

1713. February 17.

MR. JOHN KENNEDY of Kilhinzie, Advocate, *against* SIR JAMES AGNEW of Lochnaw, and Others.

Mr. John Kennedy, as assignee by his father to a personal bond, and inhibition thereon, granted to the cedent by the late Earl of Cassillis, pursued reduction *ex capite inhibitionis*, of several rights of superiority granted by the Earl to Sir James Agnew and others, completed by infestment.

Answered for the defenders: No process can be sustained against them at the instance of the pursuer, who is only a creditor to their author by a personal bond; because, *1mo*, If a removing from possession only cannot proceed without an active title by infestment, far less should real rights clothed with infestment be removed and taken out of the way by a personal creditor, conform to the rule, *Unumquodque dissolvitur eodem modo quo colligatur*. *2do*, As no heritable right whereupon infestment hath passed can be arrested till it be made moveable, for that till then the arrester cannot insist in a forthcoming, so *a paritate rationis*, a personal creditor cannot reduce real rights, because he hath no right to the subject conveyed. *3tio*, Inhibition being only a prohibitory diligence, to hinder the person against whom it is served to alienate heritage, to the inhibitor's prejudice, the inhibitor cannot reduce any such alienation, till he hath affected the subject by some real diligence, because, till then, he can qualify no prejudice; and inhibition at the instance of one personal creditor doth not hinder another personal creditor by bond before inhibition adjudging thereafter the common debtor's estate, to be preferred to the inhibitor; Stair, Instit. Lib. 4. Tit. 50. § 19. *Quia sibi vigilavit*; so that reduction at such an inhibitor's instance would be *vos non vobis*, &c. *4to*, If a personal creditor should be allowed to reduce *ex capite inhibitionis* rights completed by infestment, the property of heritage would hang *in pendentibus*; there would be *dominium sine domino*, till the inhibitor were pleased to make up a title; vassals could not be entered, or the superior would want a vassal; and the land be either laid waste, or the rents suffered to perish in the *interim* in the tenants' hands; seeing the reducer hath no title to possess; the person whose right is reduced is barred by the reduction; and the common debtor denuded in his favours could not return to possess.

Replied for the pursuer: His inhibition entitles him to reduce the rights in the defenders' persons, though infestment hath followed thereon; because, *1mo*, The act 119. Parl. 1581, bears, That inhibitions and interdictions are used against the lieges for rescinding contracts, infestments, &c.; and President Spottiswood, p. 178. observes a practick betwixt Monteith and Halyburton, No. 18. p. 6947. where inhibition was found to give an interest to reduce any posterior deed in prejudice thereof, albeit infestment had followed upon that deed. Thus, in parallel cases, reduction *ex capite lecti* is competent to personal creditors; November 25, 1669, The Creditors of Cowper against the Lady Cowper, No. 25. p. 3203. And re-

No. 51.

An inhibition without an adjudication on the ground of it, sustained as a title for reducing posterior voluntary deeds, whereupon infestment followed.

No. 51. duction, upon the acts of Parliament 1621 and 1696, concerning bankrupts, may be pursued by any creditor. *2do*, The nature and stile of inhibition prohibits not only personal alienations, but also the granting private and public infeftments; consequently, law affords action for reducing such rights granted *lege prohibente*. *3tio*, It would expose inhibitors to a vast inconveniency, to oblige them to expedite adjudications before they know the import and effect of their inhibition, on which all their interest in the subject depends; but it is more agreeable to the rules of reason, first to bring back the property to the debtor by reduction, and then to adjudge.

Duplied for the defenders: It is true, apparent heirs, without service or infeftment, have interest to reduce rights whereupon infeftment hath followed, either *ex capite lecti*, or upon the head of idiotry; because, *1mo*, They have a present prejudice in being excluded from their possessory right, which otherwise would entitle them to mails and duties, and so is *aliquale jus in re*; *2do*, When the heritable right is reduced at an apparent heir's instance, there is no *vacuum in dominio*, but the reducer *sustinet personam defuncti*; *3tio*, Till the heritable right granted be removed, he cannot serve heir; since the inquest cannot return answer to that head of the brieve, that the person to whom he craves to be served died last vest and seised. None of which reasons take place in the present case, of a reduction at the instance of a personal creditor, *ex capite inhibitionis*, who hath no real prejudice till he acquire *jus in re*, which he may do in the course of law, without any necessity of a previous reduction; and so long as he declines to make up a title to the subject, it were hard to oblige third parties to open their charter-chests to him, by production of their writs. The allegiance, That personal creditors may reduce real rights, upon the act of Parliament 1621, is redargued by the late decision, June 24, 1709, Brown, younger of Thornydikes, against Brown, his brother, No. 48. p. 16101.

The Lords found, That the inhibition is a sufficient title to reduce the infeftments granted by the Earl to the defenders.

Forbes, p. 668.

* * Dalrympie reports this case:

Mr. John Kennedy pursues a reduction of certain bonds granted by the Earl of Cassillis to Agnew and others, with the adjudications and infeftments following thereupon, *ex capite inhibitionis*.

The defender alleged: No process for reducing the defender's real diligences and infeftments, because the pursuer hath not affected the lands adjudged by the defender by any real diligence, and consequently hath no interest to call the defender's rights to these lands, or mails and duties thereof, in question; for an inhibition cannot simply reduce posterior deeds, but only in as far as they are hurtful or prejudicial to the debt on which the inhibition is used; and as long as the inhibitor hath no real diligence against the lands in question, he is not prejudged,

because, if the defenders' posterior rights had not been granted, or diligence done thereupon, the pursuer could have had no access to the rents of the lands adjudged by the defenders.

It was answered: Inhibitions are good titles of reduction for reducing all posterior voluntary rights in prejudice of the pursuer's debt and diligence that may follow thereupon; and it were of no advantage to the defender, nor any ways reasonable, to put the inhibitor to the expense of real diligence, until the effect of his inhibition were first tried; and this case was determined *in terminis*, as is observed by Spottiswood, INHIBITION, No. 18. p. 6947. where the same allegiance being proponed for the defenders, who stood infest upon comprisings, and seven years in possession, and alleged the legal was expired, yet the Lords repelled the allegiance, in respect the inhibition gives a good interest to reduce any posterior deed in prejudice of the inhibitor; and it happens frequently in rankings, that inhibitors do compear, and are admitted summarily to reduce; and it would occasion a great delay if it were otherwise.

It was replied: That the later practice hath not allowed inhibitors to reduce real diligence upon the forementioned reason, that they cannot affect the rents upon their inhibitions; and albeit in rankings there be an indulgence as to this point, for the expedition of sales, yet that is not to be extended to other cases.

“ The Lords sustained the pursuer's title to insist in a reduction *ex capite inhibitionis* without an adjudication.”

Dalrymple, No. 99. p. 140.

1713. July 22.

JAMES DOUGLAS of Hisleside *against* WILLIAM SOMERVEL of Kennocks.

In the action of proving the tenor at the instance of Hisleside, the Lords having, 10th July instant, found, That Grissil Stuart's general service, and the renunciation granted by her, was such a mid-impediment as hindered the superior's confirmation to operate in favours of the pursuer, so as to make the infestment *a me* valid, from the date thereof, the pursuer repeated a reduction of the renunciation, upon the head of fraud and circumvention.

Alleged for the defender: *Actio de dolo*, or upon fraud and circumvention, not being a popular action competent to any person, but only to the person overreached thereby, or his representatives, Hisleside hath no title to insist in such a reduction, unless he were served heir to, or did represent, the granter of the deed quarrelled, that he might have the benefit of the reduction, in case he prevailed.

Replied for the pursuer: He hath good interest to remove Grissil Stuart's renunciation out of the way; because, *1mo*, Had not that been granted, his confirmation would have drawn back, and made the infestment *a me* a valid right of

No. 52.

Not competent to an apparent heir to quarrel a deed elicited from his predecessor, upon fraud and circumvention, until he be served heir to the person alleged to be circumvented.