such contracts, is to allow retention of the portion on the part of the wife, while any condition remains to be performed on the part of the husband. Besides, in all those cases, either the wife was living at the time, or at least children of the marriage, who were creditors by the contract in their provisions; and even in some instances of that kind, the husband's creditors have been nevertheless preferred, as in the case of Margaret Turnbull, 25th November 1709, *voce* HUSBAND AND WIFE. But in no case has the husband's inability to perform been sustained to reduce the contract totally; which would be of the most dangerous consequence. Here, after neither the wife nor issue of the marriage exist, there is no room for any challenge on that head; nor even for retention, which requires a *jus crediti* in the user of it, to compel the other party to perform. The wife or children had the only interest to force the husband to implement, as the provisions made by him were in their favour; and upon their failure, the condition on his part became of course impossible; and, consequently, the defenders have no title or interest now to object, that he was not able to perform a condition which has already evanished.

And, *2do*, There was no fraud upon Mr Lindsay's part in this contract, nor was he insolvent at entering into it. But supposing him to have been so, that will not infer fraud, which is not to be presumed. It is the interest of this country as a commercial nation, that exact proportion or equality in marriages should not be required; and nothing is more discouraging to merit, than to prohibit any man from getting more money with a wife than he is possessed of in his own right. If the husband here had not a shilling of his own, yet as he was a gentleman, the portion of L. 300 was but a moderate provision from his wife's father, since he was to have the burden of maintaining the wife and children in a suitable manner. Besides, every man may be allowed to hope for an acquisition during his marriage of more than the sum in question. The husband is taken bound to provide and secure a certain fund for support of his wife and children, in the event of his decease; but he is confined to no short day for so doing. He is left at freedom to acquire such fund, and settle it at any time during the marriage; and if by accident, or misfortune, his endeavours are frustrated, it would be extremely hard to presume him a rogue from

the beginning. Moreover, the objection, if good, would go too far; for, if insolvency on the part of the husband could presume fraud, and totally void the contract, so must it do if it occurred on the part of the wife's father, or the provider of the portion. The consequence of this would be, that all provisions in marriage-contracts would be thrown loose. A husband could not be sure of the portion, a wife of her jointure, or children of their provisions; and these were the grounds of the decision in the case of Carfin, though a proof was there at first allowed before answer.

THE LORDS repelled the defence founded on the allegation, that the said Patrick Lindsay, at the date of the contract of marriage, was *obærat* and bankrupt, and so not able to have implemented his part of the contract; and that in respect of the death of the wife, and of there being no issue of the of the marriage existing; and refused to allow a proof of Mr Lindsay's circumstances.

*Act. Dav. Raz.*

*Alt. Lockhart.*

*D. R.*

*Fol. Dic. v. 3. p. 244. Fac. Col. No 132. p. 243.*

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### SECT. III.

#### Underhand dealing.

1629. November 27. PATERSON *against* EDWARD.

JOHN M'CUBBIE being debtor to divers of his creditors, for satisfying of debts owing to Nicol Edward, Mr Robert Balcanquhel, and others, he makes them a disposition of the merchant-wares which he had in his merchant-booth, valued to a sum exprest in the disposition, whereby also all other his goods are disponed to them for their relief; and about 20 days after the said disposition, he on the night delivers the saids goods in the merchant-booth, and on the morrow becomes fugitive; and on that morrow Thomas Paterson arrests the same wares in the said Nicol Edward's hands, and pursues to make them furthcoming; and they defending them with the said disposition, and tradition before the arrestment, as being done for an onerous cause, for a true and just debt, which they instructed, the LORDS found that they had right, and not the arrester to the said goods, in respect of the said disposition, and delivery to them, all done before the arrestment, and done to a true creditor, for a just and preceding

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No 16.

A merchant disponed his effects to certain creditors, and the day after delivery he left the country. In a competition between the disponees and other creditors, who had arrested on the day the bankrupt fled, the former were preferred, though the disponees were relations of the bankrupt.