

1799. February 5.

GEORGE YOUNG and HENRY AUCHINLECK *against* GEORGE THOMSON.

## No 70.

Where a reverser in an adjudication had conveyed his right to a third party, who was infest, the latter was restored against a subsequent decree of declarator of expiry of the legal, because he was not a party to the action on which it proceeded, notwithstanding that the original reverser was called, and the right of his dispo-  
 nee was posterior to an inhibition used by the adjudger.

JOHN MARSHALL, in 1751, executed an inhibition against James Auchinleck, for a small debt due by him; and in 1754 he adjudged some houses belonging to him for payment of it.

In 1785, Marshall conveyed the debt and diligence to John Thomson.

In April 1786, Henry Auchinleck, the son and heir of James, the original debtor, conveyed the houses to George Young, who was immediately infest.

In July 1786, Thomson obtained a decree of mails and duties, in an action which he brought against Henry Auchinleck only.

In April 1797, John Thomson was infest in the houses, in virtue of the decree of adjudication and conveyance from John Marshall. He afterwards raised a declarator of expiry of the legal against Henry Auchinleck, in which, in November 1787, he obtained a decree in absence.

In 1790, John Thomson conveyed the adjudged subjects to his son George Thomson, who was duly infest in them.

In 1798, George Young and Henry Auchinleck brought a reduction of the decree of declarator of expiry of the legal against George Thomson, on the ground, that George Young had not been made a party to the action in which it was obtained, although infest in the subjects before its date.

THE LORD ORDINARY found, ' that the decret of declarator of expiry of the legal, formerly obtained by the present defender, cannot affect the pursuer George Young, and that, notwithstanding thereof, he is entitled to redeem the subjects from the defender.'

In a reclaiming petition, the defender

*Pleaded*; It is a fixed point, that if an adjudication be formal, a decree of declarator of expiry of the legal proceeding on it, although in absence, cannot be recalled, Ersk. b. 2. tit. 12. § 22.; Macdowal, b. 3. tit. 2. § 65.; 7th March 1794, Campbell against Scotland, No 6. p. 321.; 25th November 1794, Landale against Carmichael, No 16. p. 305. And it is not a relevant objection to the decree in this case, that George Young was not made a party to the action. If the dispo-  
 nee of the reverser be not in possession, it is sufficient to call the reverser himself; on the same principle, that, in actions of ranking and sale, the effect of which is similar to a declarator of expiry of the legal, it is necessary to call those heritable creditors only who are in possession.

At all events, George Young's conveyance is struck at by the inhibition used in 1751, now assigned to the defender; consequently, in every competition between his right and that of Young, the latter must be considered as void.

THE LORDS refused the petition, without answers.

Lord Ordinary, *Glenlee*.  
 R. D.

For the Petitioner, *Geo. Fergusson*. Clerk, *Pringle*.

*Fac. Col. No 110. p. 251.*