

ing and obliging him to pay to the said Helen Straiton L. 1000 at the next term after her marriage; she always acquainting him therewith, and taking his consent thereto, if alive at the time; Helen Straiton, with consent of her father, but without acquainting John Duncan, married Robert Christie; who with her, assigned to William Alison, John Duncan's bond. Duncan being charged at the instance of the assignee, suspended upon this reason, That the cedent having failed to acquaint the suspender of her marriage, which is the condition in the bond, the obligation is null.

Answered for the charger; Not only is the condition in the bond, as *contra libertatem matrimonii*, to be held *pro non adjecta*; but also it is most odious and *contra bonos mores*; in so far as it tends to make the creditor depend more in the election of a husband upon Mr Duncan, than upon her own father, whom law presumes to have the most tender regard for her welfare and interest; *2do*, There being no quality in Mr Patrick Yeaman's assignation to Mr Duncan, which was the onerous cause of his granting the bond, it was unwarrantable in him to clog his bond with any such quality.

THE LORDS repelled the reason of suspension.

Fol. Dic. v. 1. p. 190. Forbes, p. 425.

1712. *January 2.*

MACKRATH *against* ALEXANDER.

JOHN MACKRATH of Mackilston having no children but a bastard-daughter, he marries her to Thomas Alexander, his nearest kinsman; and there being a daughter procreate of that marriage, he, designing to settle his estate on that grandchild, disposes his lands to one John Mackrath and Mary Alexander, his said grandchild, and the heirs-male to be procreate of their body; and then adjects this clause, 'who, by these presents, are destined and appointed to marry together.' Mackrath dying in 1703, Thomas Alexander, his son-in-law, and heir of line, enters into possession of the lands; and John Mackrath, the boy to whom it was disposed, raises a pursuit against the said Thomas, for half of the mails and duties of the lands for his aliment in the mean time, and educating and maintaining him at schools. *Alleged*, Your disposition is conditional, being to him and Mary Alexander, and the heirs-male of their body, which necessarily implies their marriage, though there had not been an express clause appointing them to marry, (as there is); and therefore you have neither title nor interest to call for the rents till you perform the condition by marrying, being both arrived at the age allowed by law, you being 15 and she about 16. *Answered*, This is no proper condition, neither suspensive nor resolute; not suspensive, for when the old man died they were about six or seven years old; and it cannot be supposed to be his meaning that I was to have no right to the mails and duties till I actually married, seeing that could not be done for the course of sundry years after, bringing us both to a maturity of age for a married

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her a sum the next term after her marriage, provided he was informed of it, and gave his consent. She married without either, but the bond found due.

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A person disposed his estate to two relations, with this clause, 'who by these presents are destined and appointed to marry each other.' The male disponent pursued for aliment, &c. the person who had an intermediate right to possess the estate. Found entitled to aliment and education, whatever might be done in future if he refused to marry upon requisition.

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state ; and, therefore, *medio tempore*, I was to be alimeted out of the lands. Neither is it a resolute irritant condition, for there is no period set for performing the marriage, nor any clause adjected, declaring the disposition void and null, in case of not performance ; and the truth is, that though she be of a full growth, yet the boy is of a weak tender sickly constitution, scarce the bigness of one of twelve years, and very unfit as yet for marriage ; and, though he does not decline it, yet he is persuaded the old man, if alive, would not be so unreasonable as to urge his marrying presently, till he came to a more solid habit of body ; and to wait that time can never forfeit my right. And what are you that detain the rents from me ? You, though heir of line, can never come in the contrary of his tailzie to me, and your daughter ; which will exclude to the end of the world ; and you have no pretence to keep up my rents, nor debar me till I be married. *Replied* ; The *ordo charitatis* in this disposition was the love and affection he bore to his grandchild, and it is by her you are called to the fee ; so, till that be performed, you have no claim, you being no relation at all but the name ; or, if any, very remote ; and had no expectation but in view of her who was the *persona magis dilecta* by the defunct ; and, therefore, the condition of a marriage hanging on a may, and may not be, *dies obligationis nec venit nec cessit*. And this is decided in l. 51. *D. de condit. et demonstrat.* THE LORDS thought, that albeit *matrimonia debent esse libera*, and where *coacta difficiles solent habere exitus*, yet if a right be burdened with that quality and condition, you must either fulfil the terms, or want the donation. So there is no absolute restraint, but only an alternative ; and though this condition be like the *sponsalia* preceding marriage, yet there being no requisition as yet used by way of instrument offering the lass to him, nor any direct positive refusal as yet on his part, he cannot be debarred from the rent to educate and maintain him, whatever may be done if he shift after requisition.

Fol. Dic. v. 1. p. 190. Fountainhall, v. 2. p. 697.

* * * Forbes reports the same case :

THE deceased John Mackrath of Mackilston having no children but a natural daughter, married to Thomas Alexander, who had by her a daughter called Mary Alexander, did, for love and favour, to John Mackrath and Mary Alexander, then infants, under the conditions after mentioned, dispohe his lands to them, who were appointed to marry together, and the heirs-male to be procreated of their bodies ; which failing, or being and deceasing, to James Mackrath in Glen his nearest heir-male ; which failing, to Mary Alexander, she surviving her own nearest heirs male or female, their heirs and assignees ; and for the causes, and under the conditions foresaid, constituted the foresaid persons in manner, and conform to the destination above-written, his assignees to the mails and duties of the land after his decease. John Mackrath, when he was

past fourteen years of age, pursued Thomas Alexander, who, as heir of line served to the disponent, had intromitted with the rents of the lands disponed, to pay to him the half thereof since the disponent's death.

Alleged for the defender; The pursuer hath no interest to call for the rents, the disposition being granted upon a suspensive condition, that he and Mary Alexander marry together; which can take no effect till the condition be fulfilled by their marriage.

Replied for the pursuer; No period of time being assigned for his marrying Mary Alexander, it must be understood in a rational and prudent sense, viz. when he should come to that maturity of age and habit of body which fits him for marriage; and he is most willing to marry her when in a capacity to do it. Now, it is not to be thought, that the disponent intended the mails and duties to remain with his heir until the pursuer were capable to marry; but that Mary Alexander and he should enjoy them *medio tempore* for their aliment and education.

THE LORDS found, that the pursuer had right to the half of the mails and duties of the lands disponed, since the death of the disponent; reserving, to their Lordships consideration, the import of the disposition, in case the pursuer should refuse or decline, when he comes to age, to accept of Mary Alexander for his wife.

Fol. Dic. v. 1. p. 190. Forbes, p. 567.

1750. June 6. & July.

SIR KENNETH M'KENZIE *against* The CREDITORS of Kinminnity.

WHERE a father, who is under a natural obligation to provide his children, qualifies a bond of provision to his daughter, with a condition 'of her marrying with consent of persons therein named,' the tocher will be due although she marry without their consent, without doubt, if the marriage be suitable: What the LORDS might do in the case of an unsuitable marriage would depend on circumstances. But, where a bond of provision is granted by one who is under no obligation to provide the child, under this condition, that she marry with the grantor's consent, then the condition is strictly interpreted, and the bond will be found null if she marry without his consent, be the marriage, in the opinion of others, suitable or not, as he is not bound to assign the reason of his dissent. And so far has this been carried, that even where a father, who had before competently provided his daughter, gave her an additional provision, which was to become void in case she married without his consent, the irritancy has been found incurred where she married without his consent, although the match was suitable. But where the consent required in the condition is not the consent of the grantor himself, but of other persons therein named, How far

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A person under no natural obligation to provide, granted a bond to a Lady, under the condition that she should marry with the consent *in writing* of the donor. She married without it, yet the bond was found due. But there were circumstances inferring approbation.