

COMPENSATION AND RETENTION.

1777. February 28. SLIGO *against* FOTHERINGHAM.

ALEXANDER Knight, merchant in Rotterdam, having drawn a bill upon John Fotheringham, which was accepted, indorsed it to John Sligo, value in account with Alexander Knight. Sligo pursued Fotheringham for payment of this bill; who suspended upon this ground, That Sligo was owing to him a greater sum, for which action was depending, at his instance, before the Court of Admiralty, and for which he claimed compensation, at least retention. Answered, *primo*, That, whatever was in this point, it could have no effect as to the bill in question, which was truly in Sligo's person as trustee for Knight, whose debts, about Aberdeen, he was in use to collect; and, indeed, the fact appeared from the tenor of the indorsation. But, *secundo*, Compensation there could be none,—a liquid debt could never be compensated by one not liquid; and, *tertio*, As little could there be retention, for, though this was allowed in certain cases, on the head of equity, yet, in this case, there was no equity in allowing it; the defender, Sligo, in the process before the Admiral, having found caution *de judicio sisti et judicatum solvi*.

The Lord Eliock, Ordinary, repelled the first reason of suspension, but sisted process till the action before the Judge-Admiral was determined. But the Lords altered,—found the letters orderly proceeded, and the suspender liable in the expense of the extract.

CONTRACT OF MARRIAGE.

1776. December 21. RICHARD and MARY DICKS *against* LINDSAY and OTHERS, Trustees of Bailie Dick.

ROBERT Dick, dyer in Jedburgh, in his contract of marriage with Margaret Ainslie, disposed to the children of the marriage, *which failing, to his heirs and assignees, the hail heritable and moveable subject that should pertain and belong to him at his death*. At this time, Robert Dick had a small stock, and his wife the liferent of four acres of land, as the widow of a former husband.

Of this marriage there were two children, Richard and Mary, and their father, after acquiring a fortune of about £3000 sterling, entered into a second marriage, but of which there was no issue.

Richard, the son, proved a wild dissipated lad; begun as a packman; twice

enlisted as a soldier; disoblged his father in many instances; and at last married without his consent; and prospered in nothing.

Mary married Thomson, who turned out in bankrupt circumstances.

By this means, old Bailie Dick, the father, became unhappy. He saw his son worthless, and unable to provide for a family of six children; a prey to company; in debt, both as principal for himself, and as cautioner for his brother-in-law Thomson. He saw his daughter Mary married to a bankrupt, also with a family; and no prospect of any better fortune.

He took a resolution therefore to settle his estate, which consisted of heritage and bonds, bearing annualrent, upon trustees. In the *first* place, To pay his debts and funeral charges; *2dly*, To pay the provisions to his wife who survived him; *3dly*, To pay the provisions made, or which he should make, to his son and daughter, and their families; and, *4thly*, To implement any legacies or other deeds which he might execute. And, of the same date, by two separate bonds, he settled an alimentary annuity of L. 30 upon Richard, an annuity of L. 3 upon Richard's wife, and secured the remainder of his estate for behoof of Richard's children. The annualrents for their education, and the stock payable at majority and marriage, for their patrimonies, to fall to Richard himself in case of their death; and to Mary he gave an annuity of L. 2:10s. yearly, and L. 10 to her children.

Of these settlements, Richard and Mary brought a reduction as *in fraudem* of the contract of marriage. And, upon advising, the Lords repelled the reasons of reduction, and assoilyied, (21st December 1776.)

As to the contract of marriage in general, they were of opinion, that it was of a kind which gave the children less of a *jus crediti* than any that had occurred. It contained not a special provision of a sum, or any particular subject; neither was it a provision of conquest: in both of these, particularly in the first, children have a *jus crediti*; but the provision here, was only of what Bailie Dick should be worth at the time of his death; so that, until that happened, they were not creditors for a farthing. In such a contract as this, the provision was not to the heir of the marriage, but to the children of the marriage, that is, to them and their families. A rational deed, therefore, securing that provision in that channel, was a just, nay, a laudable deed, and subject to no challenge. The behaviour of the son more than justified the step which his father had taken to secure his grandchildren from starving. It was a proper exertion of the *patria potestas*; and, should the son now prevail, he and his children would be ruined, and the soie benefit redound to his creditors, who were by no means entitled to any favour, being persons who seem to have ministered to his excesses; or, at least, lent to an apparent heir, in hopes of being repaid at his predecessor's death.

And as to Mary, her plea was untenable; for, at any rate, it was clear, take the case as you pleased, that the power of division betwixt her and her brother remained with the father.

It appeared that Richard was a weak thoughtless creature; and that, in this very process, his own wife, for the sake of her children, took part against him. It appeared, that, previous to his father's death, Thomson and Richard had entered into a contract to stand by one another, and to divide the inheritance; and that the action was carried on at the expense of both their creditors; so

that, upon the whole, it was evident that, if the prosecution succeeded, the creditors would be the sole benefitters, and that Richard and his family were ruined.

The case of *Douglas of Tillivhilly* was quoted and reprobated ; but the case of *Thomson of Cummanhead*, decided *anno* 1772, was quoted with approbation.

DEATH-BED.

1776. July 9.

FAICHNEY *against* FAICHNEY.

IN the cause, this day decided, 9th July 1776, Faichney against Faichney, Lord Monboddo gave his opinion, that a person advanced in life to the age of 66, labouring under a gradual decay of nature, and afterwards dying of it, cannot be said to have contracted a disease of which he died, in terms of the law of deathbed : he is under no disease, further than arises from old age, and the settled period and boundary of human life ; and therefore he contended, that, in such a case, there was no necessity for any proof of reconvalescence ; for reconvalescence supposed sickness, of which, in his opinion, there was none : but if any such proof was necessary, he thought that a party going to church unsupported, though weak, and not perhaps staying out the whole public worship, but returning unsupported, that this was all which the law required to validate the deed. In this case, the person was a minister, who was in use to go regularly to church, and stay out the service ; whereas, on this occasion, he had not only rode to church, but, over and above a louping-on stone, had been helped on and off his horse. Had been late in going into the church,—not till after the lecture was begun,—and had come out after the sermon, before the last prayer, or the blessing.

The majority of the Judges thought this an incomplete act, and that it did not validate the deed, no more than going to market and coming away in the midst of a bargain. Lord Justice-Clerk extended Lord Monboddo's doctrine to every case of a *morbus sonticus*, and contended, that, if the mind was entire, the weakness of body should be strictly interpreted so as to preserve to every man the *libera testamenti factio* as much as possible. All seemed to agree, that, where a party goes to kirk or market, *dedita opera* to validate a deed on deathbed. The behaviour of such a person was to be examined and attended to with special minuteness. The Lords had formerly repelled the reasons of reduction ; “ but this day they sustained them, and reduced the deed.”

Case of *Provost of Aberdeen*, decided 13th December 1757 ; See Principles of Equity, p. 121.