

1759. *November 16.* CHAPMAN *against* BRYSSON.

[*Fac. Coll. II, No. 211.*]

THE President and all the Lords, except my Lord Kaimes, were of opinion that this entail, wanting a clause irritating the contravener's right, did not bar onerous alienations, and that the inhibition could not go farther than the obligation which was the ground of it.

22d *January 1760.*—Adhered to this judgment. *Dissent.* Kaimes and Auchinleck.

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1759. *December 11.* M'KINNON *against* SIR JAMES M'DONALD.

THIS was a question that went very deep into the nature of our feudal rights and records: it concerned an alienation of lands made by an *interim* heir, who had made up his titles and possessed, Whether such alienation was good against the nearer heir, when he existed?—And the Lords were all clear upon the general point, that the interim heir had no more than a resolvable or defeasible property, and which, accordingly, was resolved by the existence of the nearer heir; and that, therefore, any right flowing from him must, in that event, be resolved likewise. It was observed, that, by the principles of the Roman law, no heir could enter while there was an heir *in spe*; and so the Lords once found, in the case of *Lord Leven*; and the remedy then was, that the estate was managed by a *curator bonis*. But this was found inconvenient; and it was likewise thought more agreeable to the feudal forms that the fee should not be kept vacant.

This was altered in the question about Sir George M'Kenzie's succession, and the remoter heir was allowed to enter; but that never could give him an absolute right to the estate, but only put him in the place of the *curator bonis*, with this difference, that, being in the right for the time, he would be entitled to put in his pocket the rents of the estate, after payment of the annualrents of the debts.

The only question in this case was, What powers of administration the interim heir had? That he had the power of ordinary administration was not doubted; but the question was, Whether he could sell any part of the estate for necessary or at least rational purposes?

The Lord President and Lord Justice-Clerk thought that, being, as it were, tutor for the child unborn, he could not, like an ordinary tutor, for the most necessary cause, sell any part of the estate without the authority of the Court; but the Lords, before answer, ordered an inquiry into the necessity of this sale, and the price at which it was made. (See *infra*, 26th *November 1762.*)