JUSTICE-CLERK. I see here an *enixa voluntas* in the husband to provide for his wife in a more ample manner than had been done by the marriage-contract. My only difficulty lay in this, how far Kircaldie, being the trustee and custodier of the deed, had a power to cancel it while his daughter, and her possible issue, had an interest in it? It is certain that, by cancelling it, he put them in the power of the husband.

ESKGROVE. I had the same difficulty. At the same time I could not go the length of saying that, in no case, a marriage-contract may be destroyed. Had the widow thought it of moment, and for her interest, to resort to her conventional provisions, *she* might have proved the tenor of the marriage-contract. But *that* is *jus tertii* to the pursuer. The widow not only acquiesces in the cancellation, but she also homologates it. The pursuer may have an *interest consequential*, but he has no *right*. But, supposing that he had an interest, I answer, that the heir is bound by the act of the predecessor; and I think it is proved that the predecessor consented to the cancellation.

HAILES. It has been said, in the course of the pleading, that there is nothing improper in putting an end to a marriage contract by the act of throwing it into the fire. This ought not to have been said, for the method was not only uncommon but hazardous and wrong. No man ought to step out of the common road of business. A short memorandum or docquet subjoined to the deed would have saved all this trouble to the parties and to the Court.

On the 21st July, "The Lords, having considered the special circumstances of this case, dismissed the action, and assoilyied."

Act. G. Ferguson, Ilay Campbell. *Act.* H. Erskine, R. Dundas.

Hearing on proof.

1787. *July* 25. JOHN RAMSAY *against* JAMES LISTER.

ARRESTMENT.

A prior arrester, who entered his claim before a decree of furthcoming was extracted, preferred to a posterior arrester, who brought the process, although the former, after arresting, had not proceeded in his diligence for three years.

[*Fac. Coll. IX.* 531; *Dict.* 824.]

BRAXFIELD. It is nothing to the purpose what is said concerning the quinquennial prescription. An arrester, if *in mora*, cannot stop the effect of another man's forthcoming. If a decreet of forthcoming is obtained, then the first arrestment must be preferred.

ESKGROVE. The multiplepoinding was in Court. This stopped preference by forthcoming.

On the 25th July 1787, "The Lords, in respect of the *mora* on the part of

John Ramsay in prosecuting a forthcoming upon his arrestment, found the interest produced for James Lister preferable;" adhering to the interlocutor of Lord Alva.

For Ramsay,—Edw. M'Cormick. *Alt.* J. Pattison.

1787. *August* 8. DAVID ROSS of ANKERVILLE and OTHERS *against* WILLIAM ROSS MUNRO of NEWMORE and his CREDITORS.

INHIBITION.

Inhibition not competent to render effectual, against creditors, a deed by which a person obliges himself, in favour of others, not to sell or impignorate his lands, nor to contract debt by which they may be burdened.

[*Dict.* 7010.]

BRAXFIELD. An inhibition does not give a right; it only secures a right. Sir Thomas Hope thought otherwise, but no lawyer has adopted *his* opinion. In the case of the *Heirs of Barholm* and *Dewar of Vogrie*, an inhibition on an obligation to entail was found not valid against creditors. Hence I conclude that the deed 1765 is not effectual. Neither is the deed 1774 effectual; for, by that deed, Newmore had a reversionary right, which may be affected by his creditors. But, as to the deed 1777, there is no ground of challenge proved against it at the instance of Newmore; and the creditors who contracted after the date of that deed cannot object.

ESKGROVE. Before the Act 1685, lawyers were very desirous of tying up estates; but they were at a loss to accomplish their purpose. The first difficulty that struck them was, How the interest of creditors could be provided for? This induced Sir Thomas Hope to propose an inhibition as a public notice. But I consider the Act 1685 as excluding every mode of effectual entails other than those sanctified by that act. The deed 1765 is not in terms of a legal entail. I also agree with Lord Braxfield as to the deed 1774, and also as to the third point respecting the deed 1777. As Newmore might have made a present of his estate, or given it to his heirs, he might do the same, by means of trustees, for the behoof of the heirs, and no posterior creditor has right to complain.

MONBODDO. By the Act 1685 no man can put his estate out of commerce, and at the same time retain the fee. But the deed 1777 is one which the law cannot prevent; for Newmore gives up every right of fee, and restricts himself to a liferent.

JUSTICE-CLERK. I was alarmed at seeing it argued, that, under the form of a contract for an imaginary *quid pro quo*, an inhibition could prevent the burdening of an estate with debt. This is adverse to the Act 1685, and also to the decisions in the cases of *Barholm* and of *Bryson*.