

No 32.

*Answered* for the defender ; Because marriage is favourable, and our law and custom hath taken some liberty in annulling all restrictions thereof, he doth not quarrel the validity of the bond, *quantenus* it can be thought a reasonable provision, but only *quoad excessum*, in so far as the father, out of his anxious desire of a good marriage to his daughter, hath given her tocher far above what his circumstances and the condition of his fortune could bear ; which being a pure donation, is not to be paid but upon precise performance of the conditions thereto adjected, *L. 4. C. de Donat. que sub modo* ; and so it is, that the said Jean Buchanan married the pursuer, without the previous consent of any of the nominees, whereby the irritancy in the bond was incurred.

*Replied* for the pursuer ; Such clauses irritant are unfavourable and held in law *pro non adjectis*, especially where the child, (as in this case) doth match with her equal in quality and fortune ; and Ballindalloch, the only surviving trustee named by the father, hath judicially declared that he hath nothing to object against the match ; *2do*, The clause cannot militate against the pursuer, unless it had been intimated to his wife before her marriage, Laird of Fetterneer *contra* Lord Semple, No 27. p. 2969. Hamilton and Baird of Saughtonhall, her husband, *contra* Hamiltons, No 28. p. 2970. ; *3tio*, The allegiance that the provision exceeds what the granter's estate could then allow, is frivolous ; for it is expressly contrary to the narrative of the bond, bearing, That it had pleased God to bless him with a fortune, and that it was just and reasonable that his children be competently provided with such moderate provisions as his estate is able to bear ; and the father knew best his own condition.

*Duplied* for the defender ; Narratives in such kind of writs, being only stile of course framed by writers, do no prove the design of the granter ; and seeing the most that can be inferred from the narrative is a presumption, that must yield to truth ; Nor could Ballindalloch's approbation *ex post facto* import that he would concur to the deed if it were yet to be done ; but only that, since what is done cannot be retrieved, he would agree and make the best of what cannot be helped.

THE LORDS repelled the defence, and found, that the clause irritant in the bond, is not relevant to infer a restriction of the sum.

*Forbes, p. 418.*

1710. July 20.

No 33.

A man granted bond to a young woman, in consideration of a sum assigned to him, and bound himself to pay

WILLIAM ALISON, Merchant in Dundee, *against* JOHN DUNCAN, Merchant there.

JOHN DUNCAN having granted a bond to Helen Straiton, daughter to Robert Straiton apothecary in Dundee, narrating, That Mr Patrick Yeaman indweller there, her uncle, had assigned to him certain sums, under the express provision and condition of his granting the obligation under-written ; and therefore bind-

ing and obliging him to pay to the said Helen Straiton L. 1000 at the next term after her marriage; she always acquainting him therewith, and taking his consent thereto, if alive at the time; Helen Straiton, with consent of her father, but without acquainting John Duncan, married Robert Christie; who with her, assigned to William Alison, John Duncan's bond. Duncan being charged at the instance of the assignee, suspended upon this reason, That the cedent having failed to acquaint the suspender of her marriage, which is the condition in the bond, the obligation is null.

*Answered* for the charger; Not only is the condition in the bond, as *contra libertatem matrimonii*, to be held *pro non adjecta*; but also it is most odious and *contra bonos mores*; in so far as it tends to make the creditor depend more in the election of a husband upon Mr Duncan, than upon her own father, whom law presumes to have the most tender regard for her welfare and interest; *2do*, There being no quality in Mr Patrick Yeaman's assignation to Mr Duncan, which was the onerous cause of his granting the bond, it was unwarrantable in him to clog his bond with any such quality.

THE LORDS repelled the reason of suspension.

*Fol. Dic. v. I. p. 190. Forbes, p. 425.*

1712. *January 2.*

MACKRATH *against* ALEXANDER.

JOHN MACKRATH of Mackilston having no children but a bastard-daughter, he marries her to Thomas Alexander, his nearest kinsman; and there being a daughter procreate of that marriage, he, designing to settle his estate on that grandchild, disposes his lands to one John Mackrath and Mary Alexander, his said grandchild, and the heirs-male to be procreate of their body; and then adjects this clause, 'who, by these presents, are destined and appointed to marry together.' Mackrath dying in 1703, Thomas Alexander, his son-in-law, and heir of line, enters into possession of the lands; and John Mackrath, the boy to whom it was disposed, raises a pursuit against the said Thomas, for half of the mails and duties of the lands for his aliment in the mean time, and educating and maintaining him at schools. *Alleged*, Your disposition is conditional, being to him and Mary Alexander, and the heirs-male of their body, which necessarily implies their marriage, though there had not been an express clause appointing them to marry, (as there is); and therefore you have neither title nor interest to call for the rents till you perform the condition by marrying, being both arrived at the age allowed by law, you being 15 and she about 16. *Answered*, This is no proper condition, neither suspensive nor resolute; not suspensive, for when the old man died they were about six or seven years old; and it cannot be supposed to be his meaning that I was to have no right to the mails and duties till I actually married, seeing that could not be done for the course of sundry years after, bringing us both to a maturity of age for a married

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her a sum the next term after her marriage, provided he was informed of it, and gave his consent. She married without either, but the bond found due.

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A person disposed his estate to two relations, with this clause, 'who by these presents are destined and appointed to marry each other.' The male disponent pursued for aliment, &c. the person who had an intermediate right to possess the estate. Found entitled to aliment and education, whatever might be done in future if he refused to marry upon requisition.