

MONBODDO. If the lady had not been previously provided, the bond would have been due; but here the case is different. As she was previously provided, the bond was gratuitous, and the father could adject whatever lawful condition he pleased; but I doubt as to the other point, the ratihabition. Here, again, we must consider the terms of the bond, granted as to an unmarried, not a married woman. The father considered the bond as importing no obligation at all: a ratification implies a prior, although imperfect obligation.

GARDENSTON. It would be hard to disappoint the creditors, who may have contracted on the faith of this bond. Any sort of antecedent consent would have been good: it is the same thing that the father approved of the marriage by receiving his daughter and her husband into family with him. This principle is as clear as any in Euclid, *ratihabito æquiparatur mandato*; and it carries conviction along with it.

PRESIDENT. Here there is no occasion to differ on points of law. A father cannot disappoint marriage altogether by adding conditions of consent; but, the lady having been previously provided, the bond must be considered as granted by a stranger. The favour of creditors is out of the question: the condition is not so worded as that it can have any effect. How can I punish the daughter for not observing a condition of which she knew nothing? I read not in the bond a single word importing that the father would not have settled the money on the daughter although he had known of the marriage. If the father meant to recal his assent, why was not the deed recalled out of the hands of Lord Selkirk? We must judge the cause as if there had been no creditor in the field at all: the ratification is very strong: the father might renounce the forfeiting clause: his conduct is equivalent to a consent.

ALVA. I put my opinion on the ratihabition: it would be unfair to disappoint the creditors, who contracted on the faith of the bond.

On the 15th November 1780, "The Lords sustained the defence."

*Act.* Neil Ferguson. *Alt.* Ilay Campbell.

*Reporter,* Hailes.

*Diss.* Auchinleck, Alva, Gardenston, Covington, President.

1780. December 7. Mrs ANN DICKSON against Captain ALEXANDER DICKSON.

FIAR.

A Bond, taken to a Father in Liferent, and to his Son in Fee.

[*Faculty Collection, VIII. 10; Dict. 4269.*]

HAILES. The father meant to settle the L.600 on his son; but he has expressed himself in an ineffectual manner: it is probable that he forgot that his daughter still remained a bairn of the house.

BRAXFIELD. When a father lends out money in this way, with power to uplift, and without obligation to re-employ, the fee in the son is merely nominal. All his purpose here was to save expense of making up titles, but his deed has transgressed his purpose.

PRESIDENT. I wish to find law for the heir, but I cannot. This is an exceeding hard case: the heir gets less than the younger child. But the subject was *in bonis* of the father, and, had he forfeited, it would have gone to the Crown.

On the 7th December 1780, "The Lords found that the L.600 makes part of the divisible fund, in accounting for the pursuer's *legitim*;" altering Lord Elliock's interlocutor.

*Act.* W. Wallace. *Alt.* A. Wight.

1780. December 7. ANDREW GRAY *against* MAGISTRATES of DUMFRIES.

PRISONER.

Liability of Magistrates for not receiving and incarcerating a Debtor duly presented by a Messenger.

[*Fac. Coll. VIII. 12; Dict. 11,754.*]

COVINGTON. I neither like this supposed *local* law, nor the affected pretences for refusing to incarcerate this man.

PRESIDENT. The moment that the debtor was set at liberty there was a *culpa* on the one side and a *jus quæsitum* on the other: the creditor had no farther business to inquire after the debtor.

HAILES. It is said that, although the debtor had been imprisoned, no payment could have been obtained from him, and therefore that the creditor can qualify no damage incurred through the neglect of the magistrates. This is dangerous doctrine. At that rate, whenever any officer of the law fails in apprehending a debtor, there must be a ranking of creditors, for ascertaining whether the creditor suffered damage by the neglect.

On the 7th December 1780, "The Lords found the magistrates liable;" adhering to Lord Braxfield's interlocutor.

*Act.* John M'Laurin. *Alt.* A. Crosbie.