

place; and so in order on the next; till the creditor, user of the inhibition, were satisfied.

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CERTAIN of the preferable creditors of Sir Alexander Hope of Kerse, having petitioned for a sequestration of his estate, it was *alleged* for the debtor, That his rents exceeded the interest of his debt, and prayed that part of the estate might be exeemed from the sequestration, for his subsistence, which the petitioners declared they did not oppose; and thereupon the estate was sequestrated, excepting part thereof in the heritor's natural possession, and the factor burdened with an additional sum in name of aliment.

A process of sale was pursued, and petition presented for recalling the aliment, which was refused, as not having been authorised by, or intimated to the whole creditors; and it must be observed, that these were amongst the postponed; and at length, on a petition of many postponed creditors, craving that the aliment might either be recalled, or declared not to affect them, it was recalled.

After the sale, when a great deficiency appeared, it was disputed on whom this, in so far as occasioned by Sir Alexander's aliment, ought to be laid.

*Pleaded* for the preferred creditors, The deficiency must affect the postponed ones, as they are secured by their diligence.

*Answered*, The aliment was granted by their consent, which implied that they were to bear a proportional part of it.

*Replied*, They did not oppose the granting an aliment, when it did not appear there was a bankruptcy, and they saw themselves sufficiently secured; it was the same thing as if part of the estate had been exeemed from the sequestration, when the part sequestrated was sufficient to pay their debts; in which shape really the affair was partly executed; which would not have burdened them with accounting for any of the rents not sequestrated, and they did not, by any consent they gave, intend to part with any part of their debt.

THE LORDS found the deficiency occasioned by the aliment allowed to the debtor, behoved to affect the postponed creditors. See PERSONAL OBJECTION.

Reporter, *Elchies*.

For the Preferred Adjudgers, *Brown*.

Alt. *R. Craigie*.

Clerk, *Kirkpatrick*.

*Fol. Dic. v. 3. p. 322. D. Falconer, v. 2. No 126. p. 143. & 127. p. 144.*

1756. June 5. HORSBURGH against DAVIDSON.

IN the ranking of the Creditors of Thomas Cranston of Birkhillside, the interests stood thus:—Horsburgh of that ilk was creditor by a personal bond, dated in May 1727, with inhibition upon it in March 1728, and Henry Davidson was creditor by an heritable bond, dated in August 1728, whereon he was in-

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Whether an  
inhibition  
could connect with an

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 adjudication,  
 led upon a  
 bond of cor-  
 roboracion of  
 the bond  
 upon which  
 the inhibition  
 proceeded?  
 Found it  
 could not.

feft, and his sasine registrated in October thereafter; and, in the third place Horsburgh had an heritable bond of corroboration, dated March 1731, on which he was infest in May 1732, for the sum of L. 2546 : 16 : 8, made up of the principal sum and annualrents in the bond first mentioned, on which the inhibition had proceeded, and of a separate personal debt of L. 360, and annualrents due thereon; and in the year 1736, several other creditors, by personal bonds, led adjudications, as did also Horsburgh, upon the personal obligation contained in the said heritable bond for the accumulated sum of L. 3727 : 16 : 10 Scots money.

In the decree of ranking, Davidson was preferred *primo loco*, as the first real creditor, and Horsburgh *secundo loco*, as the only other real creditor; and as the fund was not sufficient to pay the two real debts, the adjudgers were entirely cut out, and also Horsburgh's draught fell considerably short of his payment. But then as Davidson's infestment was by the decree of ranking found to be reducible at Horsburgh's instance *ex capite inhibitionis*, Horsburgh proposed at making up the scheme of division, to draw back in virtue of his inhibition what his draught fell short of the sum, principal and annualrents contained in the bond 1727, on which his inhibition proceeded. And there was no doubt made but that he would have been so entitled, had he adjudged upon the bond on which the inhibition proceeded; but as he had only adjudged upon the personal obligation contained in his bond of corroboration, the framer of the scheme was of opinion, that his adjudication did not connect with his inhibition, for that nothing could connect with it but an adjudication led upon the debt, which was the ground of it; but that were such adjudication to be now led, it could draw nothing, as it would be excluded by the other anterior adjudications led upon debts contracted prior to the inhibition; and therefore, as the only operation of an adjudication is to save the inhibitor from suffering any prejudice from the debt struck at by the inhibition, it could in this case have no operation at all, as he suffered no prejudice by it; seeing, although no such debt were in the field, he would be cut out by the other adjudgers; and accordingly the scheme of division was framed, giving Horsburgh no benefit by his inhibition.

To this scheme Horsburgh objected as erroneous in two respects: 1st, That it did not admit the adjudication upon the bond of corroboration to connect with the inhibition, which, as it comprehended the debt on which the inhibition proceeded, and might therefore with propriety be said to have been led upon that debt, was pleaded to connect with the inhibition, no less than if it had been an adjudication specially led upon the debt itself.—And 2dly, That it proceeded upon a supposal, that nothing could connect with an inhibition, but an adjudication led upon the debt which was the ground of it; whereas, an heritable security, voluntarily given for the debt, which was the ground of the inhibition, was said to be as effectual to connect with the inhibition as an adjudication led upon it; and such was Horsburgh's heritable bond of corroboration.

But neither of these objections weighed with the Lords, who, though they disapproved of the scheme of division, as is to be hereafter mentioned, yet, so

far agreed in opinion with the framer of the scheme, that neither the adjudication on the bond of corroboration, nor the voluntary real security could connect with the inhibition. They considered an inhibition as the creature of the law, and as such, having no other effect than practice has given it; and that as an inhibition has never been known to save any thing but that very document of debt on which it is led, and for which the stile of an inhibition was used as a proof, which is, 'That the debtor grant no deeds which may prejudice the complainant anent the fulfilling to him of the obligations, decrees or processes produced to the Lords;' so it is absolutely established, that it has effect against all voluntary deeds; and it was said, that by the same rule that an adjudication upon a bond of corroboration, or a voluntary infestment on such corroboration, would connect with an inhibition upon the original bond, the same must also obtain with respect to an adjudication or voluntary security following on all innovations or transactions whatsoever concerning the debt, which was the ground of the inhibition; which would be quite a novelty.

Neither did the LORDS refuse it be a rule, as to the operation of an inhibition, that the debt struck at by it could only be challenged by the inhibitor, in so far as he was thereby prejudiced; and had that rule been thought to apply in this case, the scheme of division would have been approved of.

But the LORDS were of opinion, that it did not apply; as the framer of the scheme had not considered, that were an adjudication to be yet led on the original bond, it would be effectual to recover the inhibitor's payment, notwithstanding the other adjudications already led on debts prior to the inhibition, because these former adjudications would be excluded by the infestment on the bond of corroboration, and consequently barred from quarrelling the adjudication supposed to be yet led on the original bond; and it would be incompetent for Davidson, as having a prior infestment, to oppose Horsburgh's setting aside the other adjudications upon his posterior infestment, as that was *jus tertii* to Davidson, whose infestment, though prior, was struck at by the inhibition.

And accordingly the LORDS found, 'That Henry Davidson could make no use of his infestment to the prejudice of the bond on which the inhibition was led; and that therefore Horsburgh was preferable to, and must draw back from Davidson the principal sum and annualrents contained in the bond on which the inhibition was led; and appointed the scheme to be made out accordingly.'

*N. B.* Though the present decision proceeded on the supposal, that an adjudication still to be led on the original bond would be effectual, yet it was the opinion of the Court, that it was not necessary that such adjudication should be led, as the inhibitor had already adjudged upon the bond of corroboration, agreeable to what the Lords had found in other cases; and in that sense, they on this occasion explained the decision, 27th June 1745, Rutherford *contra* Stewart, No 47. p. 6973. as not determining Mrs Stewart's adjudication to be effectual,

No 54. though led upon a bond of corroboration granted after Bowland's inhibition, but only as determining, that since were she to lead an adjudication on her original bond, which was prior to the inhibition, it would be effectual, it was unnecessary to put her to that trouble, when she had adjudged already upon the bond of corroboration.

*Kilkerran*, (INHIBITION.) No 13. p. 291.

\* \* See D. Falconer's report of this case, *voce* COMPETITION, No 103. p. 2901.

No 55.

Inhibition does not affect the alienation of annualrents due on an heritable bond.

1755. June 15. SCOT against COURTTS and Others.

It would appear from the stile of an inhibition, that originally it has affected moveables, as it prohibits the alienation of moveables no less than of heritable subjects in prejudice of the complainer: But however that may have been, there is no record of its having ever in practice affected moveables; which has justly, and one may say necessarily obtained *favore commercii*. But in no time did inhibition ever affect *nomina debitorum*; and therefore that an heritable bond on which infestment has not followed, or a bond heritable, as bearing annualrent, as the law once stood, or heritable, as secluding executors, as the law now stands, have never been reached by an inhibition, has not proceeded from the favour of commerce, which would not be much affected though they fell under inhibition; but from this, that an inhibition even by its stile does not reach *nomina debitorum*.

It follows however from this, that the criterion of what subjects are, and what are not affected by inhibition, is not whether they be heritable or moveable, as between heir and executor, though it should not be further observed, that there are also instances of subjects which fall to the executors, viz. Heritable bonds, whereon infestment has followed, but whereon the creditor has used requisition and charged, which yet fall under inhibition, although not used till after the requisition and charge. It remains therefore to say what the criterion of it is; and the present case gave occasion to a reasoning on this point.

Archibald Cockburn younger of Langton, who had acquired certain debts secured by heritable bonds and infestments upon the estate of Langton, to the extent of about L. 2000 Sterling, conveyed the principal sums, with the interest thereof from Martinmas 1723, to certain persons, who advanced the money upon that security, but retained the bygone annualrents due preceding that term; and, in 1732, he conveyed these annualrents to John Courtts and others. In the ranking of the creditors of Langton, William Scot of Thirstain, who was creditor by progress to the said Archibald Cockburn, in a debt, whereon Jean Joissy, one of his authors, had raised inhibition in 1730, repeated a reduction *ex capite inhibitionis* of the said conveyance to John Courtts of the bygone annualrents, which being still *in medio*, he pleaded were affected by the