

Johnston had a *forum* here, and that an arrestment, by the law of Scotland, at the market-cross of Edinburgh, pier and shore of Leith, was valid: if so, why may not a decret of forthcoming go against him? And if he pays upon such decret, surely that will be a good defence to him against paying over again in Ireland, or any other country in the world, as much as voluntary payment. Nor is the case parallel of the *corpora* of goods belonging to Captain Wilson being in the possession of Captain Johnston, for these *corpora*, not being within the territory, could not be attached by the diligence of our law; but Captain Johnston's person being here *fictione juris*, any personal decree could go against him; and the consequence of the President's doctrine is, that if my debtor's debtor resides in a foreign country, though he may be a native of this and have an estate in it, yet I cannot get at him otherwise than by suing him in that foreign country, which in some cases may be impracticable, as in England, where there is no method known of attaching a debt due to my debtor. If this were law, it would be a great bar to commerce and credit, by depriving the subjects of this kingdom, in many cases, of the benefit of the salutary diligence of arrestment.

With respect to Prestongrange and Justice-Clerk's opinion, they said it went so far as to set aside even arrestments of Scotch debts in the hands of Captain Wilson's debtors residing here; that the rule of law upon which their opinion was founded was departed from by our practice in the matter of succession, and, *a fortiori*, it should be so in this case where the consequence of it would be to annul legal procedure, and to deprive men of the benefit of legal diligence.

Upon a full hearing in presence, the assignees were preferred by a small majority.

---

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

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

Two parties, A and B, agree to tailie mutually their lands in favour of one another and a certain series of heirs, and accordingly B took a disposition of his lands to himself and certain heirs, of whom A was one, with prohibitive and resolute clauses, but without any clause irritating the contravener's right; but upon this entail no infeftment was exped, nor was the entail recorded, so that B's right to the lands was merely a personal right. B sold the lands to C, and having charged him for payment of the price, he suspended, alleging that A had interpellated him from payment, and accordingly A appeared in the process, insisting that B could not sell the lands because they were under an entail of which he was the third substitute; and further, he said that he had executed an inhibition against B, previous to the sale: The question was, Whether B could sell the lands?

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, so that, as B was under no obligation not to alienate for an onerous cause, the inhibition could operate nothing; neither was C *in mala fide* to bargain with B though he knew of the entail, because he knew at the same time that, by law, the entail did not hinder him from selling.

\* The decision in this case is mentioned already, but the argument of Lord Kaimes was, by mistake, omitted.

On the other hand, Kaimes said, that, as the right in the person of **B** was only a personal right, there was no question about an entail, which only concerns real rights to lands, so that all the regulations of the statute 1685 were out of the question, which only was, whether or not a convention betwixt two parties concerning the alienation of lands might not be made effectual by an inhibition; and as it is now established by practice that a negative obligation, as in this case, not to alienate, may be made effectual by an inhibition, as well as a positive obligation to pay or perform, he saw no reason why the inhibition in this case should not have its effect; nor did he contend that the inhibition should operate farther than the obligation, for the obligation was not to alienate even for an onerous cause, and under this quality and condition **B** had accepted of the right. It is very true, this quality would not have availed to hinder the alienation, if **B** had completed his right to the lands by infeftment, because a real right to lands cannot be fettered or clogged otherwise than is directed by the statute 1685; but personal right to lands may be qualified with any condition, and in passing from hand to hand will be affected by every deed of the author. If, therefore, there had been no inhibition in the case, the purchaser must have taken the subject with the burthen of giving it up as soon as the succession devolved to **A**, and much more will this hold when the lieges were put upon their guard by an inhibition. He further said that every man, knowing of a prior and preferable right that another has upon a subject, is *in mala fide* to bargain for the subject; and he put the case of a man taking a second disposition to lands when he knew of a first, and upon that second disposition getting himself first infeft: such a right, he said, would be reducible upon the head of fraud.

Nevertheless the contrary opinion prevailed, with a reservation to **A** to insist in an action of damages against **B**, when his right should take place, by the succession opening to him.

1760. *January 22.* This case was mentioned before, 16th November 1759. This day it was brought under review, and the Lords treated the question in this abstract way:—**A** man makes an entail of his lands, with prohibitive and resolute clauses, but without recording it, and without a clause irritating the right of the contravener: the heir of this entail uses inhibition against the maker; and the question was, Whether this inhibition made the entail effectual against the purchaser?

The President was of opinion that this was a way of making an entail, not agreeable either to the statute 1685 or the common law; not to the statute, because it was not recorded,—nor to the common law, because it did not irritate the right of the contravener, which the constitution of our feudal rights requires. And as to the inhibition, the only use of it was to publish a tailyie or any other obligation that was of itself valid, but it would not make a tailyie valid that was otherwise invalid: and with him agreed a great majority of the Lords; *dissent.* Auchinleck and Kaimes.