

No 27. yet such clauses could take no effect, unless they could instruct a just cause of the refusal, much more when they were past by.

THE LORDS found the clause of the bond was just and valid ; but it could not be understood to be transgressed, unless it had been known to the Lady before her contract of marriage, and in that case, ordained her friends to declare their relevant reasons of denying their consent, and to instruct the same.

*Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 812.*

1681. February 13.

HAMILTON *against* HAMILTON.

No 28.

MARRIAGE being free, marrying without a father's consent, was found not to annul a bond of provision, by a father to his eldest daughter. The bond contained this clause, ' she marrying with his consent, and of those named by him as her curators, ' otherwise she should only have the sum of blank,' which was never filled up. The LORDS found they might fill it up, if she had transgressed the clause, and thereby restrict the provision according to the match she made ; but this nomination not being shown or known to her, the irritancy was found not incurred.

*Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 865.*

\* \* \* See The particulars, No 3. p. 672.

1682. March.

FOORD *against* FOORD.

No 29.

A party granted a disposition to his niece with this *proviso*, that she should not marry without consent of certain persons. The contravention found relevant to annul ; but the defence admitted, that she had required this consent, and it had been refused without a cause assigned.

WILLIAM PETRE in Wester Saltoun, having granted disposition of his moveables to Allison Pooll, his niece, with this provision, That she should marry with the advice and consent of William Foord and John Calderwood in Saltoun, and in case she should not follow their advice, and marry otherways, the disposition is declared to be null and void ; in that case, disposes his moveables to the said Allison and to her brother, and to Elizabeth, another sister, equally amongst them. And the said Allison having married without consent of the persons appointed by the father, her brother and sister raise a declarator against her, for declaring the disposition to be null, and that two parts of the moveables did belong to them. *Alleged* for the defender, That such provisions are unlawful, as being *contra libertatem matrimonii*, and can be no farther sustained but to oblige the person who is burdened therewith to enter into a rational marriage ; and her husband being a suitable match, the persons appointed by the father cannot condescend upon any rational ground of their dissent. *Answered*, That such provisions are just and rational ; and as it was in the uncle's power to have dispoed his moveables to her or not as he pleased, and therefore she having contravened the provision of the disposition, she ought justly to lose the benefit thereof, which has been many times decided in the like case,

and particularly is decided 1669, the Lady Hume against her Tenants, No 22. p. 2964., where the LORDS found that knowledge and silence, and no dissent expressed for the space of 25 years was not sufficient, unless positive consent had been obtained and proven; and 17th January 1673, Rae against Glass, No 25. p. 2966., where the LORDS found that there was no necessity for the parties to condescend upon the reasons of their dissents; and the 13th February 1680, the Laird of Buchannan against Elizabeth Buchannan, No 26. p. 2968., where, albeit it was offered to be proven that Buchannan was not *sanae mentis*, and had declared that he would consent to no other marriage with his daughter but George Grant; yet, the LORDS found a bond of provision, bearing, that quality was null, in respect his daughter had married without his consent, albeit the person she matched with, was a suitable match. THE LORDS found it relevant to annul the disposition, the provision in the disposition that she should not marry without consent of the person therein mentioned, to be proven by her oath; and if she acknowledge the same, found the answer relevant, that she required the persons by whose advice she was appointed to marry to give their consent, and that they refused to give a reason why they would not consent to the marriage.

*Fol. Dic. v. I. p. 189. Sir Pat. Home, v. I. No 186.*

1687. June 9.

CAPTAIN JOHN DALZIEL and CHRISTIAN ELIES *against* SCOTSTARBET, &c.

CAPTAIN JOHN DALZIEL and Christian Elies his spouse, having obtained a deliverance last Session to cause Scotstarbet, Livingston and me, to answer summarily to a declarator raised by them against us, to consent to their marriage, and to her disposition of her portion to him by her contract of marriage; or else that the Lords would declare her disposition valid without our consent; notwithstanding that, by her father's disposition, she is restricted to adhibit our consent;—THE LORDS, on a bill, retracted that deliverance, and ordained the process to be given out to see *in communi forma*; though he was a Captain in Holland, and his forelooff expired; because, whatever the Lords might appoint against me, as a member of the session, (and yet this is not *in actu officii*.) yet they could not deny the rest the usual *inducia deliberatoria* of seeing in common form *et via ordinaria*.

No 30.  
Found, that a lady had right to her tocher, although she had not obtained the consent of certain persons named by her father.

July 6. 1688.—The declarator pursued by Captain John Dalziel and Christian Elies, his spouse, against Scotstarbet, &c. mentioned 9th June 1687, being advised; the LORDS find that she has right to the tocher, notwithstanding the friends named by the father have not consented to her contract of marriage; and the LORDS supplied their consent; but found she must provide it in the