

No 84.  
the ground of  
diligence a-  
gainst the  
debtor's per-  
son or move-  
ables.

*alleging*, That this inhibition of this tenor could not furnish him action to reduce his bond, albeit posterior to the inhibition, seeing the prohibition extended only to the contracting anent his lands, and contained no warrant to discharge him to grant bonds on borrowed money, or the lieges to receive the same; this allegiance was repelled; for the LORDS found the inhibition of the tenor foresaid sufficient to reduce posterior bonds of money, albeit not bearing lands to be disposed therefor, in so far as these bonds might be grounds and warrants to deduce comprisings thereupon of the party's lands; but in so far as personal execution might be used against the party upon that bond, or pouding, or arrestment, or other execution upon his moveable goods, the LORDS found, that the inhibition could not strike thereupon, and that the bond could not be reduced, to want that sort of execution.

A&. Craig.

Alt. Nielson.

Clerk, Gibson.

*Fol. Dic. v. 1. p. 473. Durie, p. 574.*

\* \* \* Auchinleck reports this case :

1631. *February 23.*—THE LAIRD of Crosbie pursues reduction of a bond given to Gilbert Aitchieson, Bailie in Edinburgh, by Sir George Home of Eccles, because he had served inhibition against the said Sir George, upon a bond granted by the said Sir George to Captain Donaldson, whereunto the Laird of Crosbie was made assignee. To which reason of reduction it was *answered*, That the words of the inhibition made no mention to inhibit the lieges from taking of bonds from the person inhibited. To which it was *replied*, That the exception ought to be repelled; because, Gilbert Aitchieson had, by virtue of the said bond, comprised Sir George's lands, and had obtained infeftment upon the said comprising. THE LORDS repelled the exception, in respect of the reply.

In the same action it was *alleged*, That, although the bond be posterior to the inhibition, yet the cause of the bond was for merchandize furnished preceding the inhibition, which Gilbert Aitchieson offered to prove by witnesses. THE LORDS would not take away the force of the inhibition, by deposition of witnesses.

*Auchinleck, MS. p. 109.*

1667. *February 27.*

MR JOHN ELIES *against* WISHART & KEITH.

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Inhibition af-  
fects both *ac-*  
*quisita et ac-*  
*quirenda.*

A wadset be-  
ing acquired

MR JOHN ELIES having inhibited Elizabeth Keith his debtor, she did there-  
after acquire a wadset of certain lands within the shire, where the inhibition  
was published, and thereafter, upon payment of part of the sums, the wadset  
right was renounced *pro tanto*; and the rest being consigned, there is now a  
process of declarator of redemption, wherein Mr John Elies compares, and

produces a declarator, at his instance, for declaring the sums of the wadset to belong to him; and alleges no declarator of redemption till the whole sums contained in the wadset consigned be given up to him, without respect of the payment or renunciation of a part; because, it being done after his inhibition, it was null, and so is craved to be declared by his declarator. It was *answered, first*, That inhibitions can reach no further than to the lands the person inhibited had the time of the inhibition, but not unto lands he should happen to acquire after the inhibition; because, the inhibition bearing, that the person inhibited should not sell or alienate, to the prejudice of the user of the inhibition, albeit she should sell what thereafter she acquired, the user of the inhibition were in no other case, than when the same was published, the land being both gotten and gone thereafter; and, if that were the effect of inhibitions, every provident person would publish and register them in all the shires of the kingdom; because, they can only reach lands lying in the shire where they are registered; which was never done, neither was it ever decided, that inhibitions reached lands acquired thereafter. *2dly*, Inhibitions can never hinder persons, having right of reversion, to pay the sums, and the wadsetter to renounce; because, inhibitions only restrain, debar, and inhibit to sell, &c. but do not hinder him to pay his debt; or, upon payment of the wadset sums, to discharge the sums, and renounce the lands, these being deeds necessary, to which he might be compelled; and, if this hold, no man might safely pay an heritable bond, having infestment of annualrent, without searching the registers, which the most cautious man never did; and for this alleged the express opinion of Craig, that inhibitions hinder not discharges of heritable sums, or renunciations of wadsets. It was *answered*, That inhibitions are personal prohibitions, restraining the person inhibited, and the lieges to alienate, buy, or sell any lands, in prejudice of the user of the inhibition, and until he be satisfied of the ground thereof; which prohibition respecteth the person inhibited directly, and the lands but indirectly as they belong to him; so that there is no difference whether they belonged to him before or after; for, *hoc ipso* that they are his, they fall under the restraint; and the alienation thereof is to the prejudice of the user of the inhibition; because, if they were not sold, he might apprise the same; so that, albeit he be not in a worse case than he was the time of the inhibition, yet he is in a worse case than he would be, if the land had not been sold. And albeit, upon uncertainty, men will not register inhibitions through all the kingdom, that infers not but they might, and that they would be effectual to lands thereafter acquired in these shires; neither is there any ground to except the renouncing of wadsets, which are alienations of the wadset lands; but the redeemer, before he declare, or deliver the money, and take renunciation, he ought to search the registers, and to call those persons who have used inhibitions for their interests.

THE LORDS found, that inhibitions reached to lands acquired after the inhi-

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after inhibition, it was found, that the creditor might renounce it notwithstanding of the inhibition.

No 85. bition; but were not clear that inhibition hindered renunciations of wadsets; but superseded to give answer to that point till the first of June.

1667. *July 16.*—THIS cause, at the instance of Mr John Elies against Keiths, being disputed the 27th of February last,

THE LORDS found inhibitions to reach lands acquired after the inhibition; but superseded to give answer to that point, whether the inhibitions were to be extended to take away renunciations of wadset lands, which being now debated,

It was *alleged*, That an inhibition could not hinder the granter of a wadset to pay his debt, and accept of a renunciation from the person inhibited; because, a renunciation is but a discharge, and inhibitions were never found to take away discharges of heritable bonds, nor to hinder any party to pay his debt; but, on the contrary, it was an universal custom over all the kingdom, that debtors should pay their debts, and did accept discharges, and renunciations, without looking into the registers; which hath been most frequent, not only in wadsets, but mainly in infestments of annualrent upon heritable bonds, which no man ever doubted to pay, till he searched the registers of inhibitions, *et communis consuetudo pro lege habetur*. It was *answered, first*, That the inhibition bears, expressly, a prohibition to grant renunciations, but no prohibition to grant discharges; and, as to the custom, it cannot be shewn that persons did pay wadsets, and take renunciations from those that were inhibited; much less that the Lords, by their decisions, did approve the same; which decisions can only make a custom equivalent to law. *2dly*, Albeit where wadsets were before the inhibition, the debtor might accept renunciation; because, by the reversion, the wadsetter is obliged to grant renunciation upon payment; so that the granting of the renunciation being upon an obligation anterior to the inhibition, could not be prejudged by the inhibition, as is found in all cases; but here the wadset was contracted after the inhibition. *3dly*, The renunciation here granted was voluntarily accepted, and payment was voluntarily made, because there was a clause of premonition and requisition in the wadset, which was not used. It was *answered*, That the stile of inhibitions is no rule, seeing it prohibits the selling of goods and gear, to which no inhibition is extended; and there being no law, nor any decision, that an inhibition should be extended against a renunciation of a wadset, the common opinion, and common custom of the nation, to the contrary, is sufficient; neither is there any difference in the custom, whether the wadset be contracted after the inhibition or before; and, if there were, there is much more reason that wadsets, contracted before, should rather be subject to the inhibition, than wadsets contracted after, by which the creditor inhibitor is in no worse condition when they are renounced, than he was the time of his inhibition; neither was the payment here made voluntary, albeit requisition was not used, because, there being an obligation to pay, the delay upon the requisition be-

ing only for a few days, no prudent man would suffer himself to be charged upon the requisition ; and it is no more voluntary, than if a creditor should pay before the registration of his bond, because he could not be compelled before it was registered, and he charged ; but, seeing law and custom obliged not debtors to enquire for inhibitions, they may pay what way they please ; and, albeit there had been a requisition, yea, and a consignment, unless the debtor, after inhibition, had been obliged to call the inhibitor, it could operate nothing as to the inhibitor. It was *answered*, That there would be a great detriment to creditors, if they cannot affect wadsets by inhibition, seeing these cannot be arrested. It was *answered*, They might be apprised. It was *answered*, They might be renounced before the term of payment of the creditors debt, so that apprising could not proceed, and that a debtor's whole estate may consist in a wadset. It was *answered*, That that case could seldom occur, and that there was neither law nor custom introduced upon that account.

THE LORDS found, that the inhibition could not operate against the renunciation of the wadset ; and decided that general point by itself, for clearing the lieges ; and ordained the parties to be heard upon some other points in this particular case, as that payment of this wadset was made after the parties were in *mala fide* after process intented against him by Mr John Elies.—See a case between the same parties, No 191. p. 5987. *voce* HUSBAND AND WIFE.

*Fol. Dic. v. 1. p. 473. Stair, v. 1. p. 457. & 473.*

\* \* \* Dirleton reports this case :

1667. July 16.—THE LORDS, upon debate and deliberation, found, That a person addebted in payment of a sum upon a wadset, may pay his debt, and take a renunciation, though the creditor granter be inhibited, and that inhibitions do not affect renunciations.

The reasons that moved those that were for the decision are, *1mo*, That inhibitions do hinder the lieges to purchase from persons inhibited, but not to borrow money from them ; and, as they may lawfully pay the sums they borrow, so they may take discharges and renunciations. *2do*, When a person does grant a renunciation of a wadset, he doth not grant a voluntary right, but only a discharge upon the matter, which in law he might be forced to give, upon an order of redemption. *3tio*, A person inhibited might take payment, and grant discharge of an heritable bond, even before sums due upon such bonds became arrestable. *4to*, If inhibitions should affect renunciations of wadsets, then they could not be granted without consent of the creditor who had inhibited, even after an order of redemption. *5to*, The inhibition, where it mentioneth and prohibiteth renunciations, is to be understood of voluntary renunciations, which the party inhibited is not obliged to grant ; as *v. g.* An heritor having a base right irredeemable, should after inhibition renounce the same. *6to*, If a wadset had been granted before the inhibition, the creditor

- No 85. may renounce; because, in law, and by the contract, he is obliged upon payment to renounce, so that it is not a voluntary deed. And there is *eadem ratio* in wadsets after inhibitions, seeing the right is granted with that condition, that, upon payment, the creditor should renounce; and, as I may grant a right to a person inhibited, so I may grant it with that quality, that he should be obliged to re-dispone, in which case, he may lawfully dispone back again, notwithstanding of the inhibition.

*Dirleton, No 96. p. 38.*

- No 86. 1685. December 9. M'INTOSH and SOMMERVILLE *against* PRIMROSE.  
THE price of lands (like other moveable subjects) is not affectable by inhibition or interdiction.

*Fol. Dic. v. 1. p. 473. P. Falconer.*

\*\*\* This case is No 16. p. 5087.; *voce* GIFT of ESCHEAT.

- No 87. 1700. July 16. CREDITORS of COCKBURN of Langton, Competing.  
THE LORDS found, That inhibition extends not only to *acquisita*, to what stood in the debtor's person at the time of executing the inhibition, but likewise to *acquirenda*, if the lands lie in the same shire where the inhibition was published, as had been often decided.

*Fol. Dic. v. 1. p. 473. Fountainhall.*

\*\*\* This case is No 18. p. 1290.; *voce* BASE INFETMENT.

- No 88. 1703. December 31. OLIPHANT *against* IRVINE.  
INHIBITION as it bars alienation of lands, so it bars contracting of debt, by which lands may be attached, but it does not bar the debtor to alienate other heritable rights, nor is there any clause in letters of inhibition directed to that end; and therefore the LORDS found, that an assignation of an heritable bond, upon which infetment had not followed, though containing a clause to infet, was not reducible *ex capite inhibitionis*.

*Fol. Dic. v. 1. p. 473. Fountainhall. Dalrymple.*

\*\*\* This case is No 115. p. 5562; *voce* HERITABLE and MOVEABLE.