

Ordered and adjudged, that the interlocutors complained of, be affirmed.

1765.

For Appellant, *Al. Wedderburn, C. Yorke.*

For Respondent, *Al. Forrester, W. Johnstone.*

M'LEAN
v.
M'LEAN, &c.

Note.—Unreported in the Court of Session.

JOHN M'LEAN of Lochbuy, - - - *Appellant* ;
MARY M'LEAN and Husband, - - - *Respondents.*

House of Lords, 8th Feb. 1765.

CONDITIONAL BOND—APPARENT HEIR—A bond was granted by a grandfather to his granddaughter, under the condition that it was not to be alterable, except in the event of her marrying without his consent, or the consent of parties named. She married, after her grandfather's death, without the requisite consent. Held the bond still good, and binding on the heir taking his estate, though the grandfather only possessed on apparenacy.

A bond of provision was executed in favour of the respondent Mary M'Lean, by her grandfather, in the following terms:—" For the love, favour, and affection, which I have
" for my granddaughter, I bind and oblige *myself, my heirs,*
" (succeeding to the estate), under the provisions and de-
" claration after mentioned, to make good payment to the
" said Mary M'Lean, my granddaughter, of the sum of 7000
" merks, in name of additional portion and provision, at the
" first term of Martinmas after his death."—The provision and declaration referred to was,—“ That the same shall be
" unalterable and irrevocable, except in the event that my
" granddaughter shall marry without my consent if in life,
" and failing of me by decease, without consent of two of
" her nearest friends, for the time, on the father's side, or
" without consent of Alexander M'Dougall, her uncle by the
" mother, and failing of him by decease, without consent of
" two of her nearest friends, for the time, on the mother's
" side.”

After the granter's death, his granddaughter eloped with the other respondent, Allan M'Lean, to whom she was married, without consent of the relations named.

She thereafter, with consent of her husband, raised action for payment of the bond of provision. In defence, it was

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pleaded, that the bond of provision being conditional,—namely, on her marriage with the consent of the parties named, and as she had married without their consent, and had not complied with the condition, she had forfeited her right. Besides, the granter had no right to burden the succeeding heir with this provision, as he was himself only an heir apparent, and had never made up titles.

June 17, 1761. The Lords, of this date, repelled the whole defences, and found “the defender liable to the pursuer in payment of June 19 & 30. “the bond.” And on further petition they adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—John M'Lean, the grandfather, possessed only as apparent heir; and never having made up titles to the estate, could not burden it with deeds or debts, not strictly onerous,—That the bond in question was gratuitous, and a donation in its nature. It was further, a mere voluntary bond, and therefore every condition or restriction attached to its payment, must be strictly complied with; and, as the condition attached to the payment of this bond was, that she should not marry, without the consent either of the granter, or certain parties named, and as she had violated this condition, the donation must be considered as void and forfeited.

Pleaded for the Respondents.—The bond of provision is onerous, because it was founded on an obligation in nature; for the grandfather, after the death of her own father, stood then *in loco parentis*, and lay under an obligation to provide for his only grandchild. It is therefore good against every one but creditors, which certainly the appellant was not; and if it was good by the law of nature and equity, it was equally good under the act 1695, regarding apparent heirs; the grandfather having held the estate for more than three years, in which case, every rational debt and obligation is binding on him. And as law views all restrictions on marriage as ineffectual, the bond, even if considered purely conditional, would still remain good, though the condition of marrying with consent of certain parties had not been complied with, such condition being held as *pro non scripto*.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be affirmed.

For the Appellant, *Al. Wedderburn, W. Johnstone.*

For Respondents, *Al. Forrester, C. Yorke.*

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