1774. *February* 9.

JEAN GRAHAME and her HUSBAND, *against* BAIN and GOVAN, two of the Trustees of SAMUEL STEVENSON, deceased.

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There was a clause in a settlement by a grandfather, importing that, in the event of his grandchildren marrying, without first having consulted his trustees, and obtained the consent of the majority of them, regularly entered in the sederunt-book appointed to be kept by them, and duly signed, the grandchildren so marrying should forfeit their provision under that settlement. It was found, that as two of the trustees had verbally consented, and no dissent by the other two had been minuted, the omission of a signed consent in the sederunt-book did not occasion a forfeiture.

SAMUEL STEVENSON merchant in Edinburgh, devised his whole subjects, heritable and moveable, in favour of Janet Irvine his wife, Alexander Kincaid, James Bain, and William Govan, in trust, for the ends and purposes therein mentioned, or such of them as should accept, and survivor or survivors of the acceptors, and such other persons as might be assumed trustees, as therein directed, it being his intention, as declared by his settlement, that the accepting trustees may be as seldom as possible under the number of four.

By this deed, after directing the trustees to pay his debts, an annuity to his relict, another annuity to his son, and to apply a certain yearly sum for the behoof of his two grand-children by his son, and for the use of each of his three grand-children by his daughter, of whom Jean Grahame is one, till they should respectively attain the age of twenty-five; and, at a certain period, to pay the sum of L. 200 to each of his grand-children by his son; *lastly*, He ordained that so much of the stock should belong to each of the grand-children, as, with the respective sums formerly advanced to them, should make them all equal, and that sum to be paid to them at their attaining the age of twenty-five years. He further ordered, that the two sums set apart for answering the annuities, should belong to the five grand-children equally; and, failing any of them by death, the share or shares of those deceasing, so far as remaining unpaid, are provided to the survivors equally; and the trustees are appointed tutors and curators to the grand-children during their minority.

The clause which gave occasion to the present question, runs in these words: 'And it is hereby specially conditioned, provided, declared, and ordained, that, 'in the event of any one of my said children marrying, without first having 'advised with my trustees, and having previously obtained the consent of the 'majority of them, regularly entered in the sederunt book after mentioned, 'and duly signed, then, and in that case, the grand-children so marrying shall 'forfeit all future claim to any part of the subjects hereby conveyed, excepting 'only the interest annually of such part of the provision above mentioned, pro-'vided to such grand-children so married, as may at the date of the marriage 'remain unpaid;' which annuity is thereby ordained to be paid by the trustees accordingly, as an aliment to his said grand-children, not affectable, &c.; and, at said grand-child's death, the sum so liferented shall pertain to his or her children, and be administered by his said trustees, and divided in such manner as they shall think proper; and, failing children, to pertain to his other grand-children equally.—Then follows a *proviso*, that it shall not be in the power of the trustees to pay any sum to any grand-child so married without their consent, except the foresaid annuity. But, on the other hand, that it shall be in the power

No 36. of the trustees, upon the marriage of any one of the grand-children with the trustees' consent, at the first term after such marriage, to make a calculation, and strike a division, and to pay up the whole of the said grand-child's provision, though such child shall not have attained the age of twenty-five years.

An action was brought, at the instance of Jean Grahame, one of Samuel Stevenson's grand-children, by his daughter, and Thomas Hay surgeon in Edinburgh, her husband, for his interest, narrating Mr Stevenson's deed of settlement: That, in terms of said deed, the pursuer, Jean Grahame's share of her grand-father's means and estate, became due and payable at the term of Whitsunday last, being the first after her marriage, and concluding for the payment of the sum of L. 1600, as their just share and proportion of her grand-father's subjects, besides her share and proportion of the subject to be set aside for answering the two annuities provided by the will, when these annuities should cease.

The Trustees appeared to this action by their counsel, who endeavoured to enforce the validity of the clause requiring a consent of the trustees, previous to the solemnization of any of the grand-children's marriage; but the Lord Ordinary pronounced the following interlocutor: 'In respect it is not denied by the trustees, that two of their number, viz. Mrs Stevenson and Mr Kincaid, previous to the marriage between the pursuers, approved of, and gave their consent thereto; and, as no dissent or disapprobation is yet entered against the marriage by the other two trustees, Mr Bain and Mr Govan, finds, that the omission to enter the approbation and consent in the foresaid sederunt book, and to sign the same previous to the marriage, cannot have the effect to forfeit the claim now made by the pursuers in this action; therefore, decerns conform to the conclusions of the libel.'

Hitherto the whole of the trustees had concurred in the defence of the present action; but Mrs Stevenson and Mr Kincaid now declared, that they acquiesced in the Lord Ordinary's judgment; and declarations from them of their consenting to, and approving of the marriage, were produced in process. A reclaiming bill, however, was presented by the two other trustees, Bain and Govan, grounded upon the duty they owed to their deceased friend, and to their other pupils, and urging several topics for an alteration of the Ordinary's interlocutor.

1*st*, It was *contended*, That, with regard to no dissent or disapprobation of the marriage having been entered by themselves, it can be of no sort of consequence in the present case: That the marriage was concealed from them as long as either an assent or a dissent could have availed any thing; that is to say, till after the solemnization of the marriage. After that time, a dissent would have availed nothing; nor can the defenders see in what shape they were called upon to assent or dissent from the marriage, which had been concealed from them till it was consummated.

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2*dly*, That the clause in question is a most legal, as well as a very rational stipulation, and lays no restraint upon marriage, which the law of this, or any other country, can judge improper.

3*dly*, That Mr Stevenson was under no obligation, moral or legal, to devise a succession to his grand-children. If he had been satisfied with the conduct of his son, he was his natural heir, and entitled by law to take up the succession; but he had already advanced to him very considerable sums of money, and had taken his discharge in full of all that he could ask or demand. He had also given his daughter, the mother of this pursuer, a sufficient portion. Mr Stevenson was, therefore, the full and unlimited proprietor of his whole estate, and could dispose of it as he pleased; and, if a man should even make a whimsical settlement of his fortune, of which some late instances have occurred, the law would give full force to such deeds.

But the rule is still stronger, when a person thinks proper to settle his estate upon those who are otherwise strangers to his succession. These must take the provision in their favours *tantum et tale*, as it stands devised to them. If they do not chuse it along with the conditions which attend it, they may repudiate it, but can complain of no wrong being done to them. If, indeed, unreasonable conditions are annexed to bonds of provision, granted by a man to his own children, who have a natural and just claim to a share of his effects, a court of equity may interpose to relax some of these unreasonable fetters; but no instance can be pointed out where such a stretch has been made in favour of strangers. Several decisions where this distinction has been adopted by the Court, at different periods of our law, are cited in the Dictionary, *h. t.* And so it is also laid down by Lord Bankton, vol. 1. p. 114.

Nor is the plea of the defenders affected by the pursuers quotation from Mr Erskine, b. 3. tit. 3. § 85. where it is said, 'When the granter lay under no 'natural obligation to provide the grantee, such conditions were by our old 'custom strictly adhered to; Rae, No 25. p. 2966. But the irritancy has 'been, since that time, so softened, that, if the consent be refused unreasonably, the grantee may marry without consent, and be nevertheless entitled to 'the provision; Foord, No 29. p. 2970.' If a consent had been asked from the defenders, previous to the marriage, and they unreasonably refused it, this would, no doubt, have been restraining the natural liberty of marriage, and consequently have been deemed illegal: But the case is here widely different; no such consent was ever asked from either of the defenders; in which case, neither Mr Erskine, nor any other lawyer, or decision, has said the grantee is entitled to the provision left to them by a stranger; and the case of Foord, quoted by Erskine, when looked into, affords an additional decision in support of the defanders plea.

The pursuers plea, that the condition ought to be ineffectual, as not being notified to the legatees, proceeds upon a mistake. And the only remaining point to be considered, is the influence which the alleged consent, obtained

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from Mrs Stevenson and Mr Kincaid, ought to have upon the present question.

In the *first* place, the period at which these consents were alleged to be obtained, is not fixed; and the defenders do deny, that it consists with their knowledge, that any such consent was either asked or obtained.

But farther, in point of law, the consent, as alleged to have been obtained from Mrs Stevenson and Mr Kincaid, was not a consent of that nature which could purify the condition, upon performance of which alone the money was to be paid. Mr Stevenson does, in express terms, require the consent of the majority of the trustees, and that consent to be entered in the sederunt book, and signed by them. This was requiring a proposal of that nature to be regularly laid before the trustees, assembled in a body, when they should have an opportunity of communicating their sentiments to one another, deliberately weighing the circumstances of the case, and then returning such an answer as should seem proper to the majority of them.

It was said, and, indeed, the Lord Ordinary's interlocutor finds, That the omission to enter the approbation and consent, and to sign the same previous to the marriage, cannot have the effect to forfeit the pursuers claim. But the answer to this is perfectly obvious; such a consent as is alleged to have been obtained, could never have entered that book. The sederunt book, as its very name imports, can contain nothing except what is done at a full meeting of the trustees; or, at least, when a quorum of them is assembled. It is impossible to suppose that every rash word, dropped in conversation by any one of them, relative to the trust affairs, is to find its way into that book. Nothing can be entered in it, except their well advised and deliberate acts, when assembled together for the purpose of transacting business.

The Court 'refused the petition, without answers.'

For Pet. *Ch. Hay.*

Fol. Dic. v. 3. p. 158. *Fac. Col. No* 106. *p.* 282.

1781. *November* 27. Thomas Hay *against* William Wood.

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A father granted a bond of provision to his daughter, supposing her unmarried, to be null if she married without his consent. She had been previously married, at which her father expressed dissatisfaction, though he re-

By a postnuptial contract between William Wood and Lady Catharine Cochrane, a considerable sum of money, payable at the death of the former, was settled on the issue of their marriage. Lady Catharine died in October 1776, leaving an only child, Anne Wood; to whom Mr Wood, her father, then granted a bond of provision; by which, 'for the love and affection he bore to her, his 'only daughter, he obliged himself to pay to her, her heirs, &c. the sum of 'L. 1000 at the first term of Whitsunday or Martinmas 'next after her mar-"riage, whenever the same might happen,' with interest from the term of pay-'ment; 'providing always, That in case the said Anne Wood should marry "without his consent, that the said bond should be as void as if the same had "never been granted;' and declaring also, That the said sum should be imput-