

No 60. *voce* FEE, with Stewart's Answers. That the nature of the obligation itself being chiefly to be regarded, and there being nothing binding or obligatory in it, nor any prohibitory clause, the inhibition is altogether inept, without any force whatever, as proceeding on no proper legal foundation. And, *lastly*, The case of Auchry was not in point; the husband was obliged to preserve the lands, and do no fact or deed that might anyways prejudice the heirs of the marriage; besides, in that case, a liferent-right allenary was provided to him, which proves that the fee was not vested in him.

Duplied for the Douglasses; That an obligation on the father to infest the children in fee, at a certain period, being once established, no satisfactory reason can be given why, after the inhibition, the father should have any power to dispone: That the reasoning, from the last termination of heirs, and the decisions quoted in confirmation thereof can have no weight in a question where the father is specifically obliged to settle the fee in the children, whatever they may have to explain a dubiety, whether a fee is in the husband or wife.

THE LORDS found, by the clause in the contract of marriage, the father being obliged, after his own right was completed, to infest the heirs of the marriage in fee, as soon as they existed, that he could not grant any voluntary right in prejudice of these provisions; and therefore, that the inhibition was effectual against the disposition in question.

Reporter, *Lord Cullen.* Act. *Ja. Graham sen. & Ro. Dundas Advocatus.*
Alt. *Alex. Irvine & Ch. Areskine.* Clerk, *Dabrymple.*

Edgar, p. 129.

No 61. 1731. *January 20.* NASMYTH *against* BRANDS.

AN infestment of annualrent granted by a man to his children therein named, their respective proportions being payable at the first term after his decease, was found preferable according to its date in competition with onerous creditors. See APPENDIX.

Fol. Dic. v. 2. p. 281.

No 62.
Clause in a contract of marriage, Whether importing that the children are creditors, or only heirs of provision?

1741. *July 31.*
Competition betwixt the CREDITORS of JAMES LOCKHART and ANNA LOCKHART.

JAMES LOCKHART tenant in Brunston, in his contract of marriage with Margaret Montgomery his second spouse, provided 2000 merks to the children of that marriage, in the following terms, *scil.* "He contracts and provides to himself, and said spouse, or longest liver, during their lifetime, the yearly annualrent of the sum of 2000 merks, and the fee thereof to the bairns of the marriage which shall happen to be procreated betwixt them."