1777. *July* 18. *November* 21 and *July* 28, 1778. GEORGE MUNRO of POINTZFIELD *against* Mr ALEXANDER WOOD and OTHERS.

INHIBITION.

An Inhibition found effectual to secure a preference in competition with arresters of the price after sale.

[Mor. *Inhib.—App. No. I.*]

BRAXFIELD. The cause has been well pleaded on both sides. I view the case in the same light as if the debt had still stood in the person of Captain Sutherland and not in Pointzfield, the purchaser of the estate; for the one steps into the shoes of the other; and it was natural and proper for the purchaser to acquire a debt secured by inhibition. I do not controvert, that inhibition is only a prohibitory diligence, and not of itself sufficient to carry right to the lands. Something more must be done: the creditor inhibiting must adjudge, and pursue maills and duties. But still there is a preference; and I have seen it allowed in rankings of creditors in the Outer-house, though I do not know that the question has ever been brought into the Inner-house. The sale is good against the creditors who had used no diligence. It might be set aside by the creditor inhibiting, not totally but to a certain effect, that of benefiting himself by drawing payment. It must follow, that the purchaser is not bound to pay till the inhibition is purged. If this is good law between the seller and the purchaser, how can it be otherwise between the creditors of the seller and the purchaser? It is in vain to say that Pointzfield purchased *spreto mandato inhibitionis.* This is strange language in the mouths of the creditors, whose only claim is upon the price in consequence of that sale. The arresting creditors can never draw till the inhibition is purged. It is the nature of an adjudication that one may adjudge when he pleases: and here there is an adjudication which is good: it is good even before reduction, and it would be good even after the purchaser was infeft. It is urged, "that an inhibiting creditor is only entitled to reduce when hurt, but that here there is no hurt; for, if he had adjudged, then the other creditors, whose debts were prior to the inhibition, would have adjudged also, within year and day." But this takes it for granted that in law all creditors are held to be *vigilant*, whereas the contrary is the fact; and, in law, there are vigilant and there are *dormant* creditors. *Here* there were dormant creditors, who neglected their interest. This is the great ground of reducing trust-rights, that they are executed to the prejudice of vigilant creditors. It is observed, "that Pointzfield gets more by the will of the letters having been contravened than he would have got if they had been obeyed." This observation, if just, would put an end to inhibitions; for inhibition is of no value unless when the letters are contemned.

MONBODDO. I have not yet discovered the *ratio dubitandi* in this case. It just resolves into this: Whether is Pointzfield the purchaser of the estate, and, having acquired Captain Sutherland's debt, barred from taking the benefit of the inhibition? As the seller did not purge, according to paction, what was

there more natural than for the purchaser to acquire the bond? Hence the case comes to this abstract point, Whether is the inhibitor to have any advantage? I never heard before of a competition between an inhibitor and an arrester, and I hope I shall never hear of it again. The question has been asked, Why did not the inhibitor arrest? The answer is obvious: Adjudication is a fit diligence to follow inhibition but not arrestment: it was not competent to arrest: the inhibitor challenges the arrestment because he challenges the sale. As to the claim of a *pari passu* preference, the inhibition cannot draw when nothing follows; but *here* it has been followed by adjudication. It is said, as an argument for the *pari passu* preference, that the creditors also have adjudged within the year: but there is a *medium impedimentum*, the infeftment by Pointzfield: the creditors might have obtained a preference by adjudging, even after the sale, if before the infeftment; but this they have neglected to do, and we cannot remedy their neglect.

KAIMES. Inhibition is personal, and does not create any real lien: it prohibits selling or contracting debt. When nothing is done *spreta inhibitione*, the inhibition has its effect: but, if the land is sold, it is no sale *quoad* the inhibitor; he may still carry off the estate *quandocunque*. With regard to the purchaser, an inhibition is an incumbrance with a vengeance. Pointzfield purchased a debt secured by inhibition. This was for the benefit of all concerned; for the price could not be paid till the incumbrance was cleared. Pointzfield cannot be obliged to give up the incumbrance before the money is paid which it cost him.

JUSTICE-CLERK. There seems little differenee in principles. I doubt as to the latter part of Lord Kaimes's opinion, that Pointzfield is only entitled to draw what he paid Captain Sutherland. His author had nothing to do but to produce his inhibition, which gave him a preference. He might have given his right away, or sold it at a compounded sum. The purchaser from him must still be in the same case with him. From Mr Boswell's report, I suppose that an erroneous practice has crept into rankings: the hearing was well bestowed for correcting that error.

ELLIOCK. I was by no means clear, but I thought that Pointzfield had so carried on his cause as to be liable to a *personalis exceptio*.

PRESIDENT. An inhibition, give it what name you please, is calculated to embarrass the estate of the person inhibited. It can be removed only in one of three ways,—it must be purged, discharged, or the purchaser must be allowed to retain his debt. Supposing Captain Sutherland were in the field, the purchaser might require the inhibition to be purged or discharged, or else to be at liberty to retain the price. The creditor can only take what the seller could, that is, the price after the debt secured by inhibition was paid. I cannot make any difference between Pointzfield and Captain Sutherland, his author. There is no occasion for an adjudication or a reduction: there is a preferable debt, and it behoved to be taken away at any rate. I once thought that the parties might have been brought in *pari passu*; but now I cannot discover any sufficient ground for that. Lord Kaimes's difficulty is removed; for the full price was paid by Pointzfield to Captain Sutherland. If it had not been so, I should still have inclined to the opinion of Lord Justice-Clerk.

On the 18th July 1777, " The Lords preferred Pointzfield on the inhibition;" altering, after a hearing in presence, the interlocutor of Lord Elliock.

For Pointzfield,—Ilay Campbell, H. Dundas. *Alt.* C. Hay, D. Rae.

1777. *November* 21. GARDENSTON. I did not vote when the cause was advised; but I have since considered it, and I am clearly of the opinion of the interlocutor. If you do not give this preference to the inhibition, you set aside inhibitions altogether. There can be no sale with respect to the inhibitor, because the sale is *spreta auctoritate* of the inhibition. The creditor-inhibitor may be forced to adjudge; but to what purpose, when he is secured without it? This would only be to multiply expenses. How can the arrester of a price compete with an inhibition?

BRAXFIELD. I am firmly of opinion as to the general point. It was said that it sounded odd that an inhibiting creditor should draw without any farther diligence. In some cases diligence might be necessary; but it is certain, in practice, that, when no adjudications are led, and when the competition is between arresters and inhibitors, money is set aside for inhibitors without the necessity of adjudications, which would only tend to increase expenses. As to the lands of Gruids, being the *second* point, It is said " that Mr Munro could not take infeftment *pendente lite.*" This might be a good argument as to the debtor but not as to the purchaser. If he has a warrant for the infeftment, he may go on, make a race of it, and see to be before the diligence of other creditors. As to the *third* point, concerning the lands in the neighbourhood of Fortrose, *that* depends altogether on the fact.

On the 21st November 1777, " The Lords adhered, as to the general point, to their interlocutor of 18th July 1777, but remitted to the Ordinary, as to the lands in the neighbourhood of Fortrose, in which it is alleged that Pointzfield is not infeft."

Act. A Wight. *Alt.* Ilay Campbell.

[Much of the month of December was employed in hearing and determining the great cause of *Wilson* against *M'Lean.*]

1778. *July* 31. MONBODDO. Mr Monro is entitled to draw in the manner most profitable for himself, and to say " there are three debts secured by arrestment and inhibition: I will draw on the arrestments." If he did this *in æmulationem* of Mr Robertson, there might be an objection, but what he does is clearly for his own profit. All he does is to depart from his inhibition, as if it had never been used: and what is there to prevent him?

JUSTICE-CLERK. If the debts had remained with the former creditors, the consequence would have been different; but how can the law make any distinction?

MONBODDO. There was nothing to hinder Mr Monro to acquire the debts during the dependance: the case would have been different had preferences been previously established, and a *jus quæsitum* to particular creditors.

COVINGTON. Mr Munro, although purchaser, might acquire the debts. This often happens.

On the 31st July 1778, "The Lords found that Mr Munro might draw on his arrestments, or on his inhibition, in his choice;" altering Lord Elliock's interlocutor.

Act. Ilay Campbell. *Alt.* W. Wight.

1778. *August* 10. JAMES SCOT *against* JOHN BRUCE STEWART.

PRESCRIPTION—UNION—SASINE.

Vide supra, 13th December 1776.

[*Fac. Coll. VIII.* 163; *Dict.* 13,519; *Supp. V.* 558.]

COVINGTON. I would not incline to depart from the judgment of the House of Lords in the cases from the counties of Forfar and Linlithgow. It is the prerogative of the Crown to make an union. Sir Thomas Craig seems to question this, but the general opinion is otherwise. It is established, by the judgment of the House of Peers, that this privilege is communicable; but when the Crown's charter authorises infeftment in a particular place, I deny that the Crown's disponee can authorise infeftment in any other place: yet I think, that as infeftment has been taken, and the years of prescription have run, that all challenge is cut off. After the years of prescription, I will presume every thing, even a dispensation from the Crown.

BRAXFIELD. I do not say that the erroneous practice in Orkney and Zetland has been so general as to make me depart from what I understand to be the law; but there has been such a practice as is sufficient to make me cautious in throwing loose the titles of these countries. The true question here is, Whether is the objection to the sasine extrinsic or intrinsic? If *intrinsic,* then the sasine is null from the beginning, and it cannot grow better by being older. A sasine may be a good sasine, though not taken on the grounds of the lands, in consequence of a dispensation from the Crown; if this dispensation is once established, it is in the power of the proprietor to communicate it to the persons to whom he makes partial dispositions. Before prescription is run, the person who produces the title must remove the objection to it; but, after the prescription, the objection comes too late: it is the great purpose of prescription to support bad titles: good titles stand in no need of prescription.

KAIMES. You must still begin with a good title of possession. The charter here is very good, but the sasine is *ex facie* defective. The holder must show that it is not defective.

MONBODDO. It is established in practice, that the Crown can give dispensation; but I am clear that a subject cannot authorise the taking sasine any where else than on the lands. As to the erection of an earldom, that makes no difference: still the sasine must be in the place which the charter mentions. It alters the case greatly, that this challenge has not been brought till after the years of prescription. The Act 1617 is our *magna charta*; I should be sorry