formal assignations thereto, duly intimated. Sir Robert Sinclair produced a bond granted to him by the Lord Ballantyne and Earl of Dalhousie, containing a corroboration of an assignation to my Lady's jointure; it was *objected* against this by the other creditors, that they behoved to be preferred, because his assignation was not intimated, and theirs were. *Answered*, It needed no other intimation but Dalhousie's signing the bond; for, to whom were they obliged to intimate it, except to him? and that was sufficiently supplied by his being obligant in the bond and assignation. *Answered*, Private knowledge is not equivalent to an assignation, but it must be a legal one, which can only be by a notary and instrument, that being an essential solemnity to complete assignations, as was found, Durie, p. 128. 25th June 1624, Adamson against M'Mitchell, No 61. p. 859. 2*do*, Though the assignation be *in eadem compore* with the bond, yet Dalhousie was not concerned in the assigning part; that belonged to Ballantyne to look to, and therefore it is to be presumed he regarded only the bond, and not the assignation, as was found in a parallel case, the last of November 1622, Sir John Murray *contra* Durham, No 56. p. 855. 3*tio* Dalhousie was not the sole party to whom it should have been intimated, but the tenants who pay it, were also concerned, as Stair insinuates, tit. ASSIGNATIONS, § 8. *Duplied*, Legal knowledge of an assignation may be sundry ways inferred, besides an intimation; such as, by writing a missive letter, or paying a year's annualrent; and the subscribing of an assignation is as strong as any of these cases. 2*do*, Though a witness is not bound to know the contents of a writ, yet a party obligant is bound to know what he subscribes. THE LORDS preferred Sir Robert Sinclair, and found there was no necessity of any other intimation, except Dalhousie's subscribing the writ, which sufficiently supplied it. *See* ASSIGNATION. *Fountainhall, v.* 2. *p.* 397.

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and a bond containing a corroboration of an assignation, the bond, being prior, was preferred, as the debtor subscribed it; which was considered to be equivalent to intimation.

1709. *January* 11.

Competition between SIR ALEXANDER COCKBURN of Langton's CREDITORS.

No 94.
A competition between three sorts of creditors, inhibiters, adjudgers, and voluntary disponees. *See* short account of the case in the synopsis.

IN the ranking of Sir Alexander Cockburn of Langton's Creditors, a competition arose betwixt three sorts of creditors. Some had inhibited and adjudged; others had adjudged, but for debts prior to the inhibition; a third class had got voluntary rights and infeftments of annualrent, but posterior to the inhibitions. The inhibiters raise a reduction of the annualrenter's rights, and obtain a decreet. The annualrents being thus removed out of the way, the simple adjudgers being within year and day of the inhibiting adjudgers, crave to come in *pari passu* with them, in virtue of the 62d act 1661 between debtor and creditor, making them all joint proprietors, as if they had been all contained in one apprising; and in the division to affect the subject effeiring to their sums, as if the annualrents had never been granted. Against which the inhibiters con-

No 94. tended, this was both unequal and unjust; for the annualrenters were clearly preferable to you, the simple adjudgers, and would have excluded you to the end of the world; and if I have removed them by my negative and prohibitory diligence of inhibition, you can reap no benefit by my diligence, but I must come in to these annualrenters' place, and draw the share that belonged to them; and for what remains of the estate, the annualrenters will affect the same before the simple adjudgers get any thing; for *si vinco vincentem te, tunc te vinco;* and if I debar the annualrenters, who debarred you, then *multo magis* I debar you. By the first scheme, the simple adjudgers may draw something; by the last, they may be totally secluded, and get nothing. In the ranking of the creditors of Nicolson in 1697, in Miln of Carriden's, case, No 92. p. 2876., the simple adjudgers came in with the adjudgers inhibiters; but in the ranking of Sir James Cockburn's creditors on the price of Dunse, the inhibiters were found to have right to the annualrenter's share, ay, till the debt contained in the inhibition be paid, but did not extend it to the accumulations in the adjudication.* And it was urged, that unless an inhibition had this effect, it would be altogether elusory, and make the adjudgers who had neglected that step of diligence almost as good as the inhibiter. *See* this standard laid down by Stair, *lib.* 4. *tit.* 35. And parallel cases were cited out of Huber, *ad tit. qui pot. in pign.* and *Sande decis. frisiæ lib.* 3. *tit.* 12. *def.* 6. THE LORDS thought it of great importance for the readier expedition of rankings to fix the standard, and, without varying, to make it a rule *pro futuro;* and therefore some of the Lords proposed to have some days to think better on it, which was yielded to.

January 20. 1709.—THE competition of the Creditors of Langton, mentioned January 11th, was decided, and the vote being stated, whether the creditor-inhibiter, who had likewise adjudged, was only to be preferred, in so far allenarly as he would have been, in case no posterior annualrents had intervened; or if he, upon reducing the infeftments of annualrent, the ground whereof is posterior to his inhibition, must come in his place, and have the full sum contained in his inhibition made up to him? It carried, that he should only draw a share, in so far as the annualrenter prejudged him, and as if the annualrent had never existed, but to have his full sum. The Bench, consisting of thirteen, it splitted six against six, so it carried by the Lord President's vote. It was started, that the LORDS might determine, if the annualrenter might not recur and carry away the simple adjudgers' share till he was paid, they being posterior to him, though he was forced to yield his place to the inhibiter-adjudger; but this not being fully pleaded was not decided at this time. *See* ASSIGNATION.—INHIBITION.

Fol. Dic. v. 1. *p.* 184. *Fountainhall, v.* 2. *p.* 479. & 482.

*** Forbes reports the same case:

SEVERAL of Archibald Cockburn of Langtoun's Creditors having procured infeftments of annualrent upon his estate, all the rest did thereafter adjudge with-

* *See* INHIBITION.

in year and day of one another; some of which adjudgers had used inhibition against the common debtor, before his granting the infeftments of annualrent; and some had not inhibited, but their debts were contracted before the others' inhibitions. In the ranking of these creditors, it was *alleged* for the inhibiting adjudgers; That they by their inhibitions being in a case to reduce, and clear the estate of the posterior annualrents, should, by virtue of their adjudications, come in place of the excluded annualrenters, and draw full payment of the sum for which they did inhibit; notwithstanding that in a competition with the simple adjudgers, they could not obtain full payment, had there been no posterior annualrenter, but these simple adjudgers would have come in *pari passu*; v. g. Supposing the common debtor's estate to be 12,000 merks, affected by adjudications at the instance of three creditors for 5000 merks each, after the granting an infeftment of annualrent effeiring to 6000, in favour of another creditor one of which adjudgers had inhibited the common debtor, before the date of the infeftment of annualrent; the rule of division is, the annualrenter first draws his 6000 merks, but then the inhibiter removes the annualrenter, and saves his whole 5000 merks; and so has 1000 merks more as his third part of the 12,000 merks: Thereafter the annualrenter recurs upon the simple adjudgers, and draws his 6000 merks, leaving them only 1000 merks betwixt them; for though inhibition is no positive, it is not simply a prohibitory diligence, but also it is preparatory, and operates fully in behalf of the user for security of his debt, *ut nihil illi desit*; and he, *qui sibi vigilavit*, by using inhibition, should reap the sole benefit of it; so that the inhibiters may justly allege against the co-adjudger's *vinco vincentem*, viz. the annualrenters, *ergo multo magis vinco te* the simple adjudger, excluded by the annualrenter without recourse; seeing the brocard *vinco vincentem* takes always effect except when it runs in a circle of creditors supplanting one another; and though the inhibition cuts off the annualrents, in so far as they prejudice the inhibiter, these are good rights against the simple adjudgers affecting *unamquamque glebam* of the remainder of the estate; seeing the simple adjudger hath nothing common with the inhibiter, but what remains of the estate after deduction of the preferable annualrent, which is as real a diminution thereof, as if it were a partial right of property or wadset; whereas an inhibiting adjudger is bound to acknowledge neither annualrent nor reversion; yea, he would even remove an annualrent exhausting the whole estate, though the simple adjudger in such a case would get nothing, as having nothing to affect by his adjudication. Again, if the simple adjudgers, cut off by the annualrenters, were brought in *pari passu* with the inhibiting adjudgers who removed these annualrenters, in the case of simple adjudications to the value of the estate, those whom the annualrenters, had it not been for the others' inhibitions, would have quite excluded, would reap by the inhibiter's diligence equal benefit as themselves, which is absurd. But, on the contrary, to clear that the simple adjudgers can have no benefit by the inhibitions; if an infeftment of annualrent were granted after one of four or five

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No 94. adjudgers had inhibited, before the rest adjudged; when these adjudgers have divided and exhausted the estate with the burden of the annualrent, the inhibiter may come after the year and day and adjudge; and then, by reducing the annualrent, may carry the whole value of it without any regard or relief to the prior adjudgers; besides, inhibition is a legal diligence, securing the inhibiter against all posterior voluntary deeds of the inhibited debtor, till the inhibition be satisfied by payment.

Answered for the annualrenters and simple adjudgers; No inhibiting adjudger can receive advantage, more than he can have loss by the contracting of debts after the inhibition; nor doth the security or diligence of the posterior creditors accrue to him, as come in their place; but seeing the simple adjudgers' debts were contracted before the inhibitions, and their adjudications, by the act of Parliament 1661, come in *pari passu* with those led by the inhibiters, the latter have no further benefit by the inhibitions, than to draw their shares of that proportion of the common burden of the annualrents, that otherwise would affect them, as if these annualrents were not in being; v. g. An estate worth L. 6000, being to be divided betwixt two adjudgers, whereof each is creditor in L. 4000, and an annualrent corresponding to the like sum, anterior to the adjudications, but posterior to an inhibition used by one of the adjudgers; the annualrenter gets L. 2000, the simple adjudger L. 1000, and the inhibiting adjudger L. 3000; because, the L. 4000 of annualrent left but L. 2000 of the estate free to both the adjudgers, L. 1000 to each; whereby the inhibiter wanted L. 2000 of what he should have got, had there been no annualrenter in competition; which, therefore, is made up to him out of the annualrenter's share. This was made the rule of ranking *anno* 1692; hath been ever since observed, except in the single case of the Creditors of Dunse,* which resolved in a consent; and was confirmed *in foro contradictorio*, *anno* 1697, in the case of Carriden against the Creditors of Nicolson, No92. p. 2876.; so that being established by authority *rerum perpetuo similiter judicatarum*, for a matter of 18 years, (except in a singular instance,) it is turned into a customary law, *L.* 34. *L.* 38. *ff. de Legibus*, *L.* 1. *C. Quæ sit longa consuetudo*; and there are sufficient reasons for observing this standard in the ranking of creditors. That inhibition doth not communicate the right inhibited, is clear from the stile thereof, which discharges the granting rights in prejudice, &c.; and the stile of reduction thereon, which reduces in so far as prejudicial, &c.; so that an inhibition cannot be imagined to convey any thing, unless we could fancy contradictions, that a prohibition is a constitution, or a reduction a creation; yea, a communication of right betwixt co-adjudgers needed a particular statute in the year 1661. How can adjudgers, on debts prior to the inhibitions, be prejudiced by the inhibiter's taking up the annualrenter's place, and throwing them back upon the simple adjudgers? 2*do*, Had the annualrenter renounced his annualrent before the competition, must not the inhibiter be content to take his equal share with the adjudgers? Or, might not the annualrenters ly by till the adjudgers are ranked, and get their shares in land or money, and then require their money from the

* *See* Inhibition.

simple adjudgers; which the inhibiting adjudger, who derives no right from them, cannot hinder? 3*tio*, It is *petitio principii* that the co-adjudgers upon debts, before the inhibition, affect only the free subject, deducting the annualrents; for they adjudge the property with the burden of these annualrents, as servitudes thereon. The same rule holds, though the estate were wholly exhausted with annualrents, so as the simple adjudgers would in effect get nothing; for still the inhibiting adjudger will draw no more from one of these annualrenters inhibited, than he would if no such annualrent existed. Again, it is the same thing, though, in lieu of an annualrent, the inhibited debtor had disponed a part of his property; for even in that case, the inhibiter can adjudge that property only *in quantum* he could draw thereof from the co-adjudgers, if there had been no such disposition prior to their adjudications. 4*to*, *Posito absurdo*, That the inhibiting adjudger came fully in place of the posterior annualrenter, and that the right of annualrent accrued to the inhibiter; the annualrenter, after the inhibiter has drawn his proportion, cannot seek the same over again, or its price out of the estate, in prejudice of the simple adjudgers; because that were twice payment of the same debt. 5*to*, Not a farthing of what the annualrenter loses in a competition with the prior inhibiting adjudger, can come off the simple adjudgers; because no person who incurs eviction through his own fault or deed, has any recourse even upon real warrandice against such as were innocent thereof; seeing *culpa cuique sua non alteri nocet; non debet uni per alium iniqua conditio inferri;* and *ita est* that the annualrenter suffers only by his own fault, in taking a right of annualrent after the inhibition. 6*to*, The estate is to be considered as at the time of the ranking, when creditors prior to the inhibition have adjudged, and thereby carried away so much of the property from the inhibiter, and not as it was at the executing of the inhibition; because the inhibiter is no further eventually prejudiced by the annualrenter, but his prejudice ariseth *aliunde* from the concourse of co-adjudgers; and if the inhibiter were allowed more benefit by the annualrent than to salve his own proportion of the property, with respect to the concurring adjudgers; the inhibition would not in the least prejudice the annualrent which contravened it, but only the innocent simple adjudgers who did nothing contrary to it, upon whom the annualrenter shifts forward, to repair what he wants by the inhibiter; and *qui facit per alium, facit per se.* An inhibition hath not in all cases its full effect till payment, but only to annul posterior deeds, in so far as hurtful or prejudicial thereto; albeit an arrestment bear, ay till payment be made, or caution found for that effect. The brocard, *vinco vincentem, &c.* holds only in a subordination and succession of rights depending upon one another, and not where every one's right is independent, and contrived by choice for his own security. The reason why the annualrenters refused to go into the scheme proposed by the inhibiting adjudgers, although apparently more beneficial to them, was, because there were as many inhibiting adjudgers prior to the annualrents, as would exhaust the whole estate; and the annualrenters having once chased the simple adjudgers out of

No. 94.

No 49. the field, the inhibiters would take all from the annualrenters; therefore the annualrenters chused rather to join with the simple adjudgers, from whom they would draw a share, without being obnoxious to a back-stroke from the inhibiters, than by concurring with them in prospect of more, to serve but, as the cat's foot in the fable, to pull out the chesnut for another.

Replied for the inhibiting adjudgers; All intended by the act of Parliament 1661, was to supply the distance or ignorance of creditors, by making all apprisers within year and day to come in alike, as if they had been in one apprising, without any innovation as to inhibiters or annualrenters; for apprisers before that statute might have come in *pari passu*, had they either apprised *simul et semel*, or concurred to apprise by a common trustee; and the whole adjudgers being in effect only joint proprietors of that part of the estate that is unexhausted by the annualrents, the inhibiters removing the annualrenters, have the sole benefit of their diligences, and the annualrenters are preferable for the remainder, in so far as not carried away by the inhibiters; for the inhibiter reduceth the annualrent *quoad* the annualrenter, in order to affect it by his adjudication; and the subsequent adjudgers are not wronged by the inhibitions, but by the annualrents that are preferable to them. 2*do*, It is ridiculous to move a question about an annualrent extinguished; for who can doubt but the annualrent being extinguished, the inhibiting adjudger must come in contentedly with the simple adjudgers, when he hath no prize upon an extinct annualrent, nor can by his inhibition obtain repetition of what is paid, seeing *debiti soluti nulla condictio*.

The Lords found, That in the present competition the inhibiting adjudgers can only draw such a share, as would have belonged to them, if there had been no annualrent granted posterior to their inhibitions; and that they cannot have right to the remainder of the whole sums in their inhibitions, before the annualrenters can draw any share in the said competition.

For explicating this difficulty in the ranking of creditors, a third scheme was offered to the Lords: Supposing an estate of 12,000 merks, to be divided among three persons, creditors in 5000 merks each, viz. an inhibiting adjudger, an annualrenter prior to his adjudication, and posterior to the inhibition, and a co-adjudger within year and day of the inhibiter's adjudication, for a debt anterior to the same; the inhibiter's 5000 merks must first be laid aside, because law prefers him to the annualrents; then the annualrenter draws his 5000 merks; and thereafter the co-adjudger draws his share out of the remainder, and what fell to the inhibiter; so that the 7000 merks must divide equally betwixt the inhibiter and co-adjudger. Nor can the inhibiter grudge this, or come back upon the annualrenter; because here the annualrent-right did him no prejudice; his prejudice arising only from the act of Parliament bringing in the co-adjudgers *pari passu*, which is *res inter alios*. This scheme was learnedly and ingeniously illustrated by instances out of the Roman law, and a decision of the Court of Frizeland; but because the Lords did not consider it advising, I shall

no further insist in it, to perplex a matter that is already but too much embarrassed. No 94.

Forbes, p. 303.

*** The same case is also reported by Dalrymple:

LANGTON's affairs having gone into disorder in the beginning of the year 1690, about the time of his retiring, he grants many heritable bonds of corroboration, whereupon infeftments followed before any adjudications could be expede, and there were also many inhibitions, some older, some later, before the granting of several of these bonds of corroboration; and the creditors did all generally adjudge within year and day. The debts and diligences did far exceed the debtor's estate; whereupon a competition of creditors arising, several questions did occur which had never formerly been determined, especially in the ranking of simple and inhibiting adjudgers and annualrenters; which questions were pleaded and determined without names of parties, but upon the nature of their several rights and diligences.

For the annualrenters it was *alleged;* That their infeftments of annualrent being prior to all the adjudgers, they were preferable, and their annualrents payable in the first place before an adjudger could draw any share of the rents.

And for the inhibiters, That the sums in their inhibition must be fully satisfied before the posterior annualrenters could draw any share.

And for the simple adjudgers on debts anterior to the inhibitions, That the said inhibitions could not be any ways prejudicial to their debts, but that they as co-adjudgers with the inhibiters ought to draw the same share as if no inhibitions had been used.

These several propositions being all severally founded upon known principles of law, in case of competition betwixt any two of the three contending parties, but not reconcileable to one another in the competition of simple and adjudging inhibiters and annualrenters, which was the case that lay before the Lords to be decided;

THE LORDS, after many hearings *in præsentia*, and very mature deliberation and reasoning among themselves, did at last come to establish certain rules for determining the present question, and the like that might occur in other processes of ranking, which of late had fallen to be more frequent; and the decisions more accurate, in regard of the late acts of Parliament anent the sale of bankrupts estates.

The rules established by the Lords were these, *first*, That an inhibiter adjudger did not simply reduce posterior annualrenters, but only in as far as these annualrenters were prejudicial to the inhibiter; and found, that inhibiters would draw such a share of the rents, or in case of sale of the property of the estate, as would have belonged to him if no posterior voluntary rights had been granted; and found, that anterior creditors, adjudging within year and day of the

No 94. inhibiter, could not be prejudged by the inhibition; but that anterior creditors adjudging, would draw the same share of the common debtor's estate, as if there had been no inhibition used.

By this decision, the inhibiter did not obtain full payment of the sums in the inhibition before the annualrenter could draw any share, nor did the annualrenter lose all, but a part only; nor was the annualrenter allowed to recur upon adjudgers for anterior debts for making up that share which the inhibiter reduced and cut off: as for example, suppose the case, that the subject affected is worth 12000 merks, and that there are three adjudgers *pari passu* for 5000 merks each, and one annualrenter effeiring to 6000 merks, and that one of the adjudgers is also an inhibiter before contracting the annualrenter's debt, the division falls thus; the three adjudgers for equal sums do first divide the 12000 merks in equal parts, whereof each draws 4000 merks, and thereby lose each a 1000 merks; the annualrenter being a common burden on the subject affected, and preferable to all the adjudications, claims 2000 merks from each of the three adjudgers, as a stock effeiring to his annualrent; but the inhibiting adjudger strikes off his claim by virtue of his diligence of inhibition: but the posterior adjudgers having no defence, the annualrenter draws 2000 merks from each of them, whereby the inhibiting adjudger gets his full third share with the co-adjudgers, but loses a 1000 merks of his whole sum, and the annualrenter loses 2000 merks, and gets 4000 merks, and the co-adjudgers get each 2000 merks of the remaining 4000 merks.

According to this rule, the LORDS did uniformly determine in all subsequent rankings and sales for several years, and the rules are found practicable in all the variety of cases that did occur in the several processes of sale, which have been very frequent since that time; but thereafter, in the case of Carriden, there happened a special circumstance, which had not been pleaded when the rule was established, and some alteration had also happened on the bench since that decision; whereupon the whole foundation of that rule and decision was called in question, and often debated *in præsentia*, and several bills; and after a review and full consideration of the case, the LORDS did proceed upon the same foundation, and strengthened the former rule.

Carriden's case occurred in the competition of the Creditors of Cockburnspath, a part of Nicolson's estate, and he being an inhibiter, and also an adjudger within year and day, 'THE LORDS found his adjudication null;' but he insisted as inhibiter for reducing the right of several debts after his inhibition, whereon adjudication had been led within year and day of other adjudgers on debts anterior, alleging that he could not be wholly excluded, while these adjudgers on posterior debts were admitted to a share of the price, for he could still adjudge, whereby his adjudication would be drawn back to his inhibition, and always be preferable to such adjudgers whose debts were posterior to his diligence.

To which it was *answered:* That his adjudication could afford him no share, because, setting aside all the posterior creditors, the diligences on anterior debts were far beyond the value of the subject of the competition; and seeing his in-

hibition could not prejudge these anterior debts nor diligences, it afforded no prejudice to him that posterior creditors, by their diligence, came in *pari passu* to get a share with anterior creditors; because though these posterior debts had never been contracted, Carriden was utterly excluded, and his inhibition was only a prohibitory diligence, whereupon he could not reduce posterior debts simply, but in so far as they were prejudicial to his debt, and his after adjudication could not state him in the case of these posterior annualrenters, so as to make the benefit of their annualrents accresce to him. No 94.

Upon the several debates in that case, the LORDS at last by their interlocutor the 15th of February 1698, found that an inhibiter cannot be prejudged by posterior debts, nor anterior creditors prejudged by an inhibiter; and found that the contracting of debts after an inhibition, could not be profitable to an inhibiter, nor does their diligence accresce to him; and that therefore Carriden could draw no share of the price of Cockburns-path. *See* No 92. p. 2376., and *voce* INHIBITION.

According to these rules, all the rankings have ever proceeded uniformly without any contradiction. But of late, in the competition of the Creditors of Langton, that rule was again called in question; and, upon a petition several times moved by the inhibiters, a hearing allowed *in præsentia*, in which it was alleged that the rule above set down could not consist with the true effect of an inhibition, which was not only a prohibitory, but a preparatory diligence; and that an adjudication coming after, whether within year and day of other adjudgers or not, was always to be drawn back to the date of the inhibition, so as to remove all posterior annualrents or other diligences on posterior debts; and these being removed, the inhibiter fell to come in to get the full payment of the debts in his inhibition, at least to the extent of the voluntary rights, and then the annualrenter being preferable by the nature of his right and security, came in the next place to get the full payment preferable to posterior co-adjudgers; as for example, in the case formerly stated of a subject to the value of 12000 merks, and three adjudgers for 5000 merks each, and an annualrenter effeiring to 6000 merks, the annualrenter, as preferable, draws first his share of 6000 merks, which is set aside; so the remaining 6000 merks being divided in three, each adjudger gets 2000 merks; but the inhibiting adjudger recurs upon the annualrenter by virtue of his diligence, from whom he draws 3000 merks more to make up his 5000 merks: then the annualrenter, by the nature of his right, being preferable to the co-adjudgers, recurs on them, from whom he draws the said 3000 merks: so remains only to the co-adjudgers 1000 merks.

For enforcing this, the inhibiter insisted upon the nature of the diligence, *alleging*, That the adjudger's diligence reached nothing but the reversion over and above the annualrent, which was preferable upon every part of the subject adjudged, and therefore the inhibiter getting his full share by virtue of his adjudication and inhibition, the annualrent lay upon the shares of the co-adjudgers; and it often happens, that an inhibiter gets a better share by reason of posterior voluntary rights, than he would have had without them: as for example, suppose that in place of a right of annualrent, a posterior creditor ob-

No 94. tained either a proper wadset, or a redeemable right of a part of the debtor's estate, and being thereupon infeft, was preferable to the posterior adjudgers; in that case the inhibiter would have an equal share with the co-adjudgers if within year and day, and what were wanting would be made up to him, by affecting the wadset or right of property made after his inhibition, wherein the co-adjudgers would have no share nor interest, and by that means the full sum in the inhibition would be made up, and he in a much better condition than he would have been if no posterior right had been granted; and suppose again, that this inhibiter had not adjudged within year and day, he would indeed have had no share in the reversion or superplus with prior adjudgers, but his diligence would have been drawn back to procure to him full payment of the sums in his inhibition, at least so far as the value of the posterior voluntary right did extend to; and there is no reason that the case of an inhibiter should be worse where there is a posterior annualrent, than it would be if a proper wadset or partial right of property had been granted.

To all which it was *answered;* That there was no reason offered to make any alteration in the rules laid down by the Lords upon full debate and mature consideration, and of purpose to be a direction in the like cases, and which had now obtained by the space of eighteen or nineteen years, and whereupon every perplexity that has happened in the ranking of creditors has uniformly been resolved, and the rule applied agreeably to the principles of law, without injustice to the inhibiter, or any cause of complaint; and as the acts of sederunt of the Lords of Session are the most solid rules of their decisions in time coming, so few acts of sederunt have ever been made upon so full and mature consideration, and to overturn it now would imply no small reflection, and shake the trust and confidence that the leiges ought to have in their acts of sederunt and uniform decisions; and it would appear most incongruous, that, during the space of so many years one rule should be followed, during which time more rankings have been determined than for 100 years before, and that the same rule should be altered now, without the intervention of any new matter of fact or material circumstance; which would put the leiges in a perpetual uncertainty, and give a just grudge to multitudes of creditors, whose interest had been determined on the former rule, and possibly occasion the reversing of many former decreets; which are all weighty inconveniencies, and should require some evident and pregnant consideration to balance them.

2*do*, As to the rules themselves, they are most just and equitable, and nothing material objected.

The fundamental rules are, 1*mo*, That an inhibiter cannot be prejudged by posterior debts. 2*do*, That an anterior creditor can no ways be prejudged by an inhibition; whereas, by what is now pleaded, an inhibition would strike more effectually against the prior creditor, than the posterior annualrenter; for though the inhibiter recurs upon the annualrenter as posterior, the annualrenter again recurs upon the adjudgers whose debts were contracted prior to the inhi-

bition; by which means the annualrenter loses nothing, though the inhibition ought only to strike against posterior voluntary deeds; and the adjudger on prior debts is at the whole loss, albeit it be a most certain principle, that an inhibition has no imaginable effect against anterior debts and diligences following thereupon; so that there must certainly be a fallacy in that reasoning; and there is no manner of mystery, or the least difficulty in finding where the fallacy lies, viz. an inhibition is no ground of reduction of posterior debts simply to annul them, but only in as far as they are prejudicial to the debt in the inhibition; that is to say, in so far as the inhibiter falls to draw a less share of the estate or rents thereof, than he would have obtained if no posterior voluntary deed had been done; and an inhibition is merely a prohibitory diligence for removing the prejudice of posterior deeds, but does not give any positive right, nor state the inhibiter adjudger in the place of the annualrenter, so as to draw a share by virtue of the right of annualrent, as the inhibiter must acknowledge by his own argument; for, if the inhibiter came in the place of the annualrenter, that is to say, if the right of annualrent did accresce to the inhibiter, then the inhibiter getting payment in the right of the annualrenter, would extinguish the annualrent, and consequently the annualrenter could never recur upon the co-adjudgers: so that the scheme offered by the inhibiters is inconsistent with law and reason in every circumstance; for the inhibiter can never have what was competent to the annualrenter, but by coming in his place, and causing the annualrent to accresce; which were a notion absurd and inconsistent; and what is urged, that an inhibition is not only a prohibitory, but a preparatory diligence, is a new invented notion, never heard of in any former case, and without any foundation in law. No 94.

And whereas it is *alleged*; That in the case of a proper wadset, or a partial right of property after inhibition, and before the adjudications, the inhibiter strikes out the posterior wadsetter or purchaser, and comes in his place; from which it is inferred, 1*mo*, That an inhibiter may have advantage by posterior voluntary deeds; 2*da*, What must be acknowledged to be in the case of a proper wadset, or an irredeemable right of property, ought also to hold in the case betwixt the competing annualrenter and inhibiter,

It is *answered*; That, in the case proposed, an inhibiter may have an accidental advantage in the competition with other creditors by posterior voluntary deeds; for the inhibiter would not only have a share with the co-adjudgers in the reversion of the debtor's other estate, but further would affect the lands irredeemably disponed or wadset after his inhibition, but cannot have the like benefit in the case of an annualrenter; and it often happens, that by a competition a greater benefit arises to some creditors than would do, if some of the parties competing were out of the field, because, in competitions of many creditors, there must be general rules and foundations in law with regard to the rights and interests of the several creditors competing, which alter if the rights of some of these creditors be drawn out of the field; as, for example, in the competition betwixt an inhibition and a posterior voluntary right, without the con-

No 94.

course of other creditors, the inhibition is always preferable; but in the competition of many other creditors, the inhibiter may happen to be totally excluded, and posterior rights get a share.

To apply this to the case proposed, a proper wadsetter or a right of property of a part of the debtor's estate does wholly separate and set apart the wadset right or the property from the debtor's estate in competition with posterior adjudgers, whereby they are entirely excluded from that wadset or right of property; but *quoad* the inhibiter, the wadset or right of property is null; and therefore the inhibiting adjudger removing the voluntary right by his inhibition, comes to receive the benefit of the voluntary right, so far as is wanting to him by his diligence in competition with co-adjudgers or other creditors; whereof the reason is plain, because such voluntary rights do in the first place wholly exclude adjudgers, not inhibiters, and then the competition falls singly betwixt inhibiters, and posterior purchasers; and in the competition of these two, the inhibiter is ever preferred; but that makes nothing to the advantage of what is now urged to be a rule in the competition of simple and inhibiting adjudgers and annualrenters; for,

1*mo*, The posterior wadsetter or purchaser so excluded does not recur upon the posterior adjudgers, but only suffers the loss, as having rested upon voluntary rights without diligence; and so the rule above set down, that prior creditors are not prejudged by the inhibition, stands still good; whereas, in the present debate, it is alleged, that as the inhibiter recurs upon the annualrenter, so the annualrenter also recurs upon adjudgers and anterior debts.

2*do*, There is a manifest disparity betwixt the case of an annualrenter and a proper wadsetter or purchaser of a part of the debtor's estate by an irredeemable right; for the last two do entirely divide and separate the wadset or irredeemable right from the remainder of the debtor's estate, and thereby do wholly withdraw his purchase from the posterior adjudgers; whereas an annualrent-right resembles a servitude, and is a burden consisting with the property, and affecting every part thereof; and therefore, the posterior adjudgers carry the property so affected: and when these adjudgers divide the property or the rents, the annualrent which lies as a burden, is equally proportioned among the adjudgers, according to their dividends; but, that proportion of the annualrent, which falls upon the share of the inhibiting adjudger, is struck off, whereby he gets the same share that would have fallen to him if there had been no annualrent; and, because the said share of the annualrent is cut off by the diligence of an inhibition, the annualrenter is at a loss, and cannot recur upon the adjudgers who did not inhibit, because the inhibition can no more prejudge anterior creditors, than posterior deeds can prejudge the inhibiter; as for example, in the case above stated, of a competition for a stock of 12000 merks, the three adjudgers *pari passu* for 5000 merks each, get only 4000 merks, and the annualrenter effeiring to 6000 merks, gets 2000 merks from each of the two adjudgers who did not inhibit, but draws nothing from the inhibiter, as being after his diligence; and suppose again, that the inhibiter were not *pari*

passu with the other two adjudgers, but year and day after them, these two adjudgers would first draw their full 10,000 merks out of the common stock, whereby there would remain 2000 merks to the annualrenter, and then the annualrenter would draw his other 4000 merks from the two first adjudgers, which would make up his whole annualrent; but the inhibiter, who was not within year and day, would reduce the annualrent, in so far as extended to the 2000 merks more than fell to the two first adjudgers; because, though the first two adjudgers were preferable as to their 10,000 merks, and in so far as the annualrenter drew from them, the inhibiter was not prejudged; but, as to the superplus of 2000 merks, the competition falling betwixt the inhibiter and a posterior annualrenter, the inhibiter is entirely preferred; but, suppose again, that there were three adjudgers *pari passu* still for 5000 merks, and an inhibiter adjudger year and day after for the like sum, and an annualrenter as formerly; in that case, the three adjudgers on anterior debts would each draw 4000 merks, and the annualrenter would draw 2000 merks from each of them, and so obtain full payment; and the inhibiter adjudger not within year and day would get nothing, albeit the posterior annualrenter gets all, as was found in the forecited case of Carriden, because the inhibiter is not prejudged by the annualrenter, who can never compete if the question were betwixt them two; but the whole stock being affected and exhausted by preferable adjudications for anterior debts, the inhibiter is thereby effectually excluded by his own negligence, and the diligence of the other creditors, and is noways prejudged by the annualrenter, who by his preference to the co-adjudger gets his full annualrent; which the inhibiter ought not to envy, and cannot quarrel the annualrenter's advantage, not being in defraud and prejudice of him; and thus it happens, that in the competition of many creditors, the division being made according to foundations and principles of law, a voluntary right obtains preference and payment, when an anterior inhibiter is wholly excluded, not by the annualrenter, but by other competing creditors; and, it is a mistaken notion of the import of an inhibition to imagine, that an inhibition gives any positive right, or that the inhibiter is prejudged as long as he gets not his full payment preferable to posterior annualrents, for the effect of his diligence is only that he do not get less than if those annualrents had not been granted, or that in competition with voluntary rights alone, and without the intervention of other competing creditors, the inhibiter is always preferred to the voluntary right; but, where other creditors come in *pari passu*, or are preferable to the inhibiter, and postponed to the annualrenter, every creditor draws his share according to the nature of his right and diligence. No 94.

"THE LORDS found, that in the competition of simple and inhibiting adjudgers and annualrenters, the inhibiting adjudger could only reduce the posterior annualrent in so far as he was thereby prejudged, and that he could not claim full payment of the sums in his inhibition, before the annualrenter could

No 94. draw any share in the said competition, but could only draw such a share of the annualrents, or price, as he would have drawn, if there had been no posterior annualrent or voluntary right.

Dalrymple, *No* 89. *p.* 120.

1715. *February* 22.

ELISABETH GELLY, and Others *against* The Other CREDITORS of Monimusk, and their FACTOR.

No 95.
Personal creditors arrested in the hands of tenants. The debtor's factor, notwithstanding, uplifted the rents. Other creditors got the estate sequestrated, and a judicial factor appointed. These last creditors likewise adjudged. The arresters had the preferable right to the sum in the hands of the debtor's factor.

ELISABETH GELLY and Others, creditors of Monimusk, having arrested on their personal obligements in the tenant's hands, Alexander Pierie, Monimusk's chamberlain, does nevertheless take up the arrested money out of their hands; and the other creditors having thereafter got the estate sequestrated in the hands of James Man, as factor by the Lords, with power to him to uplift rents, &c. and call Pierie to an account; and going on also in adjudications, &c. the arresters raise a furthcoming, both against the tenants, and also call Pierie as he who uplifted the rents affected by them. Man also, the creditors' factor, insists against Pierie and their tenants for the bygone rents, and the sums uplifted by Pierie from them. This having occasioned a competition, the point in question was, whether these arresters have a point of preference to these rents, and to repeat the same from Pierie, though no arrestment was used against him? Or if Man, the other creditors' factor, have a preferable title to the balance in Pierrie's hands, arising from his intromissions with the rents arrested?

It was *alleged* for Man; That, by his commission from the Lords, he was empowered to uplift, not only the rents from the tenants, but likewise to call Pierie, the common debtors' chamberlain, to account for his intromissions; and that the said arresters had not affected the balance in Pierie's hands; and therefore could not in an action of furthcoming obtain decreet against Pierie.

Answered for the arresters; That the said balance belonged to them, because it proceeded from Pierie's intromissions with the rents which they had arrested in the tenants' hands; and his intromission being as Chamberlain to the common debtor, was obnoxious to their action of furthcoming in the same way with the tenants; since the arrestment was a *nexus realis*, affording an action of repetition against any intromitter; nor could a voluntary payment dissolve it; so that these rents could be only uplifted by Pierie *cum suo onere*, and consequently he liable here, though no new diligence was used against him.

Replied for the other Creditors; That they had raised summons of adjudication before the arrestments were used; now adjudications give right to the mails and duties before arrestments.

Duplied for the Arresters; That they were only seeking preference to bygone rents, and rents of the term current, before any adjudication was complete; for till then no adjudger could compete with an arrester for mails and duties, as was