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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.

No 37.

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-

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ceived her into his family. The bond found not exigible.

'ed in part of what she might be entitled to in virtue of the contract of mar-
'riage betwixt her mother and him.'——This bond, when executed, was deposited in the hands of the Earl of Selkirk, a relation of Lady Catharine's.

Several months before the date of the bond, Anne Wood had been privately married to John Henderson, of the island of Jamaica, a student of physic in the University of Edinburgh; which being without the knowledge of her father, he, for some months afterwards, remained totally ignorant of that event. Upon discovering it, he was much dissatisfied; but soon consented to receive the young couple into his family, where they continued to live for upwards of two years; yet, in the meantime, it appeared, he made, though not judicially, frequent demands on the Earl of Selkirk, for re-delivery of the bond. At length Mr Henderson and his wife granted an assignation of that right to Mr Hay, as trustee for his creditors; who, in an action against Mr Wood, insisted for payment. And, in support of this action,

The pursuer *pleaded;* The condition in the bond, relative to the marriage of Anne Wood, without the consent of her father, affords no defence against payment. Restraints upon the freedom of choice in marriage are viewed by the law with an unfavourable eye. Hence, conditions importing such limitations, when they occur in bonds of provision by parents to children, do not receive its support. In such provisions, indeed, as are altogether gratuitous, or proceed from strangers, not bound by any antecedent obligation to grant them, those conditions are not ineffectual; nor are they without effect, even if additional provisions are bestowed by a father on children who are already competently provided for, and who have begun to enjoy their portions. But the present case relates to a provision given by a father, and which is not additional; as it is to be imputed in extinction of the former. For though, by substituting the period of the grantee's marriage, instead of that of the death of the granter, the term of payment might be anticipated; yet such anticipation is in no proper sense gratuitous. Parents are bound by a natural obligation, to afford a suitable provision to their children when settling in business: or, if they are females, when entering into marriage. The latter obligation was strongly enforced by the Roman law, which compelled fathers "*dotare filias;*" *l.* 19. *ff. De rit. nup.; l. ult. C. De dot. prom.* The condition, therefore, ought not to be effectual. At any rate, it can only be justly interrupted consistently with a rational object, that of securing a proper match for the young Lady; not as an ultimate condition, but as a means to that end; Prin. of Eq. b. 1. p. 1. c. 4. art. 3. And, in fact, as her marriage was suitable, so the end has been attained.

But farther: The condition was truly impossible, the marriage being antecedent, Now, not only in deeds *mortis causa*, but in bonds of provision by parents to children, impossible as well as unlawful conditions are, by our lawyers, held *pro non adjectis;* Lord Bankton, vol. 1. p. 96.; Ersk. b. 3. t. 3. § 85. And, in the civil law, the very case in question is decided; *l.* 45. § 2. *ff. De legatis; l.* 10.

No 37. § 1.; *l.* 11. *pr. ff. De cond. et demonst.*; Voet, § 28. *ad tit. ff. De cond. instit.* Nor can this condition be so extended by interpretation, as to include a prior marriage as if it had been posterior: for it is not a suspensive one, but evidently resolutive; and as it imports a penal irritancy, it ought to be strictly interpreted.

In the last place: It is to be observed, that the defender, by receiving into, and entertaining in his family, for more than two years, his daughter and her husband; by manifesting a perfect reconciliation; and by having made no formal or judicial demand of the bond itself from the Earl of Selkirk, with whom it was deposited, has, *rebus ipsis et factis*, consented to the marriage; so that by his ratihabition the condition has actually been implemented. And were his conduct not to have that effect, the hardship which would result from it to the creditors, who now are requiring payment of debts arising from loans or furnishings into which they were thereby betrayed, is apparent.

Answered for the defender: In every gratuitous obligation *inter vivos*, conditions and qualities are to be strictly observed; 17th January 1673, Rae against Glass, No 25. p. 2966.; 13th February 1680, Buchanan against Buchanan, No 26. p. 2968.; M'Kenzie *contra* the Creditors of Kinminnity, No 35. p. 2977. The bond of provision in question was a gratuitous deed: for though by a constitution of the Emperors Severus and Antoninus, founded on circumstances then peculiar to the Roman empire, fathers were obliged *dotare filias*; yet in our law no such obligation exists; Robertson *contra* her Father's Heirs, *voce* PARENT and CHILD. Without implement then of its condition, there could not arise any claim from that deed; Stair, b. 1. tit. 3. § 7.; Voet, tit. *De cond. instit.* § 16. If, therefore, the condition were impossible, as the pursuer contends, the bond must fall to the ground; since conditions in deeds *inter vivos* are disregarded only when the granter had lain under a previous natural tie to execute those deeds; Stair, *loc. cit.*; Erskine, b. 3. tit. 3. § 85.; Bankton, b. 1. tit. 5. § 29. Nay, though the bond had not been gratuitous, but had constituted the grantee's sole provision, its condition would not, as having a tendency *contra libertatem matrimonii*, be totally disregarded. It would only be restricted to a rational effect.

But it would seem that there did not really exist, in this case, any obligation to be the subject of a condition. The bond was granted to a certain person, in certain circumstances, when there were not in existence any such person and circumstances. It was granted to Anne Wood, as an unmarried daughter, with a specific reference to that state; nor was it payable but at a term posterior to her marriage, considered as a future event: yet, before the date of that deed, she was the wife of Mr Henderson. In these circumstances, no right from it could accrue to her. Its object had thus no more relation to her in that situation than to any stranger. The consent necessary to constitute an obligation, was as much wanting in the one case as it would have been in the other.

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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.'