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Upon James's decease, Anna Lockhart, the only child of that marriage, confirmed herself executor-creditor to her father, for payment of the said 2000 merks; whereupon a competition ensued betwixt her and her father's Creditors.

For the Creditors it was *urged*, That, by the conception of the clause, Anna Lockhart could only be considered as an heir of provision, seeing her father does not become bound to pay to the children of the marriage 2000 merks, but only to provide and secure the fee of the said sum to the children of the marriage; so it must be deemed the same as if he had taken a bond to himself in liferent, and the children *nascituri* in fee; in which case, the children that after existed could only take the fee as heirs of provision to the father, in whose person the fee, of necessity, behoved to be lodged, though it is termed only a liferent; which, as the lawyers speak, behoved to be understood, *ususfructus casualis*, in reality a fee, though nominally termed a liferent. *2do*, This provision was not exigible in the father's lifetime, or whereof the term of payment could exist in his life; in which case alone provisions to children *nascituri* are regarded in law to create the children that supervene proper creditors, so as to compete with other onerous creditors upon their diligence. See the case of the Creditors of Easter Ogle, 24th January 1724, No 59. p. 12909.

For Anna Lockhart it was *urged*, That, by the words of the provision, she could not be considered as an heir of provision, seeing her father does, *per verba de præsenti*, provide the fee of the said sum to the bairns of the marriage; plainly avoiding the words commonly used, heirs of the marriage: That the terms of every contract must be considered upon its own footing; and here the provision is not in the common stile, to the father in liferent, and the children *nascituri* in fee; but it is anxiously provided, That the fee should be directly in the children, and nothing but the bare annualrent of the sum in the parents during their life, which, as he could, so he has done in this case; whereby, on Anna Lockhart's existence, she became a proper onerous creditor in the fee of that sum. See 4th February 1681, Thomson, No 51. p. 4258. Sir James Stewart's Answers, p. 117.

THE LORDS found, That Anna Lockhart could not compete with the other creditors upon the provision of 2000 merks.

Fol. Dic. v. 4. p. 186. C. Home, No 178. p. 296.

1748. *June* 3.
ALEXANDER GORDON of Ardoch *against* WILLIAM SUTHERLAND of Little Torboll.

No 63
A settlement in a contract of marriage is *in dubio* not

THE contract of marriage betwixt John Sutherland of Little Torboll and his spouse, begins with an obligation upon him, " duly and sufficiently to infeft

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understood to give more to the heirs *nascituri* than *spes successionis*.

and seise Anne Ross, his promised spouse, in liferent, and the heirs-male lawfully to be procreated betwixt them in fee, in all and hail the town and lands of Little Torboll, &c. and for that end, to grant to them sufficient charters, containing precepts of sasine, &c. and which infeftments, lands, and others, the said John Sutherland binds and obliges him, and his foresaids, to warrant to be good and sufficient, free, safe, and sure, to the said Anne Ross, and said heirs-male, for her liferent of the sum of L. 360 Scots, as the annualrent of the principal sum of 9000 merks, in case she be the longest liver; and for the said heirs-male their right of fee, from all and sundry prior infeftments, inhibitions, adjudications, liferents, annualrents, cesses, taxations, and other public burdens whatever, at all hands, and against all deadly." Follows an assignation to the mails and duties in favour of the wife and the heirs-male, for their respective rights of liferent and fee, to take effect after the said John Sutherland's death; and to this is subjoined an assignation to the writs and evidents, and an obligation to make the same furthcoming to them, as accords; "which assignations *respective*, the said John Sutherland binds and obliges him and his foresaids to warrant to the said Anne Ross and heirs-male, from his own proper facts and deeds, done or to be done in prejudice hereof."

This contract bears date in the 1714, and in the year 1717, an inhibition was served upon it for behalf of William Sutherland, eldest son and heir of the marriage. In the year 1725, John Sutherland the father borrowed from Alexander Gordon of Ardoch 5500 merks, and granted him a real security upon the lands of Little Torboll. The creditor having adjudged, brought a process of sale after his debtor's death; in which compearance was made for the said William Sutherland the heir-male, who *insisted*, That, by the inhibition, the pursuer was interpelled from lending money to John Sutherland of Little Torboll, in prejudice of the obligation he was under to settle the fee upon the heir-male of the marriage; and, therefore, that he could not bring the estate to a sale in prejudice of him the heir-male. The pursuer urged several passages from Stair and Mackenzie to prove, that an inhibition upon a contract of marriage is no bar to the contracting onerous debts. In answer to which, and in support of the objection, the Counsel for the heir-male reasoned as follows:

It was premised that the pursuer's arguments are founded upon a mistake, as if provisions in favour of heirs of a marriage contained in marriage-articles, were all of the same import; whereas, contracts of marriage may be as different in their tenor as any contracts or deeds whatever; and, therefore, to judge of the effect of an inhibition served upon a contract of marriage, the special clauses of the contract must be attended to. More particularly, where a man in his contract of marriage settles, or becomes bound to settle, his estate in favour of the heir-male, or of the heir of the marriage, such settlement or obligation to settle, though it imply more than a simple destination, has no further effect than to imply a prohibition upon the father to alter the order of succession; therefore, he performs his obligation by leaving his estate to descend to

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that heir *tantum et tale* as it is at his death. Contracting of debt, or even selling part or whole of the estate, is no infringement of such obligation. Rational deeds are no infringement, such as granting provisions to younger children, or making a settlement in a second contract of marriage. Nay, gratuitous deeds are no infringement, if they be not done *eo intuitu* to disappoint the heir of his hope of succession, in which case they are fraudulent deeds. This is the sense of the pursuer's quotations from Stair and Mackenzie. And as it is agreed on all hands, that clauses so conceived have no other meaning, than to bar the husband from altering the order of succession, and by no means to debar him from contracting debt, or doing any reasonable act of administration, inhibition upon such a contract would be a vain diligence; for inhibition cannot alter the nature of an obligation, nor bind a man further than he is bound by the deed upon which it is founded. Therefore, in the case observed by Durie, 18th January 1622, Laird of Silvertonhill *contra* his Father, No 1. p. 9451. inhibition was justly refused upon a contract, where the father was no further bound than to settle his estate upon the heir of the marriage. And inhibition was also justly refused in a similar case observed by Dirleton, 7th January 1675, Innes *contra* Innes, No 22. p. 12858. where a sum of money was provided to the husband and wife, and the heirs-male of the marriage; and the like, 24th January 1677, Graham *contra* Rome, No 58. p. 12909.

But now, if a marriage settlement be so conceived as to oblige the husband to denude of his estate in favour of the heir of the marriage, upon his existence, or at a certain age; or be so conceived as to bar the husband from alienating the estate, or contracting debt in prejudice of the heir of the marriage; none of our authors make a doubt that inhibition upon such a contract will secure performance of the obligation, and be an effectual bar against contracting debt. Thus, inhibition being raised upon a contract of marriage, where the husband became bound "to infeft himself in certain lands betwixt and a precise day, about a year after the marriage; and immediately thereafter, to resign for new infeftment to his future spouse in liferent, and to the heirs of the marriage in fee;" reduction by the inhibiter was sustained of an onerous disposition granted after the inhibition, because the clause inferred a prohibition upon the husband to grant any voluntary right in prejudice of the provision; 22d July 1724, Douglas *contra* Douglas and Drummond, No 60. p. 12910. And in a contract of marriage, in which the husband "became bound to join the sum of 3000 merks, with 17,000 merks of portion received with his spouse, and to lay out the same upon good security to himself and spouse, and longest liver in conjunct-fee and liferent, and to the children of the marriage in fee; and how often the sum should be uplifted, that he should so often re-employ the same in the above terms;" the man having died bankrupt, action was brought against the cautioner, who was bound with him in the contract: His defence was, that the obligation barred only gratuitous deeds, and was no impediment to the husband from laying out the money upon trade, though it

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should be sunk thereby: But the COURT found the import of the obligation to be, that, in all events, this sum should be secured to the children of the marriage; and, therefore, sustained action against the cautioner for replacing the sum. It is true, there was no inhibition upon this contract, and so the present case came not to be determined in point. But the *ratio decidendi* is the same; for from this clause was inferred a prohibition to contract debt in prejudice of the children of the marriage; upon which, if inhibition had been served, a reduction upon that head must have been competent even against onerous creditors, upon the precise same footing that an action was sustained against the cautioner.—See APPENDIX.

And here in general it must be observed, that as in many instances the COURT has sustained actions against the husband or against the cautioner, for replacing sums or subjects evicted by onerous creditors, these are all of them so many authorities to the present point. A man who in his contract of marriage reserves to himself a power of contracting debt, and of doing other rational acts of administration, cannot be bound to replace the subject or sum when it is evicted by onerous creditors; because such is the condition of the settlement made upon the heirs of the marriage. As little can his heirs or cautioners be liable; and, upon the same foundation, inhibition upon such a contract would be a fruitless diligence. But if it be either expressed or implied in the contract, that the subject is to be made effectual to the heirs of the marriage whole and entire, the husband must be liable; if the subject be evicted, his cautioner must be liable; and an inhibition upon the contract will be effectual to bar creditors.

Nor is this a new or singular doctrine; what is above laid down coincides with a practice well known in the Court of Session concerning tailzies. Before irritant and resolutive clauses were invented, inhibition was the only method commonly practised, provided an entail either bore or implied a clause *de non alienando, et non contrahendo debitum*. An inhibition upon such negative obligation was ever held sufficient to bar even onerous deeds; *vide* Hope's Minor Practiques, *voce* TAILZIES. In the present case, there is more than an implied prohibition to contract debt in prejudice of the entail or settlement in the contract of marriage; there is an express prohibition, the heir of the marriage being warranted against all debts and deeds of his father.

"Found, That the fee, by the contract of marriage, remained with the father, and that only the *spes successionis* was vested in his son; and, therefore, that the inhibition does not strike against the father's onerous contractions."

In advising this case, the principles above laid down were not controverted. But the interlocutor was founded upon this opinion, that the contract under consideration, which indeed has been the work of an ignorant writer, did not import more than a hope of succession, and was not meant to bar the father's power of contracting debt, nor of alienating for onerous causes.

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This judgment was affirmed in the House of Lords, 7th March 1751.

Fol. Dic. v. 4. p. 187. Rem. Dec. v. 2. No 91. p. 151.

*** D. Falconer and Kilkerran's reports of this case are No 54. p. 4398. *voce* FIAR ABSOLUTE, LIMITED.

1759. *January* 31.

JOHN BALLINGALL, and other CREDITORS of FRANCIS HENDERSON of Grange of Barrie, *against* THOMAS, WILLIAM, and JEAN HENDERSONS, Younger Children of the said FRANCIS HENDERSON.

No 64.
An obligation in a marriage-contract to pay a sum to younger children at a term during the father's life, constitutes them proper creditors.

BY marriage-contract, dated 26th June 1738, between Francis Henderson and Jean Reid, with advice and consent of their respective fathers, James Henderson, the father of Francis, in consideration of the bride's portion of 6000 merks, disponed the estate of Grange of Barrie to his said son Francis, and the heirs-male to be procreated between him and the said Jean Reid; whom failing, to Francis's heirs and assignees whatsomever.

The said contract likewise contained the following clause: "Sicklike, if there shall happen to be a male child procreated in this intended marriage, who, by the conception of this present contract, shall succeed to the lands of Grange of Barrie, in that case the said Francis Henderson binds and obliges him, and the said male child, thankfully to content, pay, and deliver, to the younger children to be procreated betwixt him and the said Mrs Jean Reid, the portions and provisions following, viz. if there be only one child, to the said child the sum of 3000 merks Scots; if two children, to them 4000 merks; and if three or more children, to them 6000 merks; which portions and provisions are to be divided amongst the said children, as the said Francis Henderson shall think fit to appoint by a writ under his hand, and they are to be due and payable to them at their respective majorities or lawful marriages, either of them first happening, with annualrent thereafter; and the said Francis Henderson, during his lifetime, and his eldest son after his decease, are hereby bound to aliment and educate the said younger children honestly, conform to their rank and quality, ay and while their said provisions fall due. But if it shall happen that there be no male children procreated in this intended marriage, and only daughters procreated therein, and that the said Francis Henderson survive the said Mrs Jean Reid, and have male children in a second marriage, then, and in that case, the said Francis Henderson binds and obliges him, his heirs and successors, thankfully to content, pay, and deliver, to the daughters to be procreated betwixt him and the said Mrs Jean Reid, the portions and provisions following, viz. if there be only one daughter, to her the sum of 7000 merks; if two daughters, to them 9000 merks; and if three or more daughters, to them 11,000 merks Scots; which portions and provisions are to be divided