the sum, yet *nihil impediebat* but he might, in a reduction and declarator, have annulled her right to the fee; and the decisions cited are only in the case of a positive prescription, and so are misapplied here. To the *second*, Latency is no defence against the long prescription of forty years; neither does law presume an heir to be ignorant of his father's debts, but on the contrary to know them. *3tio*, Barns's obligation in 1683 favours Lady Margaret as much as him; for, as it reserves his power of quarrelling, so all the lady's legal defences are as fully, and with the same breath, reserved; which makes it as broad as long.

The Lords thought her being liferenter did not make him *non valens agere* in this case; but found his proponing compensation against the Earl in that 10,000 merks' bond, with his reservation in 1683, &c. were sufficient interruptions; and therefore his action of reduction, *ex capite lecti*, was not prescribed.

Vol. II. Page 167.

1702. *December* 23. MARGARET WALLACE *against* WALLACE of CRAIGIE'S HEIRS of LINE and TAILYIE.

MRS Margaret Wallace, daughter to Sir William Wallace of Craigie, by Niddery's daughter, pursues an aliment against her father's Heirs of Line and Tailyie; and the modification being remitted to the Lords, they first considered her portion, which is £1000 sterling, and not to bear annualrent till her age of twelve; and then her age, that is, only about three or four; and so they modified 500 merks to her yearly, till her age of seven complete; and then 700 merks till her age of twelve. And it being craved that she might have a decreet for this, against the factor of the estate of Craigie; but the creditors opposed, CONTENDING,—That the decreet of aliment could only be the ground of an adjudication against her father's estate; and in the ranking of the creditors she may compear, but in all probability may be ranked behind most of them, so little reason there is to give her a present preference upon a personal bond not yet made real; though it may be contended she ought not to starve *medio tempore;* but her mother's jointure may allow her something of it.

The Lords declined to determine the preference *hoc loco*, or to grant warrant to the factor for making present payment, but left her to her course in law.

Vol. II. Page 168.

1702. *July* 22 *and December* 29. ELIZABETH CUNNINGHAM and JOHN MIDDLETON *against* CUNNINGHAM of ENTERKIN.

July 22.—ELIZABETH Cunningham, daughter to Enterkin, showing some purpose to marry one Mr John Middleton, son to Dr Middleton in Aberdeen; and her friends being dissatisfied with the match, she is prevailed with to grant an assignation to her brother of her bond of provision containing the sum of 10,000 merks, in case she shall marry the said Mr Middleton, reserving her the liferent of the said portion for an aliment. And the said Enterkin, her brother, by his

acceptation of the said assignation, obliges him, on her marrying any other person with her friends' consent, to retrocess her to her said tocher, under the penalty of 10,000 merks more. Notwithstanding of all which, the said Elizabeth marries Mr Middleton, and they pursue a reduction of the said assignation and discharge, as elicited from her after her affection was fixed and settled on the said Mr Middleton, which was a bar and restraint put on her, contrary both to the divine law and natural right, introducing a free liberty and election in marriage, and so *contra bonos mores*, especially where there is no disparity between the parties' births, as there is none here; and though there is no great fortune brought in by the husband, yet the comfort of marriage depends not so much upon that as the adaptation of the parties' humours with one another: and therefore minors, or persons interdicted, can marry without consent of their curators or interdictors; and law annuls all deeds giving any bias or stop to the freedom of electing their partner in this indissolvable society; and besides many of the lawyers, Voet *ad Pandectas, tit. De Pactis*, says, *Improbata sunt pacta matrimoniorum libertati contraria, ut si duo sic inter se paciscantur ut uter eorum prius matrimonium iniverit, is alteri solveret certam pecuniæ quantitatem.*

ANSWERED,—Total restraints upon marriage are indeed prohibited and repudiated in law; but not where it is only a withholding them from marrying one particular person, leaving them free as to all others: Yea, Justinian, in his Novel Constitutions, goes a greater length; for those repudiate the condition adjected to a legacy left to a maid, providing she do not marry; yet, if it be left with that quality to a widow, she cannot claim the legacy if she desert her vidual state, and reënter into the married; for then she forfeits the sum left: But the case in hand is much more easy and favourable; for she being major, what was to hinder her from giving her brother an assignation to her tocher in the event of her marrying Mr Middleton? All will agree that the father could have burdened her bond of provision with that express quality and condition; and, if he could warrantably do it, why might not she do the same, seeing there is more of a *metus reverentialis* in following a father's recommendation than can be supposed here.

The Lords thought the case of importance for the preparative, it being a great benefit to girls to be restrained from extravagant marriages; therefore, they ordained it to be heard in their own presence. *Vol. II. Page* 155.

December 29.—The action Cuningham and Middleton, her husband, against Enterkin, (mentioned 22d July 1702,) being heard this day, it was ALLEGED, That both parties had submitted verbally to my Lord Whitelaw; and it was offered to be proven, that he had emitted his determination, and so *lis erat finita*. ANSWERED,—That there was *locus pœnitentiæ*, and each party had liberty to resile; and Enterkin had done so, it not being in writing. REPLIED,—Verbal submissions and decreet-arbitrals required no writ, farther than the arbiter's decision under his hand; which the Lords had found obligatory in a case, *7th February* 1671, *Home* against *Scott*; and that it was sufficient to prove, by the party's oath, that he had submitted, and, by the arbiters' oath, that they had accordingly determined. And here the submission was judicially done, and consisted with the remembrance of the whole Lords; and my Lord Whitelaw declared, he had given in his determination in writ, that the papers might be accordingly extended, and subscribed by both parties, though now one of them does not acquiesce therein. But the parties afterwards agreed. *Vol. II. Page* 170.