to pass in course; but the Court were still in use to discharge it, upon application made, where it appeared to be unnecessary or malicious. No 59.

Answered, It was in this case the intention of William, the father, to make the L. 250 a real burden upon the estate; for it is made a burden upon the deed granted to the son, though the clause is not conceived in such a manner as to be effectual for the purpose intended; Patrick Nisbet had therefore a title to insist upon having it made a real burden, agreeable to the father's intention. Walter Stirling has refused to do this voluntarily; and therefore inhibition becomes a proper step, without being obliged to allege that the debtor is *vergens ad inopiam.*

"THE LORDS recalled the inhibition, and loosed the arrestments." *See* LEGACY.

For Walter Stirling, *Ferguson.* Alt. *Miller.* Clerk, *Gibson.*

W. J. *Fol. Dic. v. 3. p. 320. Fac. Col. No 52. p. 85.*

1760. *January* 8.

CREDITORS ADJUDGERS on the estate of Langton, not infeft, *against* The ADJUDGING CREDITORS infeft on that estate.

No 60.
Inhibition affects the least preferable of the rights against which it strikes, and not all the rights *pro rata.*

IN the ranking of the Creditors of Langton, it was *insisted* for the Adjudging Creditors not infeft, That the sums to be drawn by the creditors-inhibiters, in virtue of their inhibitions, ought to be allocated proportionally among the whole debts that are struck at by their diligence.

On the other hand, it was *contended* for the Creditors infeft, That the inhibiting adjudgers ought to draw their payment out of the first and readiest of the price, and then the other creditors be ranked upon the remainder in their order; by which the sums drawn by the inhibiters would first affect the creditors not infeft, and next the least preferable infeftments, agreeably to the decision, 23d January 1747, in the case of Lithgow against The Creditors of Elliot of Whithaugh, No 48. p. 6974.

Pleaded for the Adjudging Creditors not infeft, That inhibition is only a prohibitory diligence, calculated to prevent the debtor from alienating to the prejudice of his creditor; but gives the creditor no preference, nor real right upon the lands, till he establish it by other diligence; that, to consider inhibition as giving a preference, would lead to absurd consequences; for instance, if there are two annualrenters in the field, the first of whom only is struck at by the inhibition, if the inhibiter, as having a preference, is ranked *primo loco*, and then the annualrenters in their order, this absurdity will follow, That the first annualrenter, though struck at by the inhibition, may draw his full debt; and yet the second annualrenter, against whom the inhibition does not strike, be cut out. To prevent such absurdities, the real rights affecting the lands must be

No 60. ranked in the first place, and draw according to their order; after that it falls to be considered, what personal claims may lie against any of these creditors. An inhibition, though not a real right, affords a claim against those who obtained real rights from the debtor after he was inhibited. This is of the nature of a claim for damages; and the question is, In what manner those damages are to be ascertained among the several creditors struck at by the diligence? They ought to affect the whole equally and proportionally, for the following reasons.

First, Every one of the debts and securities subsequent to the inhibition is equally liable to reduction. This is evident from the stile of the diligence, whereby the debtor is expressly prohibited to make any alienation, contract any debt, or do any deed, and the lieges are prohibited to accept of any right or obligation from him, to the prejudice of the creditor. Every alienation and every contraction is prohibited. It is no defence to one who contracts *spreto mandato*, That he left sufficient fund. The fund must be left unimpaired, as it was at the date of the diligence. To diminish it the law considers as a prejudice done to the inhibiter. It is not necessary for him to qualify any other prejudice, or to say, that he is disappointed of his payment by the deed which he seeks to reduce; nor is he obliged to enter into a litigation concerning the circumstances of his debtor. That such has always been the construction of this diligence, appears from Craig, lib. 1. dieg. 12. § 31; and the decision, November 27th 1630, Douglas *contra* Johnston, No 17. p. 6947; as also from the constant tenor of the decreets of the Court, *ex capite inhibitionis*.

Secondly, Whatever a party struck at by inhibition is obliged to repay to the inhibiter out of the sums he stood ranked for by his infeftment, he can have no recourse against creditors afterwards infeft, who are not subject to the same diligence; and who are therefore not obliged for relief of a sum drawn from him, upon a defect in his own right. This rule is laid down by Lord Stair, lib. 4. tit. 35. § 29, and confirmed by decisions of the Court; in the ranking of the Creditors of Sir Thomas and Sir William Nicolsons, No 35. p. 6963; and, February 1730, Campbell *contra* Drummond, No 96. p. 2891.

Thirdly, Where an inhibition strikes against several purchases or annualrent-rights, affecting different parts of the same debtor's estate, the effect of it is allocated proportionally upon the several lands or heritable debts; and if the inhibiter insists to draw his whole debt out of any one subject, he must assign his diligence to the person from whom he draws, that he may operate a proportional relief; upon the same ground that a creditor having a catholic infeftment over several tenements, when he recovers his whole debt from the purchaser of one tenement, is obliged to assign to him his infeftment, that he may recur against the rest. In the same manner, a proportional allocation ought to take place where the inhibition strikes against several annualrent-rights or securities affecting the same tenement, as each of them is subject to a separate reduction at the inhibiter's instance. If one creditor obtains infeftment from the common debtor after inhibition, in the tenement A. and another in the tenement

B. they are no doubt equally liable to a proportion of the inhibiter's debt. It seems incongruous, then, to suppose that the proportional allocation should be excluded, because the creditors had got both tenements comprehended under their infeftments. No 60.

In conformity to these principles, the rule universally followed in all rankings down to the case of Whithaugh, was, That all the creditors whose securities were struck at by an inhibition, were subjected proportionally to the debt of the inhibiter.

This case is similar to a reduction upon the second clause of the act 1621, cap. 18. where it was never doubted, that all the securities granted by an insolvent debtor, after diligence against him by a prior creditor, are equally subject to reduction at the instance of that creditor; and therefore the law divides the burden amongst them proportionally.

Upon the same principle, if two heritable creditors consent to a subsequent contraction, the creditor consented to may insist against either; but as he who pays is entitled to demand an assignation, the result must be a proportional distribution. This case is extremely analogous to the present; it may be said, without impropriety, that one who contracts after inhibition, virtually consents to the payment of the inhibiter's debt.

In the same manner, where a number of cautioners bind for the same debt at different times, as they are all equally bound to the creditor, any one who is forced to pay, is entitled to an assignment. So it was found, 15th December 1722, Murray *contra* Heirs and Creditors of Orchyardton, *voce* SOLIDUM ET PRO RATA, and affirmed by the House of Lords.

Pleaded for the Creditors infeft, That the tendency of an inhibition, as is evident from the stile of it, is not absolutely to restrain the inhibited person from contracting debts, or the lieges from dealing with him; but only in so far as the inhibiter may thereby suffer prejudice; in other respects, the creditors fall to be ranked, and draw their payment, without regard to the inhibition. The inhibiter sustains no prejudice, so long as there is a sufficient fund for paying his debt; he cannot therefore interfere in the ranking. What proves that inhibition has no effect, unless the inhibiter can qualify a loss, is, that debts, though contracted posterior to the inhibition, if the inhibiting creditor sustains no prejudice from them, will draw a part of the price, while the inhibiter draws nothing. If, for example, there are adjudications against which the inhibition does not strike, sufficient to exhaust the whole price, the inhibiting creditor must be entirely set aside, while, at the same time, other adjudgers, though posterior to the inhibition, if within year and day of the former, will be ranked *pari passu* with them.

It would be destructive of the security of the records, that a person who lent his money, and for security took infeftment upon a large estate, which he saw from the records was liable to no prior incumbrance, but an inhibition for a

No 60. small sum, should suffer prejudice by posterior infeftments granted to other creditors.

The prior infeftment upon record has, by law, the same effect against posterior infeftments, as the inhibition has, with respect to all debts postesior to it; as therefore the inhibiter is entitled to draw his payment out of the first and readiest of the price, any loss arising from the deficiency of fund ought to fall upon the least preferable infeftment.

The analogy of a reduction upon an inhibition, to that upon the act 1621, is just; but in neither case is the creditor who used the diligence entitled to reduce all posterior contractions, further than to secure payment of his debt. A challenge *ex capite inhibitionis*, though in the form of a reduction, is in reality no other than a declarator, that notwithstanding the posterior contraction, the inhibiter should have the same access to affect the lands, as if such posterior deeds had not been granted. It is personal to the inhibiter, and no third party is entitled to avail himself of it; as was found, 26th January 1636, Lady Borthwick *contra* Kerr, No 20. p. 6952, and 7th January 1680, Hay *contra* Lady Balledgarno, No 27. p. 6959.

With regard to the case put, of two annualrenters, the first of whom though struck at by the inhibition, may draw his full debt, while the second, against whom the inhibition does not strike, draws nothing, if the inhibiter is to have a *primo loco* preference; it is *answered*, That where any of the annualrenters is prior to the inhibition, the inhibiter cannot be ranked *primo loco*; but the annualrenters must be ranked amongst themselves in their order, and then the inhibiter draws his payment from the annualrent-right struck at by his inhibition.

The argument from several purchases or infeftments, affecting different parts of the same debtor's estate, does not apply to the present case, where all the creditors have their security upon the same subject; for here the first annualrenter is as much preferable to the posterior ones, as the inhibiter is to them all; whereas, in the other case, the different purchasers or annualrenters have no connection with one another.

In the same manner, where the annualrenters are all *in pari casu*, and there is one catholic infeftment preferable to the whole, equity obliges the creditor to take his payment proportionally from the whole, or to assign; but where the creditors have their security upon the same subject, preferable amongst themselves, according to the priority of their infeftment, no equity can entitle the last infeft to draw any thing, while a preferable creditor is unsatisfied.

Upon these principles, the judgment of the Court was founded in the case of the Creditors of Whithaugh, which solemn decision, pronounced with great deliberation, was understood to fix the rule in all time coming; and which accordingly has been uniformly followed in all the rankings that have since occurred.

Answered for the Adjudgers not infeft, That it is true, cases may be figured, where the inhibiter can draw nothing, and yet the debts struck at by his inhibition may draw. This can only happen, when the debtor's estate is wholly exhausted by securities which cannot be affected by the inhibition; in which case the inhibiter cannot challenge any of the subsequent debts, as his reduction is only to this effect, that he may draw what he would have drawn if the posterior debts had not existed; and therefore, when the fund is exhausted by prior creditors, the reduction cannot have any effect; but when there remains fund not pre-occupied, the inhibition affects the whole and every part of it. No 60.

With regard to the security of the records, it is evident that the rule contended for on the other side can give no security; as inhibition is a prohibitory diligence which gives no preference. One who lends a sum of money, after an inhibition, even for a small sum, cannot have absolute security, however large the estate be, unless he see the inhibiter either paid or secured; for although he take infeftment, another infeftment may afterwards be taken upon an heritable bond prior to the inhibition, for a sum perhaps near equal to the value of the estate; and as the inhibiter must be paid out of the remainder, the creditor lending after the inhibition will be entirely cut out; or there may be personal debts, not struck at by the inhibition, which may, by diligence, evict the greatest part of the estate, leaving no more than to pay the inhibiting creditor; or the person inhibited may die, and his heir give an heritable bond for near the value of the estate, which bond would not be affected by the inhibition.

The creditor has many ways to secure himself against this hazard. He may, when he lends his money, see a part of it applied to clear the inhibiter's debt; or he may take care to get the inhibiter secured by infeftment; or he may insist, that the debtor to whom he lends his money, give him real warrandice against the effect of the inhibition; or he may use inhibition against the debtor upon his personal warrandice. By these methods, a creditor, lending after inhibition, may attain full security, which, from the nature of the diligence, the records cannot afford him.

Great deference is due to every judgment of the Court; but the variation of the single decision in the case of Whithaugh, is not of equal consequence with departing from a rule anciently settled and invariably observed, and so closely connected with the system of our real preferences, that departing from it may endanger other parts of that system.

"THE LORDS found, that although the inhibitions, being prior to the competing annualrent-rights, did strike against them all equally; yet any deficiency arising from the shortcoming of the fund of payment, did not affect equally, or *pro rata*, all the competing annualrent-rights, which stood anked and preferred one to the other according to the priority of their infeftments, but that the same must affect the annualrenters least preferable."

For the Adjudgers infeft, *Ferguson*. Alt. *Lockhart*. Clerk, *Justice*.

W. N. *Fol. Dic. v.* 3. *p.* 322. *Fac. Col. No* 209. *p.* 374.