

or annualrents for such a sum. It was *duplied*, That the obligation was only general, and not to infest her particularly in this land. No 97.

THE LORDS preferred the liferentrix.

*Fol. Dic. v. 1. p. 474. Stair, v. 2. p. 68.*

\* \* \* Gosford reports this case :

IN a double pointing raised at the tenant's instance of a tenement of land in Edinburgh, it was *alleged* for Elizabeth Rigg, that she was infest in liferent in the said tenement before all others, and so ought to be preferred. It was *answered* for John Begg, That her real right being after inhibition, at his instance, whereupon he had intented reduction, the same ought to be reduced, and could give her nought. It was *replied* for the said Elizabeth, That her infestment depended upon her contract of marriage, prior to the inhibition, bearing an obligation to employ upon land or annualrent the sum of L. 10,000 to her in liferent, and the bairns of the marriage in fee. It was *duplied*, That the obligation in the contract of marriage, not being special to infest her in this tenement, it being only general, the inhibition being prior to her infestment, did affect the same.

THE LORDS did prefer the said Elizabeth, and found that albeit the obligation was general, that the inhibition could not hinder the husband to infest his wife in special lands, seeing they might be ascribed thereto, and that she was not provided otherwise to lands equivalent to the liferent contained in the contract of marriage.

*Gosford, MS. No 473. p. 245.*

1673. June 24.

MARJORY HALYBURTON and Her HUSBAND *against* GEORGE MORISON of Bognie.

IN a reduction, pursued at the said Marjory's instance, and her husband, as having right by progress from Patrick and George Watts, in and to the sum of one thousand three hundred merks, for which they had recovered decret against John Watt, their brother; and, upon the dependence, had served inhibition against him, after which he had made a disposition to Morison of Bognie, of the mill and lands of Fergie; it was *alleged* for the defender, That albeit the disposition was after the inhibition, yet it depended upon a prior cause and obligation, to which it behoved to be drawn back, notwithstanding of the inhibition; in so far as the said John Watt, by a minute of his contract of marriage, for his tocher, received by him from his wife, was obliged to provide to her in liferent, and the heirs of the marriage in fee, the sum of two thousand and five hundred merks, or to a wadset equivalent thereto; and accordingly, having children begotten of the marriage, did infest them in the said lands; so that

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A general obligation to provide children of a marriage to a sum or to a wadset equivalent, was found to secure a special infestment, altho' inhibition was served before the infestment.

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the mother being dead, and the marriage dissolved, the daughters of the said marriage, and the father being infest, might lawfully dispoise these lands in favour of Morison, being the sole heirs of the marriage, and creditors to their father by the foresaid minute of contract. It was *replied*, That the minute being conceived, as said is, could give no right to the daughters, unless they were served heirs of the marriage, *quo casu* they would be liable for the father's debt, and could do no deed in prejudice of a lawful creditor who had served inhibition; and, notwithstanding of any such obligation in a minute, the father did still remain fiar, and had a right to the property of the said lands, to which the heirs of the marriage could not succeed till after the father's decease; and during his lifetime, he might dispoise thereupon, or lawful creditors might comprise or affect the same by inhibition. *2do*, The obligation in the minute being only in general to provide the heirs to a certain sum or wadset, without making mention of any particular lands; an inhibition might be lawfully served before any particular infestment, which could never be drawn back to the general obligation, in prejudice thereof. It was *duplied* to the *first*, That albeit the obligation in the minute was to provide the heirs of the marriage, yet that must be interpreted the bairns of the marriage, seeing it was to a particular sum of money; and if it were otherwise, all contracts of marriage might be easily ended, albeit the father received an opulent tocher, and the children left destitute of all maintenance; and the Lords have been in use oft times to find so, that the heirs should be interpreted bairns; which being granted, the bairns of the marriage, during the father's lifetime, having obtained themselves declared the only children of the marriage, after their mother's decease, and so being lawful creditors by the minute of the contract, which is prior to the inhibition, it can never affect any disposition made by them or the father, which depends upon a cause prior thereto. It was *duplied* to the *second*, That albeit the minute bears an obligation only in general to provide sums of money or lands, yet that being prior to the inhibition, the same cannot hinder the fulfilling thereof by particular infestments, which must be ascribed thereto as the preceding cause.—THE LORDS having much reasoned upon the debate, did delay to give their interlocutor, *in jure*, though most of them inclined to sustain the reduction, in respect the defenders alleged this pursuit to be upon collusion, to frustrate the provisions made by John Watt in a second contract of marriage; whereupon they ordained them to be heard, and the infestment granted to the children of the first marriage to be produced; after production whereof, and the debate being of new resumed, they assoltzie from the reduction, *ex capite inhibitionis*, and found that the infestments given to the heirs, being out of particular lands, ought to be drawn back to the minute of the contract, which was prior to the inhibition, bearing a general obligation; which does not at all decide that point of law, if the obligation made in favour of the heirs of the marriage should be interpreted bairns, so as to make them preferable to lawful creditors, who served inhibition before their infestments. But after all these

debates, upon the 4th of July 1673, it being *alleged* for the defenders, That the decret given against John Watt, wherein he was holden as confessed, was by mere collusion, in so far as there could be nothing produced for proving his intromission with the debts due by the Laird of Fren draught, or that ever Fren draught was debtor to their father; and if it were sustained against a prior lawful creditor, that a decret, wherein a common debtor is holden as confessed, were sufficient to constitute debt, it were to take away the security of all creditors;— it was *answered*, That the decret being given twelve years ago, and never reclaimed against, and homologated by payment of a part of the sums contained in the decret and apprising, and the parties obtainers being dead, and there being no presumption that John Watt should collude with his brethren to prejudice his own children, and being now become bankrupt, and *lapsus bonis*, it were of a far more dangerous consequence to sustain collusion, to be proved by witnesses, in prejudice of an assignee, for an onerous cause, and that without any reduction *ex capite fraudis*. THE LORDS did, notwithstanding, sustain the collusion, to be proved by the common debtor's oath, to which they did repone him, and by the oath of the Laird of Fren draught, the verity of the debt, and payment thereof to John Watt; and gave warrant to both parties to adduce witnesses, or any writ for proving the verity thereof; which seems hard, there being no reduction *ex capite fraudis*, to take away any assignee's right for an onerous cause, by way of defence.

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*Fol. Dic. v. i. p. 474. Gosford, MS. No 599. p. 342.*

1675. July 21. MENZIES of Raw *against* ———.

In a reduction of a disposition of certain lands at Menzies' instance, *ex capite inhibitionis*, it was *alleged*, for the defender, That albeit his infestment was after the inhibition, yet it depended upon a prior bond, whereby the common debtor was obliged in general to dispoise lands for satisfaction of the defender's true debt. It was *replied*, That the defence ought to be repelled, because the common debtor being infest the time of the inhibition, could not dispoise these lands in prejudice thereof. THE LORDS did sustain, and found it sufficient that the common debtor, before inhibition, by a minute of contract was obliged to dispoise lands in general for satisfaction of his just debt; and that any intervening inhibition could not hinder particular lands dispoised to take effect, nor the disposition to be drawn back to the date of the first bond, as the cause thereof; which being prior to the inhibition, nothing following in consequence could be prejudged thereby; yet nevertheless the case of legal diligence ought to be well considered; for there may be great danger in suffering the benefit of inhibitions and comprising against a debtor infest to be of no force, if upon pretence of prior latent bonds, whereupon nothing followed, a creditor who was in *bona fide* to contract in contemplation of a real estate in the person of his debtor, more

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An obligation to dispoise lands in general, without mentioning a particular subject, found sufficient to support a posterior disposition of particular lands against a reduction *ex capite inhibitionis*.