

No 10.

gratifications *proxenetis* for interposing and promoting of marriage, which is very lawful. It was *replied*, That it is never lawful to the parent, tutor, curator, or the step-father, who is in place of a parent, and who are obliged to be for the woman, to do any thing for any other deserving gratification, otherwise on this pretence, mothers and their husbands, and tutors and curators, would be encouraged to betray their trust, and for gratifications prefer undeserving persons.

THE LORDS would not sustain this bond alone without an astruction of equivalent expense, but would not put the charger to astruct it by probation, but ordained him to condescend on the expenses, and to adduce such evidence as he could, and ordained the mother's bond to be produced, reserving to the LORDS what the probation should operate, as to the modification of the expenses.

*Fol. Dic. v. 2. p. 20. Stair, v. 2. p. 774.*

1696. July 3.

JOHNSTON *against* MURRAY.

No 11.

Objected to a bond, that it was granted by a husband for obtaining the grantees' consent to his marriage. The bond was sustained.

This bond was signed between the date of the contract and the solemnization of the marriage.

HALCRAIG reported, Johnston of Newton against George Murray of Murriewhat, being a pursuit on a 400 merk bond, granted by the charger's sister, Murriewhat's wife, to him; and the grounds whereon he contended the husband was liable for it, were these, that though it was granted by a wife, *stante matrimonio*, yet it was written by the husband, and he was one of the two subscribing witnesses in it, and had paid annualrent for it. *Answered*, Whatever he did to please his wife, yet it was plain, that a bond granted by a wife *vestita viro*, was *ipso jure* null; and *esto* that the husband's being writer and witness therein, imported both his knowledge and consent, yet that no ways validates the deed in law; for a bond granted by a wife with her husband's consent is no more obligatory either on her or her husband, than without it. It is true, if it be in relation to heritage, she may so bind herself, but not *quoad* sums of money. THE LORDS considered what could be the meaning and import of such a bond, which behoved to be either simplicity or design; and therefore to expiscate, if there was any fraud, they ordained the pursuer to condescend on the onerous cause of the bond, to the effect they might consider, if there were ground to examine the other witnesses, and comuners present; and if it was asserted, That her bond was as good as his own, if he wrote it, &c. then the LORDS inclined to find the husband liable.

There was a second debt, for which he was pursued, viz. a 500 merk bond, taken by him from the husband, at the time of the marriage, which was *alleged* to be for obtaining his consent thereto; which is a dishonest and unlawful gratification, being dated betwixt the signing the contract and solemnization of the marriage; and which has been reprobated by the LORDS by several deci-

sions, as 20th July 1664, Laird of Clerkington against Stuart, *voce* SUCCESSION; and 23d June 1680, Hamilton *contra* Borthwick, No 10, *supra*. Answered, He opposed the bond granted by him when *major sciens et prudens*, and whatever the wife and children might quarrel the same as *contra pacta dotalia et fidem tabularum nuptialium*, yet it was always good against the granter and subscriber; as was found, within these two years, betwixt Hamilton of Hill, and Hamilton of Raplock. THE LORDS sustained the bond against the husband who granted it.

No 11.

*Fol. Dic. v. 2. p. 20. Fountainhall, v. 1. p. 725.*

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S E C T. IV.

Gratuity taken from a Debtor.—Taking gratification to become Cautioner.—Bond granted by a Criminal on condition of the Creditor using his interest to obtain the Granter a pardon.—Bill granted to Magistrates by a Prisoner.—*Respondentia* Bond confirmed by Collateral Securities.

1677. January 2. NISBET *against* The LAIRD of Humbie,

Sir PATRICK NISBET having charged the Laird of Humbie for payment of some bonds, he suspends, and alleges payment, by delivery of certain goods to the charger, especially two coach-horses, and horse-corn; which being referred to his oath, he deponed that he received the horse-corn, but that it was gifted to him; but as to the coach-horses, his oath was not clear, and he was appointed to be examined at the advising of the oath. This question occurred to the LORDS, Whether a creditor might take any gift from his debtor, except it were in remuneration, or for some special favour or beneficence distinct from the debt.

THE LORDS found he could not, or otherwise there could be no guard against usury, if the creditor might take any thing, either for the delay of the principal sum, or of the annualrent; otherwise the law for six of the hundred might be totally elided; for indigent debtors not being able to make present payment, would in like terms gift things upon consideration the creditor may give delay by way of favour, though not by way of contract, and so might get double annual, so long as the debtor was not able to pay; and they did remember that they had lately done the like in the case of a creditor, who had gotten

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A donation from the debtor to the creditor, will be imputed towards payment.