No 24.
upon condition *si vidua manserit et non nupserit*, the Lords found the condition lawful.

fore her mother, the said estate should belong to her mother, she remaining unmarried; as likewise by a testament of that same date, he appoints his daughter his universal legatar, and failing of her by decease, her mother to succeed upon the same terms; whereupon it was craved to be declared, that the said Dame Margaret only had right to the bonds or sums of money that belonged to Sir Andrew, his daughter being now dead, and he having no other children. It was *alleged* by the defenders, That the disposition and testament being qualified, as said is, she could thereby have no right, but, in case she should die unmarried again; and if she should uplift the sums of money belonging to her husband, she ought to be decerned to re-employ the same with that same quality and condition; so that if hereafter she should marry, they ought to belong to the nearest of kin of her husband. It was *replied*, That such conditions being reprobate by the law, whereby *matrimonia debent esse libera*; and it being the meaning of the defunct, that the said restraint of not marrying should only be in force during the lifetime of his daughter or children; she being now dead, and there being no children of the marriage, that condition and the restraint is void, specially seeing the mother's substitution to the children is burdened with the provision of 500 merks to be paid to Sir Andrew's natural daughter; which certainly he had never done, if he had not intended that his Lady should have right failing of his children, seeing that provision was payable at her marriage whensoever it should happen.

THE LORDS albeit they found, that the condition *si vidua manserit et non nupserit* be consonant to law and not reprobate, yet they decerned that the relict should have right to the whole estate, by virtue of that substitution, notwithstanding of the qualification; and, that it was the meaning of the defunct that it be so, not only because that it was burdened with a paction to his natural daughter, but likewise because, by a former bond when he had no lawful children, he had provided his Lady to his whole estate.

Fol. Dic. v. 1. *p.* 191. *Gosford, MS. No* 485. *p.* 254.

1673. *January* 17. RAE *against* GLASS.

No 25.
One having granted a bond to his niece, under condition, that she should marry with his consent; the clause was strictly interpreted, and it was fou[nd] that his

JAMES RAE having assigned to Alexander Glass several sums of money, about L. 10,000 principal, and many annualrents, he pursues the said Alexander Glass, *alleging* the assignation was in trust to his own behoof, and that Alexander promised to compt for what he should recover; and the said Alexander having *alleged* that he was obliged for no account, and having been appointed to give his oath what was the true cause of the assignation, and having begun to depone, being prest with several interrogatories, he took up the same, and offered a qualified oath in writ; whereupon the LORDS, before they determined anent the oath, ordained an accompt to proceed what the sums were that were

assigned and recovered, and what sums were due to Glass; in which account Glass gave in an article of 7000 merks, upon this ground, that the pursuer gave a bond for that sum to his niece, whereunto the defender hath now right *jure mariti*. It was *answered*; 1*mo*, That this bond was granted when the pursuer was a soldier at Newcastle, under his brother Colonel Rae; at which time he granted another bond to another daughter of the Colonel's of the like sum, which did nearly equal the principal sum of his stock, and must be understood to be done *mortis causa*, seeing he reserved not the annualrent, or any aliment to himself, and so is revocable; which is the more evident, that in the defender's contract of marrriage with the pursuer's niece, there is no mention of this bond, not so much as to oblige the husband to employ it for the wife's liferent, and the bairns of the marriage. 2*do*, The bond itself is conditional, 'providing 'she marry with the pursuer's consent;' *ita est*, she neither required nor got his consent. The defender *replied* to the *first*, That donations *mortis causa*, are never understood, but when there is express mention of eminent death; and the neglecting of this bond in the contraet of marriage, can be no ground to annul it, being done because at that time there was little hope of recovery of the debts, and the defender hath only recovered a part from the Earl of Loudon wirh great difficulty, advance, and expense. And as to the *second* defence, the condition is purified, in so far as the pursuer is a witness in the contract of marriage, which must necessarily import that his niece married with his consent; and albeit he had given no consent, such clauses can import no more than a power to give a rational disassent; for, seeing *matrimonia debent esse libera*, it must not be every disassent that will hinder, but that which is founded on a good reason, and there was no pretence to have disassented from this marriage. It was *duplied* for the pursuer, That the subscribing as a witness doth import no more, but that the witness saw the party subscribe, and not that he read, much less considered the contents of the writ; and though the pursuer had known the contents, yet finding no mention of his bond in the contract, he could never think that it was a consent to purge the quality of his bond, which could not be a presumptive or consequential consent, but an express consent for purging the condition in his bond; for after so long a time he might have forgot there was such a bond; and albeit those who have a natural obligation to provide, giving bonds for tochers upon condition of marrying with their consent, if they do irrationally disassent, their natural obligation and the favour of marriage will take off their disassent; but where a person that is not naturally obliged to provide, gives a bond upon the condition of consent, his consent is *meri arbitrii*, and he needs render no reason for it but his particular affection, or disaffection to the husband; and in this case his consent was not so much as required: And that presumptive consents are not sufficient where express consents is required, is evident in many cases; as if a superior should subscribe witness to a writ, *dis-*

No 25.
scribing witness to her contract of marriage did not import such a consent.

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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 Buchannan 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. Buchannan having no heirs-male, dispones 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 concourse 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*, 1*mo*, That such clauses are contrary to the freedom of marriage, and therefore are holden *pro non adjectis*. 2*do*, 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. 3*tio*, 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