

S E C T. II.

Prohibitions,—to alter a Destination,—to uplift without consent.

1668. *January 28.* ALEXANDER BINNY *against* MARGARET BINNY.

No 3.

A woman bound herself to resign certain lands in favour of herself, and the heirs of her body, whom failing, in favour of her brother, and to do no deed in prejudice of his succession. After inhibition was served on this deed, she married, and disposed the lands to her husband. This disposition was reduced, as being in prejudice of the brother's succession.

MARGARET BINNY granted a bond, obliging herself to enter heir of line to her father, and to resign the lands in favours of herself, and the heirs to be pre-created of her own body; which failing, to the heirs of Alexander Binny her father, and obliged herself to do nothing contrary to that succession; and having married William Brotherstones, by her contract of marriage, *nomine dotis*, she disposes the lands to him. This Margaret was the only child of Alexander Binny's first marriage, and there was an inhibition used upon the bond before her contract of marriage. Alexander Binny being son of the second marriage, and heir of line to his father, pursues the said Margaret to fulfil the bond, and to enter, and resign the land conform thereto, and thereupon did obtain decret; which being now suspended, it was *alleged*, that this being but an obligation to constitute a tailzie, could have no effect to hinder her to dispoise to her husband in name of tocher, which is the most favourable debt, or to contract any other debt which the pursuer (who behoved to be her heir) could never quarrel. *2dly*, It was *alleged* for the Husband, That he could not be discerned, as husband, to consent to this resignation, contrary to his own contract. It was *answered*, That this was not only a bond of tailzie, but an obligation to do nothing that might change the succession, and so she could not voluntarily dispoise; but the husband's provision might be competent enough, seeing both she has the liferent, and the children of the marriage will succeed in the fee; and albeit the pursuer must be heir of tailzie, yet obligations in favour of heirs of tailzie are always effectual against heirs of line, in relation to whom the heir of tailzie is but as a stranger.

THE LORDS repelled the reason, and found the letters orderly proceeded, till the wife entered, and resigned with consent of her husband, conform to the bond, seeing there was inhibition used before the contract; but they did not decide, whether this clause would have excluded the debts to be contracted by the said Margaret, or her heirs, upon a just ground, without collusion; but found, that she could not make a voluntary disposition to exclude that succession, in respect of the obligation to do nothing in the contrary.

Fol. Dic. v. I. p. 304. Stair, v. I. p. 516.

* * * Dirleton reports the same case :

No 3.

MARGARET BINNY being induced to grant a bond, obliging her to resign some tenements of land in favour of herself and the heirs of her body, which failing, in favours of her brother Alexander Binny, and to do no deed in prejudice of his succession, she did thereafter marry, and dispone to her husband the said tenements. In a pursuit at the instance of her brother against her and her husband for his interest, upon the said bond, and implement thereof,

THE LORDS found, that she, with consent of her husband, ought to resign. Some of the LORDS thought, that the import of such obligations is only that the granter should not alter such tailzies in favour of other heirs ; and that they are not restrained to sell or dispone, for onerous causes, if they should have occasion ; otherwise they should cease to be fiars, the very essence of fee and property consisting in a liberty to dispone. It may be questioned, How far the husband may be liable to his wife's obligations before the marriage ? For there being a communion betwixt them only as to *mobilia*, it may appear that he should only be liable to moveable and personal debts, seeing *penes quem emolumentum, penes eundem onus* ; but this point was not debated.

Dirleton, No 136. p. 56.

No 4.

A bond of provision was granted to children, in these terms, 'That, in case they died unmarried, or within year and day thereafter, that the sum should return to the granter's heir, and that they should make no assignation or other right in defraud of his heir.' This clause was found to import, that the children could do no gratuitous deed, but that it did not hinder them to uplift for necessary causes.

1673. July 8. GRAHAME against The LAIRD OF MORPHIE.

THE deceast Laird of Morphie granted a provision to his five children of 25,000 merks, but in these terms, 'That in case they died unmarried, or within year and day thereafter, that the sum should return to his heir ; and that they should make no assignation, or other right, in defraud of his heir.' Whereupon he *alleged*, He was not obliged to pay any more but the annualrent, this being a clause adjected by the father *de non alienando*. It was *answered*, That here was no clause irritant, but a substitution of the heir, in case the bairns were not married, and had no children, and doth only exclude assignations, or other rights, but doth not hinder the children to uplift the sums.

THE LORDS found, that the clause did import that the children could do no gratuitous deed, or any thing to defraud the heir, but found that the children, for a necessary cause, such as their breeding to letters, merchandize, or trade, might dispose of so much of the sums as was necessary ; and that the making of no right in defraud of the heir, did import that they could neither uplift nor assign further than necessity required.

Fol. Dic. v. 1. p. 305. Stair, v. 2. p. 206.