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terms of her father's tailzie ; so that failing of heirs of her body, and her sister Elizabeth, it goes to the other substitutes ; so that her husband could not break nor alter it. He reclaimed against this, that he might have the power of disposal upon it.

*Fol. Dic. v. I. p. 190. Fountainball, v. I. p. 454. 510.*

No 31.

Found, that a brother not giving consent to his sister's marriage, which consent, by her father's appointment, she was bound to obtain, under an irritancy of losing part of her portion, did not infer the irritancy, unless he gave a reason for his dissent.

1688. July 20. PRINGLE and RUTHERFORD *against* PRINGLE.

ELIZABETH PRINGLE, and Rutherford her husband, pursuing Pringle of Symington, her brother, for her portion, he repeated a reduction upon these grounds ; *1mo*, That some of the bonds assigned to her were heritable, and the assignation by her father was *in lecto*, at which time he could not prejudice his heir ; *2do*, That she was obliged to marry with his consent, else 2000 merks was to return to him.—*Answered* to the *first*, He was her tutor, and granted discharges of the annuals of these sums *tutorio nomine*, and so had homologated, and could not now quarrel it ; *2do*, He had accepted a disposition from his father, narrating this portion ; *3tio*, As to her marriage, the quality was not known nor intimated to her.—*Replied*, His acting as tutor did not preclude him, as is clear from § 4. *Institut. de inofficios. testament.*—THE LORDS repelled the reason founded upon death-bed, the charger proving that the suspender had accepted a disposition, which narrates the cause and occasion of the same to be the bonds assigned ; and find, that the suspender not giving his consent to the charger, his sister's marriage, does not infer the irritancy contained in the assignation, of applying 2000 merks of the said bonds to the suspender ; unless the suspender could give a reason of dissent ; for they would not allow him, upon the prospect of his own benefit, to deny his consent to every proposition of marriage made to his sister, because he hoped 2000 merks would fall in to him.

*Fol. Dic. v. I. p. 190. Fountainball, v. I. p. 512.*

No 32.

A lady and her husband pursued for her tocher, contained in a bond of provision having this condition, that she should marry with consent of certain friends, otherwise the bond to be null. The marriage

1710. July 7. WILLIAM BUNTIN *against* ARCHIBALD BUCHANAN.

WILLIAM BUNTIN, son to the Laird of Airdoch, having married Jean Buchanan, daughter to Drummakill, he pursues Archibald Buchanan of Drummakill, her brother, for payment of 5000 merks contained in a bond of provision given to her by her father.—*Alleged*, She has forfeited her right, because the bond contains an express quality, that his daughter shall marry with the special advice and consent of George Lindsay of Blackshome, and John Cuninghame of Ballynalloch, otherwise her bond to be void and null ; but so it is, she never required their consent ; but, on the contrary, they dissented ; and this tocher being a donation, it may be given with what qualities and conditions the donor pleases ; and if not obeyed, the quality ceases, *tot. tit. C. de donat. sub modo et*

*condit.*—*Answered*, That marriage is favourable, especially when with their equal without disparagement, (as this was) and any restrictions and limitations whereupon are commonly rejected as *contra libertatem matrimonii*, and Ballindalloch, (who was only on life of the two nominate,) has since the marriage declared his acquiescence, and that he has nothing to object against it; so that his ratihabition *comparatur mandato*; and such provisions are not pure donations, but are the effects of a pre-existent obligation from the laws and ties of nature; and whatever creditors may say against them, yet they are always good against the granter's heir; and such clauses have been oft repudiate, as *inutiliter adjecta*, and was so found, 3d Dec. 1680, Fetterneer *contra* L. Semple, No 27. p. 2969.; and in 1681, Hamilton of Monktonhall *contra* Baird of Saughtonhall, No 28. p. 2970. where the clause was not intimated to the daughter, nor shown to the daughter, nor shown to her before her marriage, the bond never being in her custody, but in the hands of a friend. Provisions to children are *juris naturalis*, and not to be forfeited upon latent clauses, but only where there is evident contempt and contravention, but here *ignorantia invincibilis* plainly excuses her.—*Replied*, The Lords have not extended these irritant clauses about marriages without consent, to annul the provision *in toto*, but only to restrict them to a moderate and reasonable tocher, corresponding to what would befall them as their legitim and portion natural, and Drummakill pleads it no farther, but that the Lords may consider the condition of the fortune, and the debts affecting the same, and they will find this a most exorbitant provision; and all that is craved is, that it may be reduced *quoad excessum*, and brought to a just equality. And as to her ignorance, it is offered to be proven she knew the terms of her father's bond; and Ballindalloch's consent *ex post facto* is of no import; for he who justly refused his consent before the marriage, when the thing is done without his concurrence, what is the remedy but to make the best of an ill bargain they can?—THE LORDS repelled the defence, and found Drummakill liable in the whole tocher, and refused to modify it: If she had married to a *turpis persona*, or with great disparity, the Lords would have taken it to consideration.

*Fol. Dic. v. 1. p. 190. Fountainhall, v. 2. p. 584.*

\* \* \* Forbes reports the same case :

WILLIAM BUCHANAN of Drummakill having, by his bond, provided 5000 merks to his only daughter Jean, she marrying by advice and consent of George Lindsay of Braxholm, and John Cuninghame of Ballindalloch, or any of them that should be alive at the time, and that the bond should be null in case she married without such consent; William Buntin, husband to Jean Buchanan, as assignee by his contract of marriage, pursued Archibald Buchanan, as representing William his father, for payment of the provision.

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was without disparagement, yet the nominees dissented. The defender pleaded for a restriction of the tocher to a sum equal to the lady's legitim; but the whole tocher was decerned for.

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*Answered* for the defender ; Because marriage is favourable, and our law and custom hath taken some liberty in annulling all restrictions thereof, he doth not quarrel the validity of the bond, *quantenus* it can be thought a reasonable provision, but only *quoad excessum*, in so far as the father, out of his anxious desire of a good marriage to his daughter, hath given her tocher far above what his circumstances and the condition of his fortune could bear ; which being a pure donation, is not to be paid but upon precise performance of the conditions thereto adjected, *L. 4. C. de Donat. que sub modo* ; and so it is, that the said Jean Buchanan married the pursuer, without the previous consent of any of the nominees, whereby the irritancy in the bond was incurred.

*Replied* for the pursuer ; Such clauses irritant are unfavourable and held in law *pro non adjectis*, especially where the child, (as in this case) doth match with her equal in quality and fortune ; and Ballindalloch, the only surviving trustee named by the father, hath judicially declared that he hath nothing to object against the match ; *2do*, The clause cannot militate against the pursuer, unless it had been intimated to his wife before her marriage, Laird of Fetterneer *contra* Lord Semple, No 27. p. 2969. Hamilton and Baird of Saughtonhall, her husband, *contra* Hamiltons, No 28. p. 2970. ; *3tio*, The allegiance that the provision exceeds what the granter's estate could then allow, is frivolous ; for it is expressly contrary to the narrative of the bond, bearing, That it had pleased God to bless him with a fortune, and that it was just and reasonable that his children be competently provided with such moderate provisions as his estate is able to bear ; and the father knew best his own condition.

*Duplied* for the defender ; Narratives in such kind of writs, being only stile of course framed by writers, do no prove the design of the granter ; and seeing the most that can be inferred from the narrative is a presumption, that must yield to truth ; Nor could Ballindalloch's approbation *ex post facto* import that he would concur to the deed if it were yet to be done ; but only that, since what is done cannot be retrieved, he would agree and make the best of what cannot be helped.

THE LORDS repelled the defence, and found, that the clause irritant in the bond, is not relevant to infer a restriction of the sum.

*Forbes, p. 418.*

1710. July 20.

No 33.

A man granted bond to a young woman, in consideration of a sum assigned to him, and bound himself to pay

WILLIAM ALISON, Merchant in Dundee, *against* JOHN DUNCAN, Merchant there.

JOHN DUNCAN having granted a bond to Helen Straiton, daughter to Robert Straiton apothecary in Dundee, narrating, That Mr Patrick Yeaman indweller there, her uncle, had assigned to him certain sums, under the express provision and condition of his granting the obligation under-written ; and therefore bind-