No 37.

Even supposing it possible, that, in such a case, an obligation might be constituted, still, as it must have arisen from error and deception, it would not remain effectual. Had the defender not been deceived, and by the undutiful conduct too of his daughter, he would not have granted the bond; and it were unjust on any occasion, but especially on this, to give effect to a mere consequence of deceit; *l.* 72. § 6. *ff. De cond. et demonst.* Lord Deloraine *contra* Dutchess of Buccleugh, 7th December 1723. *See* FRAUD.

Since, then, either no obligation has existed, or such only as the law will not countenance, it follows, that there is no room for homologation, which can only be applied to a once subsisting legal obligation. Nor in fact could it be inferred from the humanity of a father, which would not suffer his daughter to remain unsheltered in the streets; or from that delicacy which rendered him unwilling to repeat, in a judicial form, a demand for redelivery of the bond, which, in a private manner, he had frequently urged on the Noble depositary, with earnestness and importunity.

The general opinion of the Court was, That the bond had created a valid obligation, which might be homologated; though some of the Judges maintained, that the circumstances of the grantee not corresponding to the views of the granter, the deed was *ab initio* void.

THE LORDS finally found, That, by the failure of its condition, the bond had been rendered ineffectual; and, though capable of homologation, yet, in fact, as it appeared to have been redemanded from the depositary by the granter after his reception of his daughter and her husband into his house, that, notwithstanding this last circumstance, it had not been homologated; and, therefore, 'sustained the defences, and assoilzied the defender.'

Reporter, *Lord Hailes.* Act. *Neil Ferguson, Tait.* Alt. *Ilay Campbell, Cullen.* Clerk, *Orme.*

S. *Fol. Dic. v.* 3. *p.* 159. *Fac. Col. No* 6. *p.* 12.

1792. *February* 7.

LYDIA DOUGLAS, and her HUSBAND, *against* The TRUSTEES of SIR CHARLES DOUGLAS.

No 38.
A father who had granted a provision to his daughter, having in an after deed inserted the condition, that if she married a certain person the provision should be void;

BY a deed of settlement, Sir Charles Douglas conveyed to certain Trustees, for behoof of his younger children equally, of whom Lydia was one, considerable sums of money, and other property.

He afterwards executed a codicil, containing the following condition: 'That 'if my daughter Lydia hath already married Richard Bingham, son of the Re- 'verend *John* (put by mistake for *Isaac*) Moody Bingham, or any other son of 'his, in such case or event, she shall not at any time derive any benefit or advantage from my said settlement.'

No 38. effect was given the condition. But this was reversed on appeal.

Before Sir Charles' death, when this codicil came to the knowledge of his daughter, she was already married to Mr Bingham. She, however, had not been ignorant of her father's disapprobation of the match; which, notwithstanding, was universally allowed to be a suitable one.

Of the last mentioned deed she and her husband instituted a reduction, in order to set aside the irritant condition, and restore her to the benefit of the former settlement. In support of this action it was

Pleaded; The condition in this case inferred a total forfeiture of the only provision given; and yet it must be admitted that the match was not unsuitable. The benignity and the justice of our law will ever reject such conditions, as being not only *contra libertatem matrimonii*, but also *contra pietatem parentis*.

Thus Lord Stair says; Such conditions are 'void, as against the freedom of 'marriage, which the natural affection of parents obliges them not to violate;' b. 1. tit. 3. § 7. And Lord Bankton; Clauses to that effect 'are rejected by 'our law, and the provision subsists notwithstanding the children marry with-'out such consent, especially if they marry suitably;' b. 1. tit. 5. § 29. In like manner Mr Erskine, b. 3. tit. 3. § 85. And to the same effect are a variety of decisions in Dictionary, *h. t.* though in some cases, when children had been previously provided, such conditions annexed to additional provisions were sustained. Also 9th February 1774, Graham *contra* Bain, No 36. p. 2979.

Besides, it is to be remarked, that the marriage had taken place before the condition was made known to the parties, and it ought not to be permitted to operate as a snare.

If indeed the father had not bestowed any provision at all on his daughter, no remedy perhaps would have been found; but when he has himself confessed the extent of his natural obligation to provide, this ought not to be frustrated by a capricious or unnatural condition, which therefore must be held *pro non scripto*.

Answered: If the condition annexed by a father to the provision of his child be, that she shall marry a particular person, or not marry at all, it is invalid, as beyond the limits of parental authority; and it is to such cases as these, that the opinions and decisions quoted on the other side are applicable.

But a negative upon a daughter's choice is a power that belongs to a father, which, though it may sometimes be capriciously exercised, it would be pernicious to abolish. Such was the power assumed by the father in the present instance, in which there appears nothing *contra bonos mores*, or really *contra libertatem matrimonii*.

The Lord Ordinary reported the cause. The Court were unanimously of opinion, that the condition ought not to be effectual, as being *contra libertatem matrimonii*; for that the children having a natural right, and the father having

defined what he considered as a reasonable provision, this was not to be defeated by the adjecting of an unreasonable condition. No 38.

It was also considered as a circumstance of importance, that the codicil was not communicated to the daughter before the marriage. But little stress was laid upon the *misnomer* above mentioned, though founded on by the pursuers.

THE LORDS reduced the codicil.

Reporter, *Lord Dreghorn.* Act. *M. Ross.* Alt. *Abercromby.* Clerk, *Home.*

S. *Fol. Dic. v.* 3. *p.* 160. *Fac. Col. No* 205. *p.* 431.

*** This cause was appealed, and the HOUSE OF LORDS reversed the judgment of the Court of Session.

SECT. III.

Condition, whether to be understood Copulative or Disjunctive.

1677. *January* 11. BAILLIE *against* SOMMERVILL.

No 39.

THERE being a provision in a contract of marriage in these terms, that 5000 merks of the tocher should return to the father-in-law, in case his daughter should decease before her husband, within the space of six years after the marriage, there being no children betwixt them then on life; and in case the father-in-law should have heirs male within the space of six years after the marriage;

THE LORDS found the said provision copulative; and that the tocher should not return, albeit the father-in-law had heirs male within the foresaid time; seeing the other member of the said condition did not exist; in respect, albeit his daughter deceased within the said time, yet she had a child of the marriage that survived.

Reporter, *Gosford.* Clerk, *Hay.*

Fol. Dic. v. 1. *p.* 191. *Dirleton, No* 423. *p.* 210.

1712. *July* 17.

DAME RACHEL NICOLSON, Lady Preston, *against* DR GEORGE OSWALD of Preston.

No 40.
A Lady renounced her jointure, with

SIR THOMAS HAMILTON of Preston having infeft Dame Rachel Burnet, his Lady, in an yearly annuity of 1200 merks out of his barony of Preston; in a