

(FORMALITIES OF THE DILIGENCE.)

1753. August 3.

JOHN HYSLOP *against* GEORGE RICHARDSON.

IN the 1664, the Viscount of Stormonth granted bond to Carmichael, for 4000 merks, containing an obligation 'to infest him in all and fundry his lands, &c. wherever the same lie within the kingdom, for an annualrent of 240 merks.'

The precept of *fasine* in this bond was expressed in the same indefinite terms, and no infestment followed upon it.

The fee of this bond became vested, by adjudication, in Robert Richardson. After his death, George Richardson, one of his creditors, obtained, on the renunciation of the apparent heir, residing at Edinburgh, decret *cognitionis causa*, and adjudged the bond before the Sheriff of Edinburgh. John Hyslop, another of his creditors, brought a similar process, and adjudged the lands before the Lords of Session.

In a competition of the creditors of Robert Richardson, it was *objected* for Hyslop, That the decret of adjudication, pronounced by the Sheriff of Edinburgh, was null; for, that the whole lands of the debtor, adjudged in payment of the bond, lay without the jurisdiction of that Sheriff.

*Answered* for George Richardson, as having right to the decret of adjudication pronounced by the Sheriff: *imo*, Infestment cannot be taken on a precept of *fasine*, wherein no lands are specially expressed as the subject of the infestment. In this view, the bond of Carmichael differs not from a bond heritable by destination; it produces no real action which may be limited to the *locus rei sitæ*, but is merely a personal debt; it might therefore be adjudged *cognitionis causa* before that Sheriff, within whose jurisdiction, the apparent heir of the person having right to the bond, resided.

But, granting that infestment could have been taken, in virtue of the general clause above recited, yet, until such infestment was taken, the bond remained a personal right, having no relation to any lands whatever; and was therefore adjudgeable before the Sheriff of Edinburgh.

Further, although Robert Richardson had been actually infest in this bond, yet the adjudication *cognitionis causa* against his apparent heir, residing in Edinburgh, would have been competent before the Sheriff of Edinburgh; for that it adjudged the *universitas* of the *hereditas jacens*: Such adjudication requires neither a previous denunciation on the ground of the lands themselves, against the apparent heir renouncing, nor any valuation of the subject to be adjudged, but conveys to the creditor the whole *hereditas jacens* in payment of any debt whatever. This *universitas* has in itself no local situation; it may therefore be adjudged before that Sheriff, to whose jurisdiction the apparent heir renouncing is subject; and it would seem incongruous, to require distinct adjudications before the different Sheriffs, within whose territories the several parts of this *universitas* lie.

No II.

A decret of adjudication *cognitionis causa*, obtained before the Sheriff of Edinburgh, found null; because the lands, in the heritable bond, were not within the shire.

No 11.

This may be illustrated by a similar instance : When a co-partnery consists of various subjects, heritable as well as moveable, the heritable subjects disposed by each partner to the co-partnery, may not be affected by adjudication ; but an arrestment, laid in the hands of the co-partners by the authority of the judge, to whose jurisdiction they are subject, will carry the whole interest of any of the partners, although the heritable subjects belonging to the co-partnery be situated without the jurisdiction of the judge. Now, since an arrestment carries heritable subjects, wherever situated, because an *universitas* is arrested, an adjudication of an *hereditas jacens*, which is also an *universitas*, must carry the whole heritable estate of the deceased, wherever situated.

*Replied for Hyilop* : A Sheriff has properly no power over persons residing without the limits of his territory, nor over things situated without the limits of his territory : Hence it was, that anciently his sentences could only receive execution by imprisonment or poinding, within his county : This has been altered by law, and letters of horning and poinding may be directed on the decreets of Sheriffs. Thus, the aid of the Court of Session is necessary, in order to render effectual the decret of a Sheriff beyond the bounds of his county. The case is the same with respect to apprisings. The brief of distrefs was anciently executed by the Sheriff ; and it appears from act 37, Parl. 5. Ja. III. 1469, That no goods of the debtor could be poinded, nor lands apprifed by the Sheriff, unless they were situated within the sheriffdom ; and, whenever they were situated in different counties, letters directed to the respective sheriffs were necessary, in order that the whole might be attacked.

Such was the rule in apprisings ; and it must, of consequence, obtain in adjudications of an *hereditas jacens* : For, that such adjudication is no other than a legal disposition granted by the judge, where the debtor has failed to grant a voluntary disposition ; and no judge can grant a disposition of a subject, which lies without the limits of his own territory, unless he be specially authorized by law for that purpose.

To apply these observations to the present case : By the heritable bond in question, the Viscount of Stormonth became bound to infest the creditor in his whole lands, for payment of a certain annualrent ; the deed accordingly contains a precept for infesting. Had infestment actually been taken, an adjudication before the Sheriff of Edinburgh would have been ineffectual ; for that no lands belonging to the Viscount of Stormonth, were situated within this sheriffdom : The consequence must be the same in the present case ; for that Robert Richardson, although no infestment followed, had a personal right to the whole lands belonging to the Viscount for payment of the annualrent.

In order to illustrate what has been said, let it be supposed, That the creditor, in whose right Richardson now claims, had inhibited the common debtor, and registered this inhibition in the particular register at Edinburgh, but not in the register appointed for the counties within which all the lands of the Viscount of

(FORMALITIES OF THE DILIGENCE.)

No 11.

Stormonth are situated; it is contended, That such inhibition could not have affected the heritable bond, as having no relation to lands within the county of Edinburgh; and an adjudication before the Sheriff of Edinburgh cannot convey a subject, which an inhibition, executed at Edinburgh, and registered in the particular register there, cannot affect.

The bond in question differs from a bond secluding executors; for that it is a right to be constituted on lands, and has a relation to specific lands: It therefore is a proper subject for an apprising, or an adjudication *cognitionis causa*, which a bond secluding executors, being merely personal, is not.

It was contended, That infestment could not follow upon this bond: But this, if true, would not be material; for neither could infestment follow upon a reversion simply personal, which nevertheless may be the subject of an adjudication *cognitionis causa* before the Sheriff of that shire, where the lands to which it relates are situated: But further, infestment may follow on this bond; for the debtor in the bond consents that fasine be taken upon his whole lands in Scotland; and there seems no reason why the creditor may not execute the general precept.

The argument drawn from the effect of an arrestment in the hands of co-partners does not apply to the present case: After a co-partnership has commenced, the subjects conveyed by each partner to the co-partnership no longer belong to each partner; but the right of property in them is vested in the company, and each partner has a right only to his proportion of their value, after settling of accounts: This interest is arrestable, but the arrestment does not attach heritable subjects; for accomplishing of which the arrester must first insist in an action of forthcoming, and obtain decret against the co-partnership, and then he may affect the heritable subjects by adjudication.

An *hereditas jacens* is an *universitas* of subjects adjudicable; but the *universitas* can only be adjudged to the creditor by that judge within whose jurisdiction the whole subjects of the *universitas* lie.

THE LORDS sustained the objection to the decret of adjudication, obtained before the Sheriff of Edinburgh, That the lands of the debtor in the heritable bond, lay all out of the Sheriff's jurisdiction.

For Hyslop, G. Brown.

Alt. D. Scrymgeour.

Fol. Dic. v. 3. p. 8. Fac. Col. No 114. p. 169.

Dalrymple.

1757. November 18.

RANKING OF THE CREDITORS OF ALISON OF DUNJOP.

IN the ranking of the creditors of Dunjop, it was objected by some of the creditors, to an adjudication against the estate of Dunjop, produced by Anne and Margaret Auchinlecks, That though the summons of adjudication recited the

No 12.

An adjudication restricted, where the accumulate sum