

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

inhibition. The point was reported by the Ordinary; and being new, the Lords appointed a hearing in presence.

And upon the hearing, they found unanimously, 'That the disposition to the bygone annualrents was not affected by the inhibition.'

Nor could they have found otherways, without introducing a material novelty: For as the bygone annualrents on an heritable bond descend to the executor, the consequence of finding them affected by an inhibition must have been, that when they were devolved to the executor, they should fall under inhibition used against him for his own debt; a thing unheard of, and which no body will say.

And all the question was, Upon what principle they were to put this judgment?—It has been already said, that moveable or descendible to executors, and not affectable by inhibition, are not correlate. It had also been pleaded as an argument against the inhibitor, that an inhibition does not hinder the annualrenter's extinguishing the annualrents by intromission; and that it was inconsistent that an inhibition should affect a subject, which the person inhibited could, notwithstanding the inhibition, extinguish by intromission. But neither was that satisfying, there being nothing inconsistent in it, as an inhibition forbids not deeds of extinction, but only deeds of alienation; therefore, where an annualrenter intromits, so far the annualrent-right is extinguished, because the intromission is not *spreta inhibitione*.

But what the Lords generally put it on was this, That as an inhibition is only a prohibitory diligence, no deed can be reduced *ex capite inhibitionis*, but where the inhibitor can draw the subject conveyed *by an adjudication*, the only diligence known in the law to connect with an inhibition: But so it is, that an adjudication, as it only carries the rents of lands from the first term following the date of the adjudication, so it carries the profits of an annualrent-right only from that term; and the bygones of both are only affectable by arrestment.

Another objection was made to this inhibition, that supposing a formal inhibition could have affected these bygone annualrents, yet this inhibition was null, in respect it had proceeded upon the production of the horning only, without producing the ground of the horning, 'because the Lords have seen the letters of horning.'

And the LORDS were inclined to have sustained the objection, as there is no other legal ground for an inhibition, but either a decree, a liquid instruction of a debt, or a summons executed; and a horning is neither. A creditor may have got payment of his debt, and not delivered up the horning; and by the same rule, an inhibition might proceed upon a caption. But no interlocutor was pronounced upon it, as unnecessary, after having found the inhibition ineffectual, even if it had been formal.

Fol. Dic. v. 3. p. 323. Kilkerran, (INHIBITION.) No 14. p. 294.

No 55.

* * * D. Falconer reports this case :

SIR ALEXANDER and Archibald Cockburns had disposed two heritable debts on the estate of Langton, for considerable sums, with the annualrents fallen due thereon; but it having only been intended to convey the right, and growing annualrents, the disponee had granted a declaration to this purpose, and retrocessed them to the annualrents already incurred, to wit, from Martinmas 1687, and Whitsunday 1688, to Martinmas 1723; and Lockhart of Carnwath had used inhibition against them in 1715, on a debt which came into the person of Thirlestain.

Archibald Cockburn conveyed these annualrents to John Coutts in 1732, who claimed them in the ranking of the Creditors of Langton, and met with this objection from Thirlestain, That his debtor being inhibited at his instance, could not alienate this real right to the prejudice of his debt.

The question was reported, and on that a hearing appointed, wherein it was *pleaded* for Mr Coutts, That inhibitions do not obstruct the alienation of moveables; and bygone annualrents are moveable, Stair, B. 3. Tit. 1. § 28. and B. 4. Tit. 20. § 33.; in the same manner they do not obstruct the alienation of the rents of lands, though the estate itself is thereby hindered from being alienated. They do not affect subjects which are liable to arrestment; and bygone annualrents may be arrested. They are only a prohibitory diligence; but give no lien upon the subject, which must afterwards be got by adjudication; and adjudication carries only the right, and consequently the growing fruits in like manner as apprising, which did not so much as carry the rents growing after the denunciation. A person inhibited may intromit with the fruits of his rights; consequently may receive them at the hands of an assignee.

Answered, The criterion of subjects, which are affectable or not by inhibition, is not whether they go to heir or executor; but whether they are real or personal. Bygone annualrents are a burden on the land, and are not separate from the right, which cannot be redeemed without paying them; so that it may be urged they should go to the heir, as casualties of superiority do, until separated from the superiority itself; and annualrents of a sum secured by adjudication were found, by a late decision, to do. It does not follow from their being liable to arrestment that they cannot be adjudged; since an heritable bond, before infestment, was found both adjudgeable and arrestable 26th June 1705, Stewart of Torrence against Stewart of Pardovan, No 14. p. 140. And bygone rents are undoubtedly carried by adjudications on decrees *cognitionis causa*; but neither is it necessary they should be liable to adjudication, to make the inhibition effectual, since, upon the reduction on that head, the inhibitor, to whose prejudice they were alienated, may affect them by any competent diligence. Bonds for annualrents out of lands, on which no infestment has followed, and bonds secluding executors, go to the heir; and yet are not affected by inhibition. So

that this cannot be the rule ; but they are personal rights, and that is the reason they are not subject to it.

No 55.

Replied, Here the bygones were separate from the right, which was conveyed by the Cockburns, and they retrocessed to them. There is a difference betwixt annualrents on an heritable bond, and those which are said to arise on a sum adjudged for, where properly there are none ; but the estate is disposed redeemable for the debt and annualrents ; and he who succeeds to the land must, if it is redeemed, get the whole redemption money ; but the annualrent right is a *feudum*, of which the bygones, as they grew, were the profits ; and therefore are more fitly compared to the rents of land. Adjudications upon cognition have been found out from necessity, because there was no other way to affect the rents of a defunct's estate, to whom no body would be heir ; and this is done by adjudging the lands as they were at the death. The reason that bonds on which no infeftment has followed, are not affectable by inhibition, is not that they are not real ; but that they are simply obligations, which are not comprehended under the stile, and would not have been affected, even when moveable goods and gear were affected thereby.

Besides what is above argued for the assignee, it was observed by one of the Lords, That, in his opinion, the going to heir or executor was not indeed the mark ; for that a bond secured by adjudication, being charged for, if the creditor died in the course of his diligence, would go to the executor, and yet would be affected by inhibition ; as also would a debt charged by the debtor on an estate disposed by him with that burden. But the distinction was, whether the right was real or personal, of which there were some that yet had a real action annexed to them ; as particularly the right of bygone annualrents on an heritable bond, which were personal, though the right of annualrent itself was real.

THE LORDS found; That the alienation of the rents in question fell not under the inhibition ; and therefore preferred the assignee. See No 58. p. 6993.

Reporter, *Drummore.* Act. *W. Grant & Lockhart.* Alt. *R. Craigie & R. Dundas.*
Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No 138. p. 161.

1750. November 1.

BLACKWOOD of Pitreavie; *against* The REPRESENTATIVES of ROBERT ALLAN.

ROBERT ALLAN being creditor to Sir George Hamilton of Tulliallan, and Sir Robert Miln, by their joint bond, and to Sir George Hamilton by his bond, raised inhibition against them, narrating the said debts, but the will of the letters conceived in these terms, ' That ye inhibit and discharge the said Sir George Hamilton and Sir Robert Miln, that they noways sell, &c. their lands, &c. nor yet give bond for payment of sums of money, whereby the same

No 56.

An inhibition on two bonds against different debtors, which discharged them to put away their land in pre-