

of the agents. The result was, that the Court has established certain regulations, so that the business of the Court may be preserved in its due course, without interruption, and these appear to be dictated with great propriety. We have not here a matter relating to the private interests of individuals, but to the regulations of practice in a Court of justice. The impropriety of calling for your Lordships' interference, in a case like this, as far as I know, never occurred before.

“ Attempts have been made in this country, at different times, to draw into discussion in one Court, what had been matter of regulation in another. But the moment such a purpose was perceived, it was put a stop to. None of such parties ever fell upon the absurd scheme of calling for the interference of your Lordships in such a case. I am sorry that a different temper prevailed upon the present occasion.

“ I know the body of writers to the Signet to be of great respectability ; but we are all aware of the warmth and animosity that are apt to arise in discussing rival interests, as in the present case. I must blame the appellants exceedingly for not having obeyed the regulations laid down upon this occasion by the Court ; and, to mark the displeasure of your Lordships with their conduct, I move that the interlocutors complained of be affirmed, with £100 costs.”

It was accordingly

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed, with £100 costs.

For the Appellants, *Wm. Adam, John Clerk.*

For the Respondents, *Ed. Law, Chas. Hope, Ad. Gillies, Thos. W. Baird.*

SIR ROBERT PRESTON of Valleyfield,

*Appellant ;*

EARL OF DUNDONALD and his Creditors, and  
ROBERT WATSON, Common Agent in the  
Process of Ranking and Sale of his Estates,

} *Respondents.*

House of Lords, 13th April 1802.

SUPERIOR AND VASSAL.—CLAUSE OF PRE-EMPTION—REAL OR PERSONAL.—In the original contract of feu between the superior and vassal, there was no pre-emption clause or obligation to give the superior the option of purchasing, in again disposing of the subject; but it was alleged that this was understood, and in a subsequent disposition of the subjects by the vassal to his brother, the latter

1802.

PRESTON  
v.  
EARL OF  
DUNDONALD,  
&c.

1802.

---

PRESTON  
v.  
EARL OF  
DUNDONALD,  
&c.

granted a back bond, becoming bound to give the superior the first option of purchase. This latter party was never infeft; and the clause in the bond never entered into the subsequent dispositions or infeftments. He conveyed these subjects to trustees for the behoof of the Earl of Dundonald. The trustees entered into possession, and then divested themselves in favour of the Earl, into whose other estates it merged, and was confounded with them as held of the crown. When the Earl's estates came to be sold by his creditors, the superior objected to the sale of Kirkbrae, on the ground of the above pre-emption in his favour. Held in the Court of Session that the right of pre-emption, in virtue of the back bond, was not a real burden on the lands, and could not be effectual against creditors. In the House of Lords the case was remitted for reconsideration.

Sept. 4, 1745. By a feu contract, of this date, General Preston and Sir George Preston, Bart., conveyed a parcel of land called Kirkbrae to General James Cochrane. The consideration paid was £257. 13s. 4d.,—the lands to be held under the granters, for the annual payment of £1 of feu duty.

It was alleged that it was understood between the parties, at the time of granting this conveyance, that the General and his heirs were not to be at liberty to dispone this small piece of land to any stranger without first offering it for sale to the superior. But no stipulation of this kind, and no obligation to give an option of purchase to the granters, appeared in the feu contract, or infeftment which immediately followed thereon.

June 30, 1750. It was alleged, however, that this condition of the right was established *aliunde*; namely, by a disposition of this piece of land by General Cochrane to his brother Charles Cochrane, and a back bond of even date with the disposition, in which the latter was taken bound, “ that in case the  
“ said Charles Cochrane, or his heirs and successors, should  
“ at any time hereafter, sell and dispose of the said lands,  
“ that the said Sir George Preston and his heirs should have  
“ the first offer thereof, for payment of the sum of £257.  
“ 13s. 4d. sterling; and for a further sum of £50 money fore-  
“ said, which the said Charles Cochrane had laid out in in-  
“ closing and improving the said lands, with annual rent of  
“ the said two sums from the term of Whitsunday following  
“ the Martinmas at which such sale shall be made; there-  
“ fore the said Charles Cochrane bound and obliged him,  
“ his heirs and successors, that in case they should at any  
“ time hereafter sell and dispose of the said lands, they

“ should first make offer thereof to the said Sir George  
 “ Preston, at the said sum of £257. 13s. 4d. sterling, being  
 “ the price paid by the said Charles Cochrane therefor, and  
 “ of the said additional sum of £50, being the money laid  
 “ out in inclosing and improving the same: But declaring  
 “ expressly, and under which declaration these presents  
 “ were granted and no otherwise, that in case he the said  
 “ Sir George Preston and his foresaids should not incline to  
 “ purchase the said lands for their own proper use, then the  
 “ said Charles Cochrane and his foresaids, should be at  
 “ liberty to sell or dispose thereof to any other person or  
 “ persons they please.”

1802.  


---

 PRESTON  
 v.  
 EARL OF  
 DUNDONALD,  
 &c.

Charles Cochrane was never infest. He conveyed his own estate of Culross, including Kirkbrae, to trustees, for behoof of the respondent, the Earl of Dundonald. The trustees entered into possession of Kirkbrae along with the rest of the lands, and then divested themselves in favour of the Earl.

The tenure of this little possession was forgot, and confounded with the mass of the Culross estate, which was held of the crown, whereas it was held of the appellant, a subject superior.

The Earl having fallen into insolvent circumstances, his estates were adjudged by his creditors, and a ranking and sale brought of them. The estates, including Kirkbrae, were about to be sold, when a petition was presented to the Court, by Sir Charles Preston, heir of Sir George Preston, setting forth, that the adjudications raised could not affect Kirkbrae, but only such estates as belong really to the Earl of Dundonald. That the Earl was not heir at law either of General James Cochrane, or of Charles Cochrane, and had no title to Kirkbrae except through James' conveyance to Charles, Charles' disposition to the trustees, and the trustees' conveyance to his Lordship, all of which remained *personal* rights, and were not clothed with infestment; and these personal rights not having been adjudged specially by the adjudications, they could not carry Kirkbrae to the creditors; but the same remained *in hæreditate jacente* of James Cochrane; also explaining the *tenure* by which this property was held—stating that he was ready to pay the sum mentioned in the back bond for a reconveyance, and therefore praying the Court to order Kirkbrae to be struck out of the sale. Some years before this petition was presented, an action had been brought by the late Sir Charles Preston, insisting that he had a right of pre-emp-

1802.

PRESTON  
v.  
EARL OF  
DUNDONALD,  
&c.

Nov. 21, 1781.

tion, that the tenure was subject to that right, and ought to be inserted in all the infeftments regarding Kirkbrae; in which, after opposition on the part of the Earl, the Court pronounced this interlocutor, "That the tenor of the back bond and obligation libelled on ought to be inserted in all the subsequent titles and investitures of the piece of ground in question; and decerned and declared accordingly."

Nov. 20 and  
21, 1798.

When the present petition was presented, the Earl and the creditors gave it their opposition. The Court were first of opinion that the petitioner had a right to redeem the lands upon payment of the sum mentioned in the petition; but afterwards, on reclaiming petition, finally pronounced this interlocutor: "The Lords find that the right of pre-emption claimed by Sir Charles Preston, in virtue of the back bond, is not a real burden upon the lands of Kirkbrae; and, consequently, cannot be effectual against the creditors; and, therefore, that these lands must still be sold for payment of the debts due by the common debtor, in terms of the act of roup." On reclaiming petition the

Dec. 7, 1798. Court adhered.

At this stage of the proceedings the petitioner died, and was succeeded by the appellant, who brought the present appeal to the House of Lords.

*Pleaded for the Appellant.*—The interlocutor finds, that the right of pre-emption claimed by virtue of the back bond is not effectual against the creditors of the Earl of Dundonald, because it is not a real burden upon the lands of Kirkbrae. The appellant admits that it is *not a real burden*, but he denies that therefore it is not effectual against the noble Lord's creditors. A real burden is that which appears *upon the record* as a clog upon the right of the person who appears to be the proprietor, *by the record*. The whole doctrine of *real* burdens proceeds upon the supposition of a real or complete feudal right in the imposer of the burden. Every person who contracts with a feudal proprietor has a right to allege that he contracted on the faith of the record; and can be affected by nothing which the record did not point out as a charge *on the property*. But the case is totally different when the right of property is merely *personal*, that is, when there is no feudal right established in him, or nothing which enters the record. The creditors, or persons contracting with the proprietor, can then only take or attach the estate *tantum et tale*, as it stood in the person of

him they dealt with, and must be affected by every obligation, respecting the property, however latent, which could operate against such proprietor himself. Upon this rule it is that the present case rests. Such a purchaser, contracting with one who has only a *personal right*, does not rest on the security of the records; but contracts at his own peril, and must, if he takes the right, accept of it as it stands with all its burdens. The feudal right is at this moment in the heir at law of General James Cochrane as *in hæreditate jacente* of him; and Lord Dundonald is not that heir. He is not even heir by apparenacy, but holds a mere personal right. If the title had been made up and feudally completed, in Lord Dundonald having the clause of pre-emption regularly deduced and included therein, the present question could not have arisen; but when the respondents adjudgers ask your Lordships to view the question on the supposition that all this was done simply because he was under an obligation to do it, they ask what is both repugnant to law and equity. Dealing, therefore, with the question as one of *personal right*, the doctrine of real burden does not affect the question; but that *personal right* can only be taken up burdened with all the conditions by which it is affected. At all events, it was clear from the terms of the back bond, that the right of pre-emption applied only to voluntary, and not to judicial sales. In the whole circumstances, therefore, the appellant's demand for pre-emption, and to have the lands struck out of the sale, on payment of the sums mentioned in the conveyance, ought to be granted.

*Pleaded for the Respondents.*—The right claimed by the appellant under the back bond cannot affect the respondents, who had previously attached by diligence of the law the right of their debtor to the lands, which *ex facie* was unlimited, so far as regards the power of alienation. The clause of pre-emption, as here conceived, creates nothing but a personal obligation; and as it is an encroachment upon the power of alienation, it must be unfavourably viewed. But supposing the clause to import a legal obligation between superior and vassal, yet such burden, to be effectual against creditors and singular successors, must be created in a particular way, known in the law and practice of Scotland, and which in no particular has been adopted in the present case. Besides, the pre-emption clause does not appear in the original feu contract between the appellant's ancestor

1802.

---

PRESTON  
v.  
EARL OF  
DUNDONALD,  
&c.

1802.

PRESTON  
v.  
EARL OF  
DUNDONALD,  
&c.

as superior, and the respondents' predecessor, but only in the back bond stipulated to a third party, and can therefore have no effect.

After hearing counsel, it was

Ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, and particularly to find, whether the back bond given by Charles Cochrane, 30th June 1750, as mentioned in the pleadings, is not a real burden on the lands of Kirkbrae, it having been found by the interlocutor of 20th December 1781, "That the tenor of the back bond and obligation libelled on ought to be inserted in all the subsequent titles and investitures of the piece of ground in question;" which, by a decree of the Court of Session, in a process of non-entry, remains in the superior's hands, together with the mails and duties thereof, and will so continue, aye and until the lawful entry of the righteous heir; and also to find, whether the terms of the said back bond, supposing it a real burden, are not sufficient to entitle the appellant to a pre-emption.

For Appellant, *Wm. Adam, A. Maconochie.*

For Respondents, *Ad. Gillies, J. P. Grant.*

NOTE.—The case in December 1781, is reported in Morison, p. 6569. Under this remit, the Court of Session found, (6th March 1805, Fac. Coll. XIII., p. 456, App. M. Personal and Real, No. 2,) "That Charles Cochrane, who granted the back bond in question in favour of Sir George Preston, had only a personal right to the lands of Kirkbrae, which never was completed by infestment, either in his favour or in that of his successor, Lord Dundonald: Find, That the said back bond *never was inserted* in the titles of the said lands, though ordered to be so by the interlocutor of this Court in 1781; therefore, find it unnecessary to determine, whether, if the back bond had been so inserted in the titles, and infestment had followed, it would or would not have constituted a real burden on the lands. But find, that the personal right in Charles Cochrane, and his successor Lord Dundonald, did remain qualified by the condition in the said back bond in favour of Sir George Preston; and that the adjudication led by the creditors of Lord Dundonald can only attach the said personal right, subject to the said condition: Find, That such interest as Lord Dundonald has in

“ said lands is properly comprehended in the summons of sale.  
 “ Therefore find, That Sir Robert Preston has now right to redeem  
 “ said lands, on payment of the sum of £307. 13s. 4d., mentioned in  
 “ said back bond, and decern accordingly.”

1802.

\_\_\_\_\_  
 VISCOUNT  
 ARBUTHNOTT,  
 &c.  
 v  
 SCOTT, &c.

Professor Bell, in a note in his Commentaries, as to this case, says, (vol. i. p. 28,) that “ though the judgment does not determine the effect of the back bond, and so the point is not precisely decided ; yet the judges, in delivering their opinions, had no doubt of the efficacy of such a condition, if inserted in the titles. And Lord Armadale, in particular, stated, that his father in law, Lord Justice Clerk M‘Queen, and Lord Justice Clerk Miller, were, clearly of opinion, that such clauses constituted a real burden.”

The RIGHT HON. VISCOUNT ARBUTHNOTT, } *Appellants;*  
 THOMAS GILLIES, and Others, . }  
 JAMES SCOTT of Brotherton, and the Re- }  
 presentatives of the deceased CHARLES } *Respondents.*  
 FULLERTON of Kinnaber, and JOHN WEB- }  
 STER, . . . . . }

House of Lords, 25th May 1802.

SALMON FISHING—DAM DYKE—IMMEMORIAL POSSESSION—RES JUDICATA.—The upper heritors on the river North Esk complained of the dam dyke erected by a lower heritor, of a certain construction, without any openings or gaps being left to afford a passage for the fish upwards, and apparently to benefit his fishings below. They also founded on an agreement, which bound him to leave an opening in the dam dyke for the passage of the fish. The defence to the action was, 1. Res judicata, by a decree in 1769, settling the rights of parties ; and, 2. Immemorial possession of the dam dyke, as so constructed, which was necessary for the supply of the defenders’ mills with sufficiency of water. The Court of Session, after a proof, sustained the defences. Reversed in the House of Lords ; and held, that it was obvious, from the structure of this dam dyke, that the object was as much to serve the purpose of the defenders’ cruive fishing as their mills, and therefore that it ought to be altered, so as not to injure the access of the fish to the upper grounds, while the service of the mills could not be enjoyed or exercised emulously, negligently, or otherwise, in prejudice of the rights of fishing, nor to a greater extent than what was fairly necessary for a supply of these mills.

The appellants are proprietors of salmon fishings in the river North Esk. Further down the river, and about two