1666. *July* 27. L. BORTHWICK *against* KER.

No 22.

AN inhibition being raised upon the dependence of a pursuit for mails and duties, for three years preceding the summons, and in time coming during the defender's possession, it was thought that the inhibition relating only to the summons as to the three years preceding, without mention of the subsequent years, could not be a ground of reduction *ex capite inhibitionis*, in respect the defender in that pursuit was assoilzied as to the years before the summons, as being *bona fide* possessor; and albeit the summons was not only for these years, but for the time to come, as said is; and the defender was decerned to pay mails and duties for certain years after the summons; yet the lieges were not obliged to take notice of the summons, but as it was related in the inhibition.

THE LORDS were of this opinion; but the case was not decided, the pursuer having desired up his process that he might be better advised.

Adv. *Oliphant & Sir Robert Sinclair.*

Dirleton, No 36. *p.* 15.

1668. *December* 16.

SIR ALEXANDER FRAZER *against* ALEXANDER KEITH.

No 23.
Inhibition on a dependence was found ineffectual, where no judicial sentence followed, but a decree-arbitral on a submission.
See Gosford's report of this case, p. 6956. who appears to have thought that the inhibition was sustained.

SIR ALEXANDER FRAZER, Doctor of Medicine, having purchased the lands of Miekelty from Andrew Frazer, who had apprised the same from Alexander Keith, pursues a declarator of the expiring of the apprising, and of his right of the lands thereby. It was *alleged* for Alexander Keith, That he had depending actions of reduction against the grounds of the apprising, and thereupon alleged, that the said sums were satisfied before the apprising, at least by the pursuer or his author's intromissions with the rents of the apprised lands, within ten years after the deducing thereof, during which time the legal was unexpired, by the late act betwixt debtor and creditor, whereby the legal of apprisings, led since 1652, are prorogated for three years. And as to the *first* point, he *alleged*, That the ground of the apprising being a minute of alienation betwixt the said Alexander Keith and Andrew Frazer, whereby Andrew dispones the lands of Miekeltie and Stranduff to the defender, the tenor of which minute is, That the said Andrew obliges himself to infeft and secure the said Alexander in the said lands, and to purge all incumbrances thereupon; and that the price shall not be payable till the said Alexander be put in possession. There is also a commission therein granted to the defender, to purchase two expired apprisings, and to satisfy any other incumbrances, and to serve the said Andrew heir to Thomas Frazer his father, and to obtain the said Andrew infeft as heir to his father, and likewise the defender himself in the lands; so that the right the

No 23. disponer had, being only a back bond granted by Frazer to Staniwood, thereafter Lord Frazer, by which he obliged himself to denude himself of the lands of Miekeltie, in favour of the said Andrew, disponer; which back bond was apprised by the two expired apprizings, but could not reach the lands of Stranduff; because Staniwood was not infeft therein, nor did the back bond bear the same; and therefore the defender was necessitated to purchase the right of a third apprising, led at the instance of Craigivar against Andrew Fraser the disponer, as lawfully charged to enter heir to Thomas Frazer his father, who died last infeft in the lands of Stranduff; and which would have excluded any right that the defender had from Andrew Frazer; especially seeing the sum on which Craigivar's apprising proceeded was a debt due by the said Thomas Frazer to William Frazer; which William Frazer raised a pursuit thereupon, against the said Andrew Frazer, as representing Thomas his father, and raised inhibition upon a dependence; which inhibition is executed and registrated against Andrew Frazer, before he disponed the lands; after which dependence, the matter being referred to arbiters, they decerned Andrew Frazer to pay to the said William Frazer, two thousand merks out of the first and readiest of the price of Miekeltie, due by the defender, Alexander Keith, or out of any other goods or sums belonging to the said Andrew; so that the decreet-arbitral upon the submission being in the same terms, was equivalent to an assignation or a precept; and the defender, Alexander Keith, satisfying that sum, it is in effect payment of so much of the price; and Craigivar's apprising proceeding on that same sum, it was most necessary for the defender to acquire that apprising, as proceeding upon a right, whereupon inhibition was used before the minute, and upon a decreet-arbitral, in effect assigning William Frazer to so much of the sum due by Alexander Keith. The pursuer *answered*, That the defender's allegeance ought to be repelled, because the acquiring of Craigivar's apprising was altogether needless, and no way warranted by the minute, and so cannot exhaust the price; because that apprising was led ten years after the minute; and the defender having accepted a commission to do all things necessary for establishing of his own right, he ought to have served the disponer heir to his father, and to have infeft him in Stranduff, and to have infeft himself upon the disponer's resignation; or if he had found that the lands were disponed to Frazer of Staniwood upon trust, he ought to have procured the same to have been established in his person, as coming in the place of Andrew Frazer, to whose behoof the trust was; which would for ever have excluded Craigivar's apprising, being long posterior to the defender's commission contained in the minute; so that it was his own fault, that he suffered another to apprise: Neither could the inhibition have prejudged him, though prior to the minute, in respect it was upon a dependence, upon which no decreet in favour of the inhibiter could ever follow, the cause being extinct by transaction and decreet-arbitral; neither is there any process extant; neither is the decreet-arbitral equivalent to an assignation and precept, because it doth not decern Andrew Frazer to assign the sum due by the defen-

der, nor doth it declare that that sum shall belong to him, but only decerns Andrew Frazer to pay out of Keith's sum, or any other, so that thereupon no action could have been effectual against Keith, to pay the sum, but only against Frazer himself. The defender *answered*, That albeit no sentence of a judge proceeded upon the dependence, the sentence of the arbiters being *in eadem causa*, was equivalent: And whereas it is *alleged*, That the defender had a commission to perfect his own security by the price left in his hand, it was *answered*, That the commission being for his own behoof, and for his own security, he might make use of it, or not make use of it, as he pleased; especially seeing the disponer was obliged to perfect the defender's security. 2*dly*, In the minute there was no procuratory of resignation, neither were the old evidents delivered to the defender; so that he could neither obtain Frazer to be infeft, much less himself, upon Frazer's resignation, wanting a procuratory. The pursuer *answered*, That the commission being a mandate accepted by the defender, did *ex natura mandati* bind the acceptor to do diligence; neither is it to his own behoof, but was also to the disponer's behoof, that his obligements might be fulfilled, and his price not stopped: And although the minute wants a procuratory of resignation, that is no way relevant; for if the defender had required a procuratory of resignation from the disponer, or had required the writs to instruct the service, being in the disponer's hand, and had been refused of either, he had been in no fault; but without any diligence, to suffer another apprising to be led ten years after his commission, and now having taken right to the apprising himself, he cannot therewith exhaust the price, especially against this singular successor, having acquired *bona fide*, after a decreet of suspension *in foro contradictorio*, when the defender had right to the said third apprising, and alleged nothing thereupon. The defender *answered*, That he cannot be excluded from his defence by the decreet of suspension, as being competent and omitted the time of that decreet, because *competent* is only relevant against decreets in ordinary actions; but neither in reason nor custom is the same relevant against decreets of suspension, there being this evident difference, that in decreets of suspension, the reasons must be instantly verified; but in ordinary actions, there are terms assigned for proving defences, and so it hath ever been practised by the Lords. The pursuer *answered*, Albeit it was anciently the custom to admit competent and omitted only against decreets upon ordinary actions; yet by an act of sederunt in *anno* 1648 or 1649, the same was extended to decreets of suspension; and albeit through neglect of the clerks, the act hath not been booked, the session being interrupted by the war shortly thereafter ensuing, yet it is notoriously known, and was in practice *anno* 1653, when the decreet was obtained against this defender, whereupon the apprising proceeds; and that practice was both just and necessary; for if decreets might be suspended as oft as the suspender can produce another writ, the most solemn sentences should be made insignificant; for the ground of excluding things competent and omitted, is not only that public sentences upon compearance are as

No 23.

No 23. valid as transactions, which, upon no pretence, can be rescinded, that pleas be not perpetual, but also because they are omitted *dolo et animo protrahendi litem*, which is ever presumed, unless another cause be assigned, wherefore they were omitted as *noviter veniens ad notitiam*, which is sustained even as to decreets in ordinary actions; and if in no case competent and omitted be allowed in suspensions, we shall have no more decreets in ordinary actions, but the defenders will still be absent, and will suspend as often as they can find different grounds; as if of one sum, one have twenty or thirty several receipts, he will raise as many subsequent suspensions, which will at least serve for as many sessions; and though it should be alleged *quod dolo omisit*, it would not be relevant: So that if the suspender can purge his fraud, either as not knowing of the writ, whereon he hath again suspended, or as not then having it presently in his power to instruct it, would be sufficient; which clears the difference betwixt decreets of suspension and other decreets, to operate no further than that, in suspensions, the fraud is purged, by showing that the writ was not *ad manum*, which is not so in ordinary actions, where terms would have been assigned to get the writ; and albeit the Lords might, by modifying great expenses, bar the multitudes of suspensions, they could hardly do it justly, if of the law it were no fault; and it is known, the Lords are neither in use of, nor have time for such modifications.

THE LORDS superceded to give answer as to this point, till the accounting proceeded as to the particulars; but the LORDS had no respect to the allegeance upon the inhibition, seeing no decreet followed, nor upon the decreet-arbitral, which they found not equivalent to an assignation or precept; but the LORDS found the commission contained in the minute, not to oblige the defender, as to any diligence; and therefore found, That as to that point, he might acquire the third apprising, which would have excluded him, albeit he might have prevented it by diligence.

Stair, *v.* 1. *p.* 571.

*** Gosford reports this case:

1666. *Dec.* 16.—IN the declarator pursued of the expiration of the legal reversion of the lands of Midbelty, at the instance of Sir Alexander Fraser of Durris, physician to his Majesty, against Alexander Keith, from whom the said lands were comprised, there being several points controverted, the following interlocutors were pronounced. The case was, That by a minute in *anno* 1636, Andrew Fraser of Midbelty did dispone to the said Alexander Keith, the lands of Midbelty, with the teinds, bearing an obligement to purge all real burdens, and particularly two comprisings at the instance of one Drumie and one Mortimer; and in case of failzie, giving a power and factory to Keith to purge the same, and to obtain the disponer infeft as heir to his father or goodsire, for which Keith was to pay the sum of L. 15,000.

In *anno* 1647, the disponer did pursue a count and reckoning, and obtained decreet for 7000 and odd hundred pounds, as the remainder of the price; and likewise in *anno* 1653, got a decreet of suspension, finding the letters orderly proceeded, whereupon he did comprise the whole lands disponed; and the legal being expired, did dispone the right thereof to the said Sir Alexander, who thereupon did pursue this declarator. It was *alleged*; *1mo*, That the defender had acquired a right from a third compriser, not mentioned in the minute, as likewise a right to the tiends, and had been forced to pay Sir Andrew Ramsay a part of the remainder of the price, he being assigned thereto by the said Andrew Fraser. No 23.

To which it was *answered*, That all these were competent and omitted the time of the decreet of the suspension, and could not be obtruded to the pursuer, who was a singular successor, and did *bona fide* acquire.

THE LORDS did not decide as to the relevancy of that allegeance, though the most inclined that it was not relevant upon a decreet of suspension, and not proven *in prima instantia*; but ordained first trial should be taken if the particular sums were necessarily and profitably given out.

2do, It was *alleged*, That the acquiring of the third comprising could not be allowed, because, by the minute, Keith had power to infeft his author; and if he had made use thereof, the third compriser could have no right, being deduced in *anno* 1648. THE LORDS found, That that power and factory was in favour of Keith, and did not oblige him, but he might make use thereof as he pleased.

3tio, As to Sir Andrew Ramsay's sum; It being *alleged*, That in a decreet of suspension upon a reason of double poinding, Sir Andrew did concur by his procurator, that Andrew Frazer should be preferred, which was equivalent to a retrocession, and so Keith needed not to pay him, the LORDS found, That that sum ought to be allowed notwithstanding, because the concurrence was not by any special mandate; and notwithstanding thereof, Sir Andrew did use all execution, and incarcerated Keith until he made payment, whereupon he suspended the decreet, and raised a reduction long before any right made to the pursuer.

1669. *Feb.* 2.—THE said parties being again heard in the foresaid declarator of the expiration of the legal, the pursuer did insist that the sum wared out for acquiring a right to a third comprising from Forbes, could not be allowed, notwithstanding of the first interlocutor; because Keith having both a procuratory and the whole price in his hand, and in possession, as he might have infeft his author *debito tempore*, so if he suffered any new incumbrance to come upon the estate, it was his own fault, and his author should not suffer therefor. To this it being *answered*, That Keith having got a factory only *in subsidium*, and failing of his author's perfecting his security, to secure himself by purging the lands, which the time of the minutes were not affected with this third compri-

No 23. sing, but yet upon the ground thereof, there being an inhibition before the minute, and soon thereafter a decreet-arbitral, decerning a part of the price of the land, due by Keith, to be paid in satisfaction thereof, which was intimated by arresting in Keith's hands;——The Lords adhered to their former interlocutor, allowing the purchase thereof.

Gosford, MS. No 65. p. 23. and No 101. p. 36.

1670. *June* 17. Langlands *against* Spence of Blair.

No 24.
It was the practice in regalities, to execute inhibitions at the head burgh of the regality, not at that of the shire.

Langlands pursues Spence of Blair for reduction of his rights of certain lands granted by Hamilton of Blair, his author, because Hamilton was inhibited at the pursuer's instance, before he granted these rights to the defender. It was *alleged* for the defender, absolvitor, because the inhibition was null, the question being of lands lying within the regality of Culross, and the inhibition was not executed at Culross, the head burgh of the regality, but at Perth, the head burgh of the shire; and for instructing that Culross was a regality, the Lord Colvil's infeftment was produced, which though it bear not expressly a regality, yet it bears a bailliary, with power to repledge, which imports a regality; and accordingly the bailie, and not the sheriff, makes count in Exchequer, and briefs are directed to the bailie, and there is produced an inhibition *anno* 1657, and another in *anno* 1666, executed at Culross. The pursuer *answered*, That Culross was never denominated, holden, or repute a regality, but a bailiary, and though the power of repledging be a special privilege of regality, yet there are many other privileges thereof, not consequent upon the repledging. 2*dly*, The pursuer having followed the ordinary course, used the time of his inhibition, viz. by executing at the market cross of the head burgh of the shire, he hath produced three inhibitions about that same time, executed as his is; so that what was then holden repute to be the head burgh, is sufficient for him to make his legal diligence subsist; and for the inhibition executed at Culross in *anno* 1657, it cannot be respected, because it is known that at that time regalities were suppressed by the English; and for the inhibition in *anno* 1666, it might have been done of purpose, *pendente processu*, and cannot regulate the custom the time of the pursuer's inhibition, which was in *anno* 1633.

The Lords sustained the pursuer's inhibition, and reduced, for they neither found it clear that Culross was repute a regality, nor that the custom was to execute inhibitions there at that time, but at Perth, the head burgh of the shire.

Stair, v. 1. p. 681.