

[Heard, 5th July.— Judgment, 2d August, 1842.]

CHARLES HENRY GORDON, Esq., *Appellant*.

MRS LOUISA CAMPBELL, *Respondent*.

Inhibition. — Ranking and Sale. — In a competition under a ranking and sale, between an inhibiting creditor who had not sued out adjudication against his debtor, and a posterior heritable creditor infest, *found*, that the inhibitor, in addition to the dividend which she would draw as in a *pari passu* ranking with the other creditors, in whose favour the ranking and sale operated as a general adjudication for behoof of all, was entitled to draw back from the heritable creditor such a sum as would increase her dividend to what it would have been had his debt not been in the field; but that she was not entitled to have the benefit of the heritable creditor's security to the effect of drawing full payment out of the money drawn by the heritable creditor.

ON the 20th of June, 1818, Walter S. Glas borrowed from Campbell L.1500 upon his own acceptance. Glas repaid L.500, and for the balance Campbell brought action against him, and used inhibition on the dependance, by execution which was registered on the 18th of January, 1822. At this time, the only real estate of which W. S. Glas was possessed were certain subjects in the burgh of Stirling.

On the 3d August, 1822, Dr Glas, the father of W. S. Glas, died, leaving considerable heritable property, to which W. S. Glas succeeded as his heir-at-law.

In 1827 W. S. Glas borrowed L.6000 of Gordon, and, in security of its repayment, gave him a bond and disposition of the lands which he had inherited from his father, and of the subjects in the burgh of Stirling. Gordon took infestment upon this

bond in the lands derived from Dr Glas on the 10th November, 1827, which he put upon record on the 9th of January, 1828; and in the subjects in the burgh of Stirling on the 12th November, 1827, which he put upon record on the same day.

In June, 1831, a process of ranking and sale of W. S. Glas's estates was raised, which was not prosecuted under the 6 Geo. IV. cap. 120, but under the old form of process. Subsequently to the bringing of this action, creditors of Dr Glas brought actions for constituting their debts, and obtained decrees in them.

In the process of ranking and sale, claims and interests were lodged for Campbell and Gordon respectively. The common agent reported upon these claims that Campbell would be entitled to draw back from any dividend which might be allocated to Gordon, such a sum as would put her in the same situation as if the disposition had not been granted to Gordon, inasmuch as it had been granted subsequent to her inhibition; but that Campbell's inhibition could not have any effect against debts contracted by Dr Glas in his lifetime, or by W. S. Glas prior to the inhibition.

Campbell objected to this report, on the ground, that as the creditors of Dr Glas had not constituted their debts until after the bringing of the ranking and sale, and the decree in it drew back to the date of the summons, operating as a general adjudication in favour of all; they ought not to be preferred to her whose inhibition had been used long prior to the ranking and sale; but she did not attempt to controvert the view taken by the common agent of her rights as between her and Gordon.

After certain procedure not necessary to be adverted to, Gordon's heritable debt was held to be preferable on the lands of W. S. Glas, and he was allowed, by interim warrants of the Court, to draw L.5500 of the price of the lands, on condition of his consigning L.2000 to answer Campbell's claim, under her inhibition, on the final result of the ranking.

On the 18th February, 1840, the Lord Ordinary (Cun-

GORDON *v.* CAMPBELL. — 2d August, 1842.

ninghame) remitted to James Webster, S.S.C., “to make out a
“state, shewing the ranking of the claim of Mrs Campbell,
“giving effect to the inhibition used on her debt against the
“common debtor Mr Glas, and having regard to the common
“statements and pleas of Mrs Campbell, and of Mr Gordon,
“respectively,” and to report the same.

Webster, in his report, stated at length the grounds taken by Campbell for preferring his debt to those contracted by Dr Glas, and his (Webster's) reasons for disregarding them, and preferring the creditors of Dr Glas. Assuming this to be correct in principle, Webster prepared a scheme, in which he stated the whole debts due by W. S. Glas, whether on his own account, or as representing his father, and the amount of the divisible fund after deducting the sums which Gordon had been allowed to uplift. He then apportioned the fund, as it existed originally before these deductions, among the creditors, excluding Gordon, and the other creditors, whose debts had been contracted by W. S. Glas subsequent to Campbell's inhibition. In this view, the dividend payable to Campbell was made to be L.748, 16s. 11d. He then apportioned, among the same creditors, the fund as it existed after allowing the deductions. In this view, the dividend payable to Campbell was made to be only L.177, 11s. 11d, shewing a difference between the two views of L.571, 5s. He then allocated this deficiency of L.571, 5s. upon Gordon and the other creditors, whose debts had been contracted subsequently to Campbell's inhibition, and in this way, adding the L.571, 5s. to the L.177, 11s. 11d., he brought out the dividend, to which Campbell was entitled, to be L.748, 16s. 11d., the same amount as she would have drawn if Gordon and the other last mentioned creditors' debts had not been admitted into the ranking.

Campbell objected to the scheme prepared by Webster, upon various grounds, but none of them impeaching the mode in which the inhibition was made to affect Gordon's security.

GORDON *v.* CAMPBELL. — 2d August, 1842.

On the 2d December, 1840, the Lord Ordinary pronounced the following interlocutor: — “ The Lord Ordinary having considered the report of the common agent as to the effect of the inhibition used by one of Mrs Campbell’s authors against Mr W. S. Glas in December 1821 — approves of the common agent’s report on that matter, and appoints Mrs Campbell to be ranked and preferred in terms thereof; *quoad ultra*, repels the objections of Mrs Campbell to the said report, and decerns.”

Campbell reclaimed against this interlocutor, by a note which prayed the Court “ to recal the interlocutor submitted to review; to sustain the objections to the common agent’s report so far as repelled by the Lord Ordinary, and to rank and prefer the objector for the full amount of principal and interest upon the fund *in medio*; or, in any event, to find the objector entitled, under the inhibition used by her author, to rank upon the price of the subjects sold by the common agent which belonged to said W. S. Glas, in his own right, prior to his succession to his father’s heritage, without reference to the alleged claims of the creditors of his said father, and to prefer her on the funds accordingly; to find her entitled to the expenses of this discussion; or to do otherwise in the premises as to your Lordships shall seem just.”

At the advising of this note, Campbell for the first time insisted that, as against Gordon, she was entitled to have full payment out of the fund allocated to him, inasmuch as his bond had been executed subsequently to her inhibition. The Court, on the 26th February, 1841, sustained this plea by an interlocutor in these terms: — “ Recal the interlocutor of the Lord Ordinary reclaimed against; find that Mr Gordon is preferable to the creditors, other than Mrs Campbell, for the amount of his debt, by virtue of his heritable security; but find that Mrs Campbell, by virtue of the inhibition pleaded by her, is entitled

GORDON v. CAMPBELL. — 2d August, 1842.

“ to draw back from Mr Gordon the amount of her debt on
 “ which the inhibition proceeded: Find no expenses due, and
 “ decern.” The observations which fell from the Court, will
 be found in 3 *D. B. M.* and *D.* 634.

Pemberton and Anderson for appellant. — Inhibition is merely a personal prohibition to the debtor to do any thing to the prejudice of the inhibitor; it does not give any active lien, and is of no avail unless a sale is made, or debt contracted. If the sale be voluntary, and followed by infestment, the lands are effectually cut off from all subsequent diligence at the instance of the seller's creditors; but in the hands of the purchaser they are liable to be adjudged by prior inhibitors, after reduction of the sale *ex capite inhibitionis*, *Monro, Mor. app. Inhibition, No. 1*; *M'Lure v. Baird, 12 F. C. 26*; *Lennox v. Robertson, Hume's Cases, p. 242, Stormonth, Hailes, 933.* Had the respondent used adjudication before the institution of the ranking and sale, and no other creditor had followed the example within a year and day, she would then have had a preferable claim over the anterior creditors, and in the state of the fund, she would in that case have drawn full payment to the total exclusion of the appellant. But the interlocutor in the ranking and sale under the 10th sect. of 54 Geo. III. cap. 137, operated as a general adjudication in favour of every creditor, to the exclusion of any separate adjudication by individual creditors, *Carlyle, Kilk. 285.* The respondent, therefore, not only has not any active preferable title by adjudication, but is not in a situation to procure such a title, so as to admit of the introduction of the principle, that where, in a competition, a party is *in titulo* to obtain a preferable title, he shall not be put to the circuitry and expense of obtaining it, but shall have his rights adjudged, as if he had already obtained it.

The respondent is merely a personal creditor, having a *pari passu* preference with the other creditors, and no right of absolute

GORDON *v.* CAMPBELL. — 2d August, 1842.

preference except the negative right, which her inhibition gave her against those creditors whose debts were contracted subsequent to it. On the other hand, the appellant, by virtue of his heritable security, had a right of preference over all the creditors of W. S. Glas, except the respondent in respect of her inhibition. The effect of the inhibition was not however to place the respondent in the appellants' shoes, and give her the benefit of the appellant's preferable security, but merely to entitle her to such a share of the fund *in medio*, as in a *pari passu* preference with the other personal creditors she would have had in case the appellant had not been in the field; in other words, the effect of the inhibition is to prevent any prejudice to the respondent by the appellant's security, but not to entitle her to any advantage from it. All the institutional writers agree as to the effect of an inhibition, *Stair*, IV. 35; *Bank*. I. 7. 142; *Ersk.* II. 11. 14 — 16; 1 *Ross Lect.* 488; 2 *Bell Com.* 514, 519; *Bell Prin.* sect. 2393; and the point was expressly decided in Cockburn's ranking, *Mor.* 2883; in *Miln v. Nicolson*, *Mor.* 2876; Cockburn's ranking, *Mor.* 2877, and 2885.

[*Lord Brougham.* — Was this point argued in the Court below?]

Yes. But not one of these authorities was cited. The point was a surprise upon the appellant. These cases settled the law, and the point has never since been mooted. In *Ferrier v. Penny-cuick*, 14 *F. C.* 737, it was not raised, but it was referred to by the Judges as settled in law by these decisions.

M'Conochie and Bailey (Sir John) for the respondent. — Inhibition is no doubt a prohibitory diligence, but it strikes against all voluntary alienations or heritable burdens, and preserves the estate of the inhibited in the same condition as if neither had occurred, and is effectual as well against subsequent acquisitions, as present possessions. No doubt the creditors of Dr Glas, if

GORDON v. CAMPBELL. — 2d August, 1842.

they had availed themselves of the Act 1661, cap. 24, and used diligence against their debtor's lands within three years of his death, would have established a preference over the creditors of W. S. Glas, over even the respondent his inhibiting creditor; but having omitted to do so, they come in only in the same rank as the ordinary personal creditors of W. S. Glas, against whom the inhibition is to receive effect. Although in the ordinary case, inhibition can be rendered active only by adjudication, that is not necessary in every case, as was decided in *Munro, Mor. voce Inhibition*, app. Pt. 1. where the inhibiting creditor having become purchaser of the lands of the common debtor, and having obtained infestment, was preferred upon his inhibition to prior creditors, who had used arrestment only, although the inhibition had not been followed by adjudication. Again, in *Lennox v. Robertson*, and *Dennistoun*, 19th Nov. 1790, *Hume's Dec.* an inhibiting creditor was preferred upon the price of the debtor's lands, in the hands of a purchaser, who had obtained infestment, although he had not sued out adjudication.

[*Lord Campbell.* — These cases suppose that the creditors had not adjudged, and that the inhibiting creditor *only* could adjudge, but can *that* be said where there has been a ranking and sale?]

Yes. In the case of *M'Lure v. Baird*, 19th Nov. 1807, 12 F. C. 26, the arresting creditors had adjudged, but the inhibiting creditor was preferred nevertheless, without the necessity of his leading adjudication; that which had been led by him being informal.

In *Horsburgh v. Davidson*, 10th June, 1750, *Elchies*, vol. 1. adjudication was dispensed with as unnecessary to complete the diligence of the inhibiting creditor as against adjudging creditors, inasmuch as the adjudications of these creditors were excluded by infestment taken by the inhibitor, upon a security obtained by him subsequent to his inhibition, and could not compete with adjudication, if led by the inhibitor.

No doubt a ranking and sale stops all preference, but here the preference was created prior to that process. The infestment of Gordon necessarily excluded all the creditors, except the respondent, who, by virtue of her inhibition, had a right to reduce Gordon's infestment as taken *spreta inhibitione*. This was a right which the ranking could not give the other creditors a title to participate in, and could not exclude the respondent from the benefit of. Ranking and sale will not bar an adjudication in implement, Simpson and Graham, 10 *Sh.* 66, nor prevent an heritable creditor executing a power of sale, Hutchison *v.* Cameron's Trs. 8. *Sh.* 982; neither could it here interfere with the right acquired by the respondent, previously to its institution to reduce the appellant's bond, and adjudge the lands.

Pemberton in reply. — The cases of Munro and M'Lure, merely establish that, where the lands are by sale or otherwise put beyond the reach of creditors who have arrestment only, and cannot be attached by them by adjudication, these creditors cannot compete with an inhibiting creditor, from whom the right of adjudging is not taken away, and that when that right of adjudging exists, without question the Court will give the inhibiting creditor the benefit of his diligence, without putting him to the expense of completing his diligence; but none of the cases controvert the principle laid down in the ranking of Cockburn's creditors, and the other authorities which have been cited, that the inhibiting creditor cannot be benefited by posterior rights, but is only not to be prejudiced by them. The ranking and sale operates as an adjudication in favour of the other creditors, as well as the respondent, and reduces her to a *pari passu* ranking with them, and all that her inhibition entitles her to, is to draw such a dividend as the fund would have yielded her in such a ranking, had the appellant's debt not been in the field. But the effect of the interlocutor appealed from, is not to remove the appellant's debt, so far as it prejudices the respondent in the ranking, but to trans-

GORDON v. CAMPBELL. — 2d August, 1842.

fer to her the benefit of the security. This, none of the authorities warrant, but, on the contrary, expressly negative.

LORD CAMPBELL. — This is a case of considerable importance to the law of Scotland; and although I confess that I feel a strong opinion upon it at present, yet I should like to have an opportunity of referring to the authorities, to see whether the principles laid down so very deliberately in Lanton's case,⁽¹⁾ and recognized by all the text writers, have been at all broken in upon by the two cases of Munro and M'Lure. I hope it will turn out that they may all be reconciled; but if there is any difference, I should certainly be strongly inclined to adhere to the law which was deliberately laid down at the end of the seventeenth century, upon the principle that the inhibitor is not to be prejudiced, and is not to be profited by any subsequent security.

Lord Brougham. — We will let it stand over.

LORD CAMPBELL. — My Lords, since this case was argued at the bar, I have very deliberately considered it, and the impression on my mind at the close of the argument being strengthened, I do not now hesitate to advise your Lordships to reverse the interlocutor complained of. If the authorities brought to our notice had been cited before the learned Judges of the First Division of the Court of Session, (which we understand they were not,) I cannot help thinking that this interlocutor would not have been pronounced; for there seems no part of the law of Scotland better established, than that upon which the present case depends.

The question is, whether an inhibitor, under the circumstances, is to be placed in a better situation than he would have been in, if the transaction contrary to the inhibition had never taken place?

This question does not appear upon the record, and was raised

GORDON *v.* CAMPBELL. — 2d August, 1842.

for the first time at the hearing in presence before the Inner House, upon an appeal respecting other matters from the Lord Ordinary, before whom no objection was made to the report of the common agent, on the ground that it did not award payment in full to the inhibitor.

It has been contended by the appellants, that it was not competent to the respondents in that stage of the proceeding, to make this objection; but I do not consider it necessary to determine whether it was so or not, as the objection to the report of the common agent appears to me to be entirely unfounded on its merits. The general rule, as laid down by all the institutional writers, ancient and modern, and founded on very solemn decisions, is, that inhibition being only a negative, or prohibitory diligence, the inhibitor can neither be prejudiced nor benefited by a transaction *spreta inhibitione*.

But this rule is said to have been broken in upon by the cases of Munro of Poyntzfield, M'Lure *v.* Baird, and Lennox *v.* Robertson. Of these cases, it is enough at present to say, that they do not apply; for supposing that, upon an alienation of the estate, where the inhibitor may adjudge, he is entitled to be paid in full, in this case, the inhibitor could not adjudge, for by the ranking and sale under the bankrupt Act, neither the inhibitor nor any other creditor could have raised adjudication against any part of the lands or property embraced in the ranking and sale.

There is nothing to take this case out of the general rule respecting inhibition, as the inhibitor could not by any diligence have placed himself in a better situation than he is placed in by the report of the common agent, if the inhibition had been strictly respected, and the bond had never been executed.

I therefore move your Lordships, that the interlocutor be reversed.

Lord Brougham. — I entirely agree with my noble and learned friend, and I believe my noble and learned friend, who is

GORDON *v.* CAMPBELL. — 2d August, 1842.

not here, who heard the case with us, is entirely of the same opinion.

Mr Anderson. — Will your Lordships give us the costs in the Court below; the Lord Ordinary found us entitled to the costs, but the Inner House, reversing that interlocutor, gave costs against us.

Lord Brougham. — No. My Lords, I should say nothing about costs.

Mr Anderson. — Your Lordships just affirm the Lord Ordinary's interlocutor.

Lord Brougham. — Yes.

Ordered and Adjudged, That the interlocutor, so far as complained of, be reversed.

BRUNDRETT, RANDAL, and BROWN — WM. BELL, Agents.