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

only a destination of succession, that the father was still fiar, and that the inhibition would not secure against onerous debts. No 54.

The view now had of the case was, that a disposition *de presenti liberis nascituris*, imported no more than a hope of succession; nor could it bear another construction; for, as a fee cannot be transmitted to persons not in being, and that it must be some where, it must therefore remain with the father: That though there might be this difference between a disposition *de presenti liberis nascituris* and an obligation to dispone, which was the present case, that where the intention appeared manifest, that the father was to denude of the fee, such obligation might be effectual when secured by inhibition, yet that has never been thought to be the intent of such obligation, except where a certain period has been fixed for the performance, such as on the heir's arriving at a certain age, or any other time certain; but where the obligation is only in general, as here in favour of the heir-male of the marriage, it supposes that the heir is to have no right till after his father's death, as till then he cannot with any propriety come under the designation of heir-male; and as the consequence of giving it a stronger effect would be no less than this, that the moment the child was born, he should be creditor in the obligation, and though he should live but an hour, the next child must serve heir to him and so on through a dozen, should so many once exist and die; and as in the present case there is no reservation of the father's liferent, he would be even stript of the liferent of his estate in favour of his son the moment he was born; such construction was not to be put upon the deed where it could bear another.

And as to the obligation to infeft *a me et de me*, and clause of warrandice, on which the weight had formerly been laid, they were considered to be only clauses of stile thrown in by an inaccurate writer, and but too slight a foundation for such consequences.

In this interlocutor, Little Torboll acquiesced so far as to admit the intention to have been that the fee should remain in the father, but then he urged in a petition, that even upon that supposition, the effect of the inhibition was to secure the heir of the marriage against all debts onerous as well as gratuitous; on this ground, that as an heir of a marriage is heir, so he is also creditor, and though the father, as being fiar, may affect the subject with onerous debts, and may even sell it, and the purchaser will be safe, yet he is bound to his heir *qua* creditor to purge it of these debts, or to replace the value in case of a sale; and though an inhibition cannot extend an obligation, yet the true effect of it is to make a personal obligation as effectual against the lieges as it is against the granter.

Accordingly the LORDS, on advising petition and answers, on the 16th December 1747, found, that the inhibition served upon the contract of marriage, which contains a clause of absolute warrandice, secured the petitioner against the onerous contractions of his father posterior to the date thereof.

No 54.

Yet afterwards, on advising a petition for Ardoch, with the answers for Little Torboll, 3d June 1748, it was found, that the inhibition on the contract of marriage could not prejudge the onerous creditor.

Such of the Lords as remained of opinion for the former judgment, were not satisfied why even an obligation to transmit a succession, with a clause of warrandice, may not by the force of an inhibition upon it, be rendered of the same effect against all and sundry the lieges, as it is against the granter. It must at the same time be owned, that the last judgment is more agreeable to the notion that every body has had, and which even the Court has formerly entertained, (*vide* January 24th 1677, Grahame *contra* Rome, *voce* PROVISION TO HEIRS AND CHILDREN) and is the more expedient of the two, as the giving such force to the inhibition would be in effect to make a common contract of marriage, with an inhibition on it, equal to an entail.

N. B. Both the above judgments were, upon an appeal to the House of Lords, affirmed on the 7th March 1751.

Fol. Dic. v. 3. *p.* 215. *Kilkerran*, (FIAR, ABSOLUTE AND LIMITED) *No* 6. *p.* 197.

*** D. Falconer reports the same case:

JOHN SUTHERLAND of Little-Torboll, by his contract of marriage, became bound to infeft his wife in liferent, and the heirs-male of the marriage in fee, in certain parts of his estate, and to grant sufficient charters for that purpose: 'Which infeftments and land he bound and obliged himself to warrant to be 'good and sufficient, free, safe and sure to his said wife, and the heir-male law-'fully to be procreated of the said marriage, at all hands, and against all dead-'ly.

Ross of Aldie, brother to the lady, at whose instance execution was provided to pass, inhibited Little-Torboll on the contract; and he having become debitor to Alexander Gordon of Ardoch, and died, a sale was by Ardoch pursued of his estate.

William Sutherland, the heir of the marriage, appeared, and craved to have the lands contained in the contract struck out of the sale, as having been provided in fee to him, by which his father became bound, upon his existence, to dispone them to him; and this obligation being secured by the inhibition, could not be hurt by any after contraction. He *pleaded*, that it was plain there was more intended to be settled on the heir of the marriage than a hope of succession, from the clause of warrandice, which equally secured the heir in the property with the Lady in her liferent; and the LORDS had found obligations to children unborn to be valid debts, entitling them to secure themselves by diligence, and to compete with other creditors; February 1682, Creditors of Marjoribanks against Marjoribanks, *voce* PROVISION TO HEIRS AND CHILDREN; and 22d July 1724, Douglas against Douglas, IBIDEM.

No 54.

Pleaded for the pursuer; That an obligation to setle the fee of a land estate upon an heir unborn, was always understood to be only a hope of succession; the fee necessarily remaining in the father, whose onerous deeds therefore behoved to affect it, nor could his heir of provision, by using an inhibition, hinder him in the use of his property, or free himself from a burden necessarily incumbent upon a representative: 16th July 1708, Home against Home, *voce* PROVISIONS TO HEIRS AND CHILDREN; 2d July 1714, Rome against Graham, IBIDEM.

Observed, That if by the contract it was designed the fee should be vested in the heir, this was improperly exprest, since the obligation should have been to denude upon his existence; but the obligation here was to take place immediately, which could not be so executed as to vest a fee in a child to be born.

THE LORDS, 4th June 1747, 'found that the inhibition on the contract of marriage, secured the defender against the onerous contractions of the father, after the date of the inhibition.'

On a bill and answers, wherein it was *pleaded*, That the import of the contract had already been determined in an action at Little-Torboll's instance against Aldie; who, being pursued for part of the Lady's portion, made this defence, That he was not obliged to pay till the pursuer implemented his part, by vesting the fee in the heir of the marriage; whereupon the LORDS, 5th February 1724, 'found that the pursuer ought to resign the lands in favours of himself, and failing him, in favours of his son *nominatim* in fee, with absolute warrandice and assignation to the mails and duties, as mentioned in the contract, before payment of the remainder of the tocher:'

THE LORDS, 4th November 1747, 'having advised the interlocutor in the process at the instance of Sutherland of Little Torboll against Ross of Aldie, found, that the fee by the contract of marriage remained with the father, and only the *spes successionis* was vested in the son; and found that the inhibition did not strike against the father's onerous contractions.'

They found, 17th December, 'that the inhibition on the contract of marriage, which contained a clause of absolute warrandice, secured the petitioner, William Sutherland, against the onerous contractions of his father after the date of the inhibition.'

THE LORDS afterwards found, that the inhibition on the contract of marriage could not prejudge the onerous creditor.

Reporter, *Lord Dun.* Act. *Ferguson & Hamilton-Gordon.*
Alt. *Lockhart & H. Home.* Clerk, *Forbes.*

D. Falconer, v. 1. *No* 253. *p.* 340.