WILLIAM SUTHERLAND, of Little Torbol, Esq. - - - } *Appellant.*

ALEXANDER GORDON of Ardoch, Esq. *et alii* - - - } *Respondents.*

1751.

SUTHERLAND *v.* GORDON.

7 March 1751.

PROVISION TO HEIRS AND CHILDREN.—FIAR ABSOLUTE AND LIMITED.—A disposition in a marriage contract to the heir of the marriage in fee, with an obligation to infeft, and absolute warrandice, imports only a right of succession, and not a *jus crediti*, in a question with onerous creditors.

INHIBITION.—A right of succession under a marriage contract cannot by inhibition be made effectual against onerous creditors of the father.

[Falc. and Kilk. Mor. 4398. Kames, 12915.]

GORDON of Ardoch having adjudged upon an No. 94.
heritable bond over the lands of Little Torbol, brought an action of ranking and sale of the same. In this action Mr. Sutherland of Little Torbol, (eldest son and heir of the debtor in the bond,) appeared and produced the contract of marriage between his father and mother, whereby the father bound "himself, his heirs and successors, to infeft "his promised spouse in liferent, and the heir-male "to be procreate betwixt them in fee," in the lands of Little Torbol; and further bound himself to warrant the said infeftment to his wife, and the heir-male of the marriage, for their respective interests of liferent and fee, "from all and sundry "prior infeftments, inhibitions, adjudications, &c."

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And lastly, it was declared, that execution for implement should pass on the contract at the instance of Mr. Ross, the wife's father, against Sutherland and his heirs. He also produced an inhibition which, during his infancy, had been raised on the contract of marriage by the said Mr. Ross; and he pleaded that by virtue of it, the right of fee had been so effectually secured to him as heir of the marriage, as not to be frustrated by any voluntary security for debt subsequently granted by his father; and that the debts now founded on being all posterior in date to the inhibition, the lands of Little Torbol ought to be struck out of the sale.

Answered—That the defender was not properly a creditor under the marriage contract in competition with ordinary creditors, nor could he claim the estate under that character but only as heir to his father. By the marriage contract, the hope of succession was the only thing secured to him; the fee and absolute property of the estate remained with the father, and was therefore subject to his onerous debts; and although the inhibition secured the defender's right against gratuitous deeds, it could not alter or enlarge the original obligation.

The case being reported, the Court (4 June 1747) "found that the inhibition served upon the "contract of marriage secured the defender against "the onerous contractions of the father, after the "date of the inhibition.

A petition was presented against this interlocutor, in the answers to which, it was *inter alia* pleaded, that at all events the defender was an onerous creditor of his father for the provisions in favour of the heir under the contract, and that this had been already fixed by the Court in an action

against Ross of Aldie, who being pursued by the defender's father for part of his wife's portion, stated in defence, that he was not obliged to pay until the father implemented his part by vesting the fee in the heir of the marriage; whereupon (5 Feb. 1724) it was found 'that he ought to resign 'the lands in favour of himself, and failing him in 'favour of his son *nominatim* in fee, with absolute 'warrandice, &c. conform to the contract, before 'payment of the tocher.'

The following interlocutor was pronounced, (4th Nov. 1747:) "Having advised this petition, with "the answers made thereto, with the interlocutor "of date the 5 Feb. 1724, in the process at the "instance of Sutherland of Little Torbol against "Ross of Aldie; find 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 creditors."

Upon again considering the case on a petition, founding strongly on the clause of warrandice and a petition and answers thereto, the Court (7 Dec. 1747) altered; and found, "that the inhibition "served upon the contract of marriage, which "contained a clause of absolute warrandice, se-"cured the defender against the onerous contrac-"tions of his father, posterior to the date thereof."

This interlocutor was again altered on the 3d June 1748, when it was found, "that the inhibi-"tion served on the contract of marriage, did not "preclude the onerous creditors of the father, "though posterior to the inhibition; and found, "therefore, that the lands ought not to be struck "out of the sale."

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The appeal was brought from the interlocutors of the 4th Nov. 1747, and of the 3d June 1748.

Pleaded for the Appellant:—From the whole tenor of the marriage contract—from the obligation to infeft—from the clause of warrandice, and from the clause for execution at the instance of a trustee, it clearly was the intention of the parties that the fee of the estate should be absolutely secured to the heir-male of the marriage. Indeed, if no more than a *spes successionis* had been provided to the heir, the clause for execution would have been absurd, as the obligation in the contract itself sufficiently secured to him the right of succession, and barred all voluntary and gratuitous acts in prejudice of it.

The appellant is an onerous creditor of his father for the several provisions made in the contract in favour of the heir-male of the marriage. This is the legal effect of the deed, and has been established by the judgment of the Court of Session, in the previous case above mentioned. The inhibition, therefore, which was used against the appellant's father upon this obligation, not only disabled him from entering into engagements inconsistent therewith, but also put all other persons so contracting with him in *mala fide*. It is the effect of an inhibition to make a personal obligation as binding negatively upon all the lieges as it is positively upon the obligant; in other words, to prevent third parties from doing any thing that may disappoint the performance of the obligation. Now, here the fee was provided to the heir-male of the marriage, and warranted absolutely against all incumbrances. The inhibition passed upon both these obligations of provision and warrandice, and

consequently barred all transactions inconsistent with their complete execution. Of this nature entirely is the respondent's bond, which, if allowed to stand, must disappoint altogether these provisions in the appellant's favour.

Pleaded for the Respondent.—Where an estate is settled upon the parents in conjunct fee and liferent, and on the heirs of the marriage in fee, the power to contract debt, and to dispose of the whole for valuable considerations, continues in the party from whom the settlement proceeds. The present case falls within this rule; the fee remained with the father; and the heirs of the marriage not being *in esse* at the date of the settlement, they had only *spes successionis* subject to the father's legal power over it.

The heir of a marriage is considered in a twofold light, as heir and as creditor; as heir, in respect of deeds granted for valuable consideration, and he is liable to the burden of such; but as creditor, in regard to voluntary and gratuitous deeds, which have no effect against him. Now a clause of warrandice cannot vary the nature of the right warranted. It may be effectual to defeat gratuitous deeds, or perhaps found an action of damages against the father's separate estate; but it cannot affect the father's right of property, or prevent others from contracting with him.

In like manner, the inhibition can have no other effect than to secure those who are interested under the contract in the enjoyment of their proper rights, according to the true construction of the deed; but it cannot have the effect of extending or enlarging these rights, so as to encroach upon or interfere with the father's right of property.

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But the obligation of warrandice expressly referred only to *prior* existing incumbrances, and therefore could not secure the right of the heir against debts afterwards entered into by the father in the exercise of that right, which in point of law remained, and would have remained in him, although he had infeft the appellant in terms of the contract, as pointed out by the interlocutor of February 1724.

Judgment, 7 March 1751.

After hearing counsel: "It is ordered and adjudged, &c. that the several interlocutors complained of be, and the same are hereby, affirmed."

For Appellant, *W. Murray, Alex. Lockhart.*
For Respondents, *A. Hume Campbell, C. Yorke.*

The LORD ADVOCATE, - - *Appellant;*
LORD BOYD, *et alii*, - - *Respondents.*

28 *March* 1751.

FORFEITURE.—ACT 1, GEO. I. c. 20.—A conveyance by a father to his son after the date specified in the act, sustained—the debts charged on the estate, and for which the son became personally liable, being nearly equal to the value of the lands.

[Elchies *voce* Forfeiture, No. 8.—Falc.—Mor. 14768.]

No. 95. WILLIAM, Earl of Kilmarnock, in 1732 disponed his estate, reserving his own liferent, to his eldest