

1635. February 3.

Ross against Dick.

ONE Robert Ross, son to the Lo. Ross, pursues William Dick for reduction of a contract made betwixt the said William Dick and Sir John Home of North Berwick, anent the alienation of the said lands to the said William, *super capite inhibitionis*, as done after the said Robert Ross's inhibition, executed against the said Sir John, upon his bond of 12,000 merks, debtful to him by the said Sir John. And the said William Dick *alleging*, That albeit the said contract was posterior to the inhibition, yet it depended upon causes preceding the same; for the said Sir John being debtor to the said William in diverse sums, and also to diverse others his creditors, which other creditors had security of the said lands for their debts, before this contract now quarrelled, it was very lawful to the said William Dick, to the effect he might get security for payment of his own debt, to take the said security of the said Sir John's lands, wherein he has obliged himself to pay the said other creditors, who had security of the land by infestment, before the contract quarrelled; so that these rights being perfected to the creditors before this inhibition, the subsequent contract, albeit after the inhibition, yet depending upon the said other rights preceding the same, cannot be reduced; seeing this pursuer may yet comprise the reversion of the said contract, and take the lands, by payment of the other preceding sums. This allegiance was repelled, for the LORDS found, That this contract now quarrelled, could not be sustained, being done after the inhibition, as if it had depended upon the prior securities; in respect it was a new security, not made in favour of the creditors, who had securities expedite before this contract; but was made in favour of William Dick, another party, who had no right made to him of these debts by these creditors, whose real securities preceded this inhibition, and whose securities did subsist unprejudged, by the falling of the contract, which was made as said is, betwixt Sir John Home and William Dick, who was a stranger to the other creditor's rights; and therefore this contract was reduced, as done after inhibition, and not having any dependence upon a right preceding the same, whereunto the said William Dick had good right.

Act. Advocatus.

Alt. Gilmore.

1635. Feb. 6.—THIS cause, which is mentioned Feb. 3. 1635, being again this day called, and the parties heard in presence of the Lords; it was found, That the contract of alienation of the lands of North Berwick, made to William Dick by Sir John Home, after the date of the pursuer's inhibition, ought not to be reduced upon that reason, as done after his inhibition, where the said contract depended, and was made for fulfilling of bonds preceding that inhibition; in the which bond the debtor was obliged to give infestment, either in wadset or of annualrent, or where the said contract was made, according to prior infestments granted to other creditors, before the said inhibition; which contract

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A sale of lands not reducible *es capite inhibitionis*, where the purchaser was taken bound to apply the price in payment of incumbrances on the lands prior to the inhibitor's right, because the inhibitor could qualify no benefit by the reduction.

The defence was also sustained, that the price was to be applied in payment of debts prior to the inhibition, on which no infestment had been taken, but which the debtor was bound to secure by infestment.

The reduction was sustained *quoad* debts due prior to the inhibition, but for which the debtor had not bound himself to grant heritable security.

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the LORDS found not to fall, for the reason of the said preceding inhibition, where the same contained no other head, nor no more than was granted in the said infestments, perfected to the creditors, who were infest before the contract, and where the same contract contained nothing but the obligation and perfecting of the infestment, whereto the debtor had obliged himself, by his bond to his creditors, before the said inhibition; and respected not the reply, whereby the pursuer answered, that the contract being made with William Dick, who had not acquired the right of the preceding creditors their infestments, but being a new security, done after his inhibition, however it might have been sustained to the creditors themselves, or to their assignees, yet cannot be sustained to this party, who had contravened the inhibition; which was repelled, seeing the party pursuer received no prejudice thereby; for that which, in the person of other creditors, would have excluded the pursuer's inhibition, might alike have the same effect in William Dick's person, who had paid the creditors, and who had resigned their rights of infestments in his hands, he being infest upon this contract in the lands libelled: But whereas the said contract contained any other head, which had no dependence upon a cause preceding the inhibition, and which the debtor might have been compelled to fulfill, upon the ground of a preceding obligatory clause, the LORDS found the contract, in these points, as done *post inhibitionem*, ought to be reduced; and because the defender also alleged, that the contract was in some points perfected, for satisfaction of preceding bonds of money, addebted to the creditors, and whereupon they had served inhibition before this pursuer's inhibition, and before his bond, which is the ground thereof; and that the pursuer alleged and replied, that these preceding bonds of borrowed money, and inhibition before the pursuer's bond, could not be received, to sustain this contract, which had no cohesion together; and if the defender had any ground of priority of inhibition before the pursuer's bond, he might reduce thereon, but it could not be received in this place, by way of exception. THE LORDS, for shortening of pleas betwixt parties, found, That they would *hoc ordine*, and in this same place, discuss this allegiance upon the priority of the defender's debt and inhibition; for if he thereby might, in a reduction, annul the pursuer's bond, then the contract quarrelled might lawfully subsist for that debt also; and it was found, that it might summarily be cognosed and disputed betwixt the parties as conveniently in this process, without multiplication of more processes, and without farther vexation of any of the parties.

Act. *Advocatus*.Alt. *Nicolson & Gilmer*.Clerk, *Scot*.*Fol. Dic. v. 1. p. 476. Durie, p. 748. & 752.*

\* \* \* Spottiswood reports this case :

1635. Feb. 6.—ROBERT ROSS, son to the Lord Ross, convened William Dick of Braid, to hear and see a contract of alienation, with the infestments following

thereon, made by Sir John Home of North Berwick, to him, of the said lands, reduced *ex capite inhibitionis*. *Alleged*, The contract could not be reduced, albeit posterior to the inhibition, because it had a dependence upon prior necessary causes, viz. debts whereupon infestment had followed, or for which the debtor was obliged by his bond to infest, or inhibition was made, and that before the pursuer's inhibition. *Replied*, There is nothing here craved to be reduced, but that which is done after the serving of the inhibition, *et sic spreto mandato judicis*; and the contract being a voluntary deed after the inhibition, must be reduced; and if the defender will maintain himself by any anterior right, it may be done in its own place, but cannot stay the reduction of this voluntary deed after the inhibition: And as to that part of the allegiance, that the contract hath dependence upon prior inhibitions, that cannot be received *hoc loco*, to take away the pursuer's inhibition *ope exceptionis*, but he must reduce upon it. THE LORDS assolizied from the reduction, in so far as the contract had a dependence upon the causes mentioned in the allegiance; and for the inhibition, they received it to be discussed *hoc loco*, and would not put the defender to a reduction, *ad minuendas lites*.

*Spottiswood, (INHIBITION.) p. 179.*

\* \* \* This case is also reported by Auchinleck :

1635. Feb. 3.—ROBERT ROSS, son to my Lord Ross, to whom Sir John Home of North Berwick was addebted the sum of 1200 merks, pursues William Dick for reduction of a contract passed betwixt him and the said Sir John, anent the disposition to the said William Dick, of his lands of North Berwick, *ex capite inhibitionis*. It is answered by William Dick, That this contract cannot be reduced *ex capite inhibitionis*, because the whole sums which he had taken to pay by his contract were all owing by Sir John before the pursuer's inhibition, and he could not be affected with this posterior inhibition, because, as every one of the creditors might have taken infestment and security for their just debt from Sir John, notwithstanding of this posterior inhibition, so might William Dick contract with the said Sir John for payment of the said creditors lawfully. To which it was answered, That the allegiance ought to be repelled in respect of the inhibition, discharging all the lieges to block, buy, or bargain with the person inhibited, in the defraud of the inhibitor; and although the creditor might pursue every one of them upon their prior rights and infestments, yet William Dick might not contract with the debtor, nor use that right not depending upon prior infestments, in prejudice of an inhibition which is real, nor could, by contracting with the common debtor, make prelation of any creditor to any other, at his pleasure, in defraud of him that served inhibition. THE LORDS found the reason of the reduction relevant, notwithstanding of the answer.

*Auchinleck, MS. p. 111.*