

No 48.

ment for security of the whole sum, as well due to the inhibitor as advanced by himself; or by causing the debtor to grant infestment to the inhibitor, and then he can be in no danger. Or, *thirdly*, by inhibiting the debtor upon his warrandice, which gives him recourse against other subjects belonging to the debtor. Or, *fourthly*, by taking infestment of warrandice against the effect of the inhibition.

It was *urged*, in the *last* place, That the creditor last in order is in *mala fide* to lend his money, or take the real security, when he sees the lands exhausted by prior infestments, and by the inhibition.

Answered, It often happens, that the creditor who takes the first infestment is more in *mala fide* than those who come after. The common case is, that a man, after inhibition, contracts personal debt, perhaps to no great extent; he continues in good credit; comes to be in labouring circumstances, and can procure no money but upon real security. He borrows a considerable sum, and the creditor obtains the first infestment; after which the prior creditors, diffident of their security, obtain heritable bonds of corroboration, and are infest. In the spirit of what is pleaded for Lithgow, the latest creditor who lent his money upon heritable security, when his debtor was in labouring circumstances, ought, as having the first infestment, to bear no share of the burden of the inhibition; but the same ought to be totally laid upon the prior creditors, which is absurd.

Found, that the inhibition being prior to, and therefore affecting the annual-rent-rights, the deficiency arising from the shortcoming of the fund, does not affect equally, or *pro rata*, all the annualrenters who stand preferred one before the other; but must affect the least preferable.

Through the weight of this decision, though deviating from the nature of an inhibition, the same judgment was given in the ranking of the Creditors of Langton, 8th January 1760, No 60. p. 6995.

Rem. Dec. v. 2. No 78. p. 119.

. See Kilkerran's report of this case, No 101. p. 2896. *voce* COMPETITION.

. The case in the ranking of Langton, referred to p. 6976, is No 94. p. 2877.

No 49.

Inhibitions are not allowed to pass, on conditional obligations, where there is no appearance of the existence of the condition.

1747. January 27.

M'CREADIE against M'CREADIES.

IN the contract of marriage of Andrew M'Creadie younger, now of Pearston, Andrew M'Creadie his father provided the estate of Pearston ' to his son, and ' the heirs-male of the marriage, which failing, to the heir-male of any other ' marriage; and in case of daughters only, and no heirs-male, the father and ' son became bound to pay certain sums to the daughters, one or more.'

After the death of Andrew M'Creadie elder, his daughters and executors observing that their father was bound for the said provisions to the daughters of

his son, in the event of there being no heirs-male, executed a summons against their brother to relieve them thereof, and on the dependence an inhibition; and the defender having applied to have the inhibition recalled, and the registration thereof stopped; or if already registered, that the users should be ordained to discharge it, and to registrate the discharge along with the inhibition; on this ground, that having three sons alive, and three daughters, and his spouse a young woman bearing children, there was no likelihood of the event's happening on which the pursuers are liable to be subjected to the daughters provisions, the Lords 'granted the desire of the petition.'

It were right that no inhibition passed but *causa cognita*; but this much is a settled point, that on conditional obligations, inhibitions are never allowed to pass, where there is no appearance of the existence of the condition.

Fol. Dic. v. 3. p. 320. Kilkerran, (INHIBITION.) No 7. p. 288.

* * * D. Falconer reports the same case :

ANDREW M'CREADY of Pearston, disposed his estate in his son Andrew's contract of marriage, to him, and the heirs-male of his body; which failing, to the eldest heir-female of that marriage, 'with, and under the burdens, provisions, and conditions after specified,' which were, that the son and father, as taking burden for him, did burden and affect the lands with the sum of 15,000 merks Scots, which they obliged them to pay to the children other than the heir; and if there should be only daughters of this, and a son of a subsequent marriage, they are obliged to pay to one daughter 20,000, to two 24,000, and to three 30,000 merks; and failing sons altogether, in which case the eldest daughter was to succeed, to pay to the younger daughters 15,000 merks, and to the wife a liferent of 900 merks.

The executors of old Andrew M'Creedy pursued young Andrew for relief of these provisions, and thereupon inhibited him.

On a petition from Andrew M'Creedy, shewing, that he had three sons, so that there was little danger of the provisions in case of no sons of the marriage taking place, and answers thereto,

THE LORDS recalled the inhibition, in so far as it proceeded on the provisions conceived in favours of the daughters in the case of the estate's falling to a son of a subsequent marriage; and declared, that upon Andrew M'Creedy's securing by infestment his younger children for their provisions, within a limited time, they would also recall it, in so far as it proceeded on them; and superseded considering how far it could stand upon the obligation to pay the Lady's jointure, till it appeared whether she was secured by infestment or not.

Petitioner, *Lockhart.*

Alt. *Boswel.*

D. Falconer, v. 1. No 162. p. 214.