

No 25. *poning ward lands*; his subscribing witness could not import such a consent, as did ratify the deed, and take away recognition.

THE LORDS found that the pursuer subscribing as witness to the contract of marriage, or being present at the communing, or marriage, did not import that consent that is required in the condition of his bond, unless it had been specially treated concerning his bond, he being present and knowing the same; and that his presence at the marriage, or living with the married persons thereafter, did not import that consent: but they did not find that the bond was a donation *mortis causa*, and so revocable.

Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 151.

1680. February 13. BUCHANNAN against The Laird of BUCHANNAN.

No 26.
A daughter being competently provided, her father gave her an additional provision which was to become void, if she married without his consent. The Lords found the irritancy incurred, she having married without his consent, tho' it was a suitable match.

THE Laird of Buchanan in his contract of marriage, provides his estate to the heirs-male of the marriage, and to the daughter of the marriage, in case there should be but one, 10,000 pounds; but thereafter he gave her a bond of 20,000 merks, and she gives a bond that she should not marry without her father's consent, and if she did in the contrary, that she should lose any addition made to her portion-natural. Buchanan having no heirs-male, disposes his estate to Major Grant, he assuming his name, and providing that he marry the said Elizabeth his daughter, and in case of her refusal, he burdens the estate only with the provision in her mother's contract, and declares the same to be free of the 5000 merks he had added to her by his bond. Major Grant came to the said Elizabeth with a notary, and offered to marry her, and desired that she should consent, which she refusing, he took instruments thereon. The said Elizabeth hath now married Stuart of Ardvorlich, and with his concurrence pursues adjudication upon her father's bond. The defender *alleged* absolvitor from the 5000 merks of addition, because the pursuer had not married with her father's consent, but contrary to his express will; so that the addition being a gratuitous donation, it is not only revokable for her ingratitude in marrying without her father's consent, but by express provision, both by the bond itself, and by the back-bond. The pursuer *answered, imo*, That such clauses are contrary to the freedom of marriage, and therefore are holden *pro non adjectis. 2do*, She ought not to have desired her father's consent to this marriage, knowing that he was pre-determined to assent to no marriage but to George Grant's; and it would be no ingratitude to refuse to marry George Grant, being a man so far above her age, and who shewed no affection for her, but rather to be rid of this addition, by an uncivil putting her to an acceptance of the marriage on the first proposition; neither was her father in a capacity to assent to this marriage, in respect of his disposition to Grant. *3tio*, Such clauses do import no more but to guard against unsuitable marriages, and this marriage is most suitable, for if she had desired her father's consent, and he had been at freedom to give it, it

would not have annulled her portion, unless he gave a reasonable cause of his refusal. The defender *replied*, That clauses adjected, in case parties marry not, are holden as not adjected, being impeditive of marriage, which should be free; but free donations granted on condition, 'That the party marry such a man, or marry not, without the donor's consent,' are no ways rejected; much less in the case of a father and daughter. *2do*, The daughter should have craved her father's consent, both by her natural obligation, and her back-bond, nor was he bound up by his disposition to Grant; for, if she had proposed a reasonable cause why she should not marry Grant, if it had been no more but that she could not find affection for him, it might have excused her, if she was ready to depon that it was true; but she is inexcusable never to have demanded her father's consent; neither was he bound up, but if he had been convinced of the reasonableness of her refusal, in not marrying Grant, and marrying Ardvorlich, he might have consented, and so purified the condition in her bond, which being before Grant's disposition, could never be prejudged by any clause in it.

THE LORDS found the liberty of the marriage did not exclude the provision in the back-bond, and found that the father might have assented to her marriage with Ardvorlich, and so made the bond effectual, albeit after the bond he had insert an irritancy in Grant's disposition, and therefore adjudged only for the 10,000 pounds.

Fol. Dic. v. 1. p. 189. Stair, v. 2. p. 756.

1680. December 3. The Laird of FETTERNEER *against* The Lord SEMPLE.

THE deceased Lord Semple granted a bond of provision to his daughters, specifying their particular portions, and bearing this clause, 'That they should proceed in all their affairs by advice of his friends therein mentioned, and in case they did transgress, or did not carry themselves virtuously, the bond as to these should be null, at least his friends, or the major part of them on life, should have power to restrict, and to apply the restriction to such other of the daughters as they thought fit.' The portion of his eldest daughter Mistress Anna, is 10,000 merks by a former bond of provision, 'having only power to himself to alter,' and she having married the Laird of Fetterneer, he pursues for her portion. The defender *alleged*, That she married without his friends consent, and that therefore they had restricted her portion to 6000 merks, suitable to the quality and fortune of this husband, and bearing this consideration, 'That his fortune was but small, and lying far from her friends in Aberdeenshire.' The pursuer *answered*, That all clauses against the freedom of marriage are null. *2do*, That Mistress Anna could not be said to transgress, unless the second bond had been intimate to her, or known by her. *3tio*, Though it had, and though she had required their consent, and they had refused it;

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The condition in a bond of provision to daughters, that they should proceed in all their affairs by advice of certain friends, found to be valid and effectual.