

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.*

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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."

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.

No 62.

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 presenti*, 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 173. p. 296.*

1748. June 3.

ALEXANDER GORDON of Ardoch *against* WILLIAM SUTHERLAND of Little Torboll.

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

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