

every heir, who was impatient of his father's management, to present bills of suspension and interdict against any reasonable act of administration by which he might pretend to be eventually injured. But it is not the duty of a court of law to deprive the owner of an estate of his powers over it, merely because his heir supposes they may be exercised to his prejudice.

No 143.

THE LORDS (November 25. 1802) "having advised the mutual informations for the parties, sustain the defences, assoilzie and decern."

And, upon advising a reclaiming petition for the pursuer, with answers, they adhered.

There was, however, some difference of opinion on the Bench. It was conceived by several of the Judges, that the contract of marriage must be understood as conveying something more than a mere *spes successionis*; because every son has a *spes successionis* to his father's estate, whether there is any contract or not; and, therefore, though the son had no power to control his father in the management of the estate, if the father chose to sell it, the father must become bound to reiterate the obligation, by securing the price in the same way in which the estate itself was secured, to the heirs-male of the marriage, otherwise such provisions in marriage-contracts are of no avail. But the majority of the Court held, that the father remained fiar of the estate, with no other burden than a provision in favour of the heir-male of the marriage, which, by the law this country, does not prevent him from executing onerous deeds, and therefore from selling the estate; that there was little danger of a father selling a family estate, without sufficient reason, for the mere purpose of disappointing his heirs; and that it would be attended with bad consequences to recognise the right of an eldest son to control his father in the management of his property.

Lord Ordinary, *Glanlec.* Act. Lord Advocate Hope, Monypenny. Agent, Colin Mackenzie, W. S.

Alt. Hay, Clerk. Agent, Jo. Macfarquhar, W. S.

f.

Fac. Col. No 135. p. 298.

## SECT. XVII.

## What Deeds are held onerous.

1739. July 12. &amp; 1740. July.

M'DOUGAL against BARBARA M'DOUGAL and her Husband.

THE estate of Mackerston was in the year 1669 settled by Henry M'Dougal then of Mackerston, upon Thomas M'Dougal his son, and the heirs-male of his

No 144.  
Provision to  
heirs of a mar-  
riage, onerous  
in competi-

No 144.  
tion with  
heirs of a  
former inves-  
titure.

body, &c. by simple destination, (but with a power to alter) on which Thomas was infeft.

On the death of Thomas, his son Henry was served heir to him, and infeft. In the year 1715, Henry being under no limitation by the said investiture, executed a new settlement by procuratory of resignation, in favour of himself and the heirs-male of his body, which failing, of Barbara M'Dougal his daughter, and the heirs-male of her body, &c.

In the year 1722, Henry dying without issue-male, was succeeded by his daughter Barbara, who served heir to him on the settlement 1715; and in 1733, in her contract of marriage with Mr George Hay, who, on his part, contracted L. 1500 Sterling, to be applied towards extinction of the debts of Mackerston, she on her part disposed the said estate to her future husband in liferent, and to the heirs-male of the marriage in fee.

A discovery having been made of a bond of tailzie, dated in 1684, by Henry M'Dougal, father of Thomas, in virtue of the reserved power to alter in the foresaid settlement *anno* 1669, and whereby the estate was of new settled on his said son Thomas, and the heirs-male of his body, which failing, &c.; but containing prohibitive, irritant, and resolute clauses, against altering the order of succession, alienating the estate, or contracting of debt;—upon this tailzie, Thomas M'Dougal, uncle to the said Barbara, and immediate younger brother to her father Henry, and as such heir of the tailzie 1684, brought a reduction of the settlement made by his elder brother Henry on his daughter Barbara in 1715, and consequently of the disposition made by her in her contract of marriage in favour of Mr Hay her husband, and the issue-male of the marriage.

THE LORDS found, “that George Hay having entered into a marriage-contract with Barbara M'Dougal, who stood seized in the lands by virtue of a progress of infeftments, containing no limitation upon her father, and having become bound to advance L. 1500 Sterling towards payment and extinction of the debts of the family, in contemplation of, and upon the mutual agreement of the estate's being settled upon him in liferent, and the heirs-male of the marriage in fee, the contract was fully onerous, and therefore must be available, and subsist according to the conception thereof in favour of the said George Hay and the heirs-male of the marriage, notwithstanding the latent tailzie 1684, the same having never been recorded, nor any infeftment nor document whatsoever taken thereupon; and therefore assoilzied from the reduction.”

And upon advising petition and answers, and after a hearing in presence, the LORDS “adhered.”

*Fol. Dic. v. 4. p. 183. Kilkerran, (PROVISION TO HEIRS, &c.) No 6. p. 458.*

\* \* \* See a case between the same parties, No 172. p. 10947. *voce* PRESCRIPTION.