No 52. even the attempt so to do would have been unjustifiable, and as little would his heir be heard in such a plea.

'THE LORDS find no necessity that the Earl of Moray, before determination of this cause, should be made a party thereto. Find, that the late Earl of Moray, notwithstanding of the prior liferent by way of locality, granted to the Countess, and her infeftment thereon, had right to grant tacks of the lands contained in said locality effectual against the Countess; but find, that the tack in question not having been regularly executed by the said Earl, is not effectual against the Countess; and, therefore, ordain the suspenders to remove from their houses, biggings, yeards, and grass, at Whitsunday 1773, and from the arable lands at the separation from the ground of the crop 1773.' *See* TACK.

Act. *A. Lockhart, et M'Queen.* Alt. *Ilay Campbell et Crosbie.* Clerk, *Tait.*

Upon an appeal taken by the Tenants, and a cross appeal brought by the Countess, the House of Lords, March 24th 1773, affirmed the first part of the judgment and reversed the latter. They 'ORDERED and ADJUDGED, 'That that part of the interlocutor of 23d of July 1772, complained of by the 'cross appeal, be affirmed; and it is further ordered and adjudged, that the in-'terlocutor of the 29th January 1772, and also so much of the interlocutor '23d of July 1772 as are complained of by the original appeal, be reversed; 'and it is hereby declared, that, under all the circumstances of this case, the 'lease in question is as effectual and binding, as if it had been signed by James 'late Earl of Moray, deceased. And it is farther ordered, that the reasons of 'suspension be sustained.'

Fol. Dic. v. 3. *p.* 215. *Fac. Col. No* 22. *p.* 61.

SECT. VIII.

Provisions by Parents in contemplation of Marriage of their Children.

No 53. Prohibition to alienate, inferred from implication.

1743. *November* 2. & 30. M'CLELLAN and WATSON *against* MEIK.

PATRICK ERSKINE, butcher in Dalkeith, by deed in 1729, settled his little estate of three acres and a tenement of houses, upon Jean Erskine his only child, and Robert Meik her husband, in conjunct fee and liferent, and the children of the marriage in fee, which failing, to the said Jean Erskine her nearest

No 53.

heirs and assignees whatsoever; and in the settlement it was declared, 'That 'the said disposition in favour of Robert Meik should not be construed to extend any further than his liferent use only, and that failing of children between him and the said Jean Erskine, it should in that case be lawful and in 'the power of the said Jean Erskine, to sell and dispose upon the said three 'acres and tenement at any time in her lifetime, and that without the consent 'of the said Robert Meik her husband.'

In 1732, Robert Meik borrowed 2000 merks from John Thomson in Newbottle, and Samuel M'Clellan and John Watson became cautioners for him; and, of the same date, Jean Erskine and her husband Robert Meik, upon the narrative that M'Clellan and Watson had become cautioners as aforesaid, became bound to relieve them of their cautionry obligation, and Jean Erskine, with consent of her husband, disponed to them her said three acres and tenement in security, and for their more effectual relief.

M'Clellan and Watson having paid the debt, and taken assignation, they after Robert Meik's death, pursue Patrick Meik his son as charged to enter heir to him, and Jean Erskine as intromitter with her husband's effects; and the heir renouncing, decree *cognitionis causa* was obtained against him, and against Jean Erskine, on the medium foresaid.

On this decree they led an adjudication of the three acres and tenement; and having pursued a ranking and sale thereof, appearance was made for Patrick Meik the heir, who contended, that by the settlement 1729, the fee in Jean Erskine was limited, that she could not alienate the same by any gratuitous deed in prejudice of her children; and such the disposition granted by her to the pursuers in 1732 was said to be. 2*do*, Her personal obligation for her husband's debts was *ipso jure* null, and consequently the real security which is accessory thereto could not subsist.

Upon the 2d November 1744, the LORDS, on report of Lord Arniston, found by a considerable majority, 'That by the disposition by Patrick Erskine in '1729, in favour of Jean Erskine his daughter, the fee of the lands was esta'blished in the said Jean, but that she could not grant the security in *anno* '1732, in prejudice of the issue of the marriage; and remitted to the Ordinary 'to hear parties upon the import of the adjudication led against her by M'Clel'lan and Watson the pursuers.'

And, upon the 30th of said month, the LORDS 'adhered,' notwithstanding the following reasons for altering. 1*mo*, That any limitation on Jean Erskine by the settlement 1729 was at best by implication, and that it was both a dangerous and illegal doctrine to sustain implied prohibitions at all. 2*do*, That by our law, where there is only a prohibition to contract debt, or alienate, without an irritancy, it is never thought to go further than a prohibition to contract gratuitous debts; and that a cautionry is not a gratuitous debt.

3*tio*, That though a married woman cannot bind herself personally, she may, with consent of her husband, effectually impignorate her heritage in security of

No 53. such obligation, agreeably to a variety of decisions, Stair, 15th Dec. 1665, Elies *contra* Keith, *voce* HUSBAND AND WIFE; Harcarse, — December 1683, Marshall *contra* Fergusson, IBIDEM; Fountainhall, 2d and 3d February 1686, Somerville *contra* Paton, IBIDEM.

Notwithstanding all which, the LORDS adhered as said is, but only by the narrowest majority.

Fo. Dic. v. 3. *p.* 214. *Kilkerran*, (FIAR, ABSOLUTE AND LIMITED) *No* 4. *p.* 193.

No 54.
The fee of an estate was provided by contract of marriage to the heir, with absolute warrandice. It was found, that an inhibition used on the contract by the heir against the proprietor, could not prejudice onerous creditors contracting with the proprietor after the inhibition.

1748. *June* 3. GORDON *against* SUTHERLAND.

GORDON of Ardoch pursued a sale of the lands of Little Torboll and others, which belonged to the deceast John Sutherland of Little Torboll his debtor, in which process William Sutherland, now of Little Torboll, the eldest son and heir of the debtor, compeared, and produced the contract of marriage between his father and mother, whereby the father became bound to infeft his future spouse in liferent, and the heir-male to be procreated of the marriage in fee, in the lands of Little Torboll, and which he obliged himself to warrant to be safe and sure to his future spouse, and heir-male foresaid, for their respective interests of fee and liferent, from all private infeftments, liferent-annuities, &c. at all hands, with an inhibition on this contract raised by Ross of Aldie, at whose instance execution was provided to pass; and pleaded, that by the said inhibition, the right of fee was so effectually secured to him, the heir of the marriage, as not to be frustrated by any posterior voluntary contraction of debt, and that the debts in the pursuer's person, being all posterior to the inhibition, the said lands of Little Torboll ought to be struck out of the sale.

Accordingly it was upon report found, 5th June 1747, that the inhibition served on the contract of marriage secured the defender against the onerous contractions of the father, and a remit was made to the Ordinary to proceed accordingly.

The notion the Court had at this time was, that as the father had not as usual become bound to take the rights to himself, and the heir of the marriage in fee, but directly to infeft the heir of the marriage, and that with warrandice, it appeared to be the intention of the father to create a present right; the rather still that the obligation further bore to infeft the heir of the marriage by double infeftment, one to be holden of himself, &c. which imported that he was to denude in his own time; and wherever a man is bound to any thing performable to his heirs in his own lifetime, his heirs are then understood only as heirs *designative*, and an inhibition renders the obligation effectual no less than if it had been granted to the heir of any other person.

But notwithstanding these considerations, the LORDS, on advising petition and answers, November 4th 1747, found, that the contract of marriage imported