

found Lister *contra* Aiton and Sleich, No 13. p. 2765.; far less is a naked summons of adjudication to be noticed; for whatever that may operate against voluntary deeds of the debtor, yet it has no effect against a lawful creditor using arrestment.

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THE LORDS found, That Pierie the Chamberlain, having intromitted with what was arrested in the tenants' hands, he was liable to the arresters for the same; and therefore preferred the arresters to Man, the subsequent factor, as to the balance in Pierie's hands, in so far as their arrestments gave them interest therein, or extended to:

Act. Hay.

Alt. Horn.

Clerk, Robertson.

Bruce, No 87. p. 104.

February 1730.

CAMPBELL *against* DRUMMOND.

THE estate of Tofts being sold at a public auction, and the decret of ranking remitted to an accountant, to make out a scheme for dividing the price among the creditors; an objection was started against the scheme, to understand which, the following facts must be premised; *1mo*, Susanna Belshes had an inhibition in the 1672, and an adjudication in the 1685, both upon the same debt; *2do*, Kippenross had an inhibition in the 1673, and, upon the same debt, an heritable bond of corroboration *anno* 1679, with sasine upon it; which heritable bond consequently was struck at by the inhibition of Susanna Belshes; *3tio*, A number of annualrenters, some prior, some posterior to that of Kippenross, but all of them struck at by his inhibition; *4to*, A number of adjudgers in the 1685: coming in *pari passu* with the adjudication of Susanna Belshes, struck at by neither of the inhibitions. To reduce this case to its simplest terms with respect to Kippenross, the operation of his inhibition was first considered; which striking against the annualrenters, made his case the same as if these annualrenters were not in the field; and the inhibition itself was also laid aside, it having in this manner got its full effect. The case being reduced to its simplest terms, the ranking as to Kippenross comes out thus: Kippenross's infestment of annualrent obtains the *first* place; and in the *second* place come the adjudgers, one of whom, viz. Susanna Belshes, has an inhibition that strikes against the infestment of annualrent.

The question is, In what proportions is the price to be divided among these creditors? The annualrenter, in the first place, draws his whole sum; and the inhibitor draws from him, whatever she could draw were he not in the field. So far the matter is clear. But can the annualrenter recur against the adjudgers, for any share of what is thus drawn from him by the inhibition? The scheme says no; the objector says yes.

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A preferable annualrenter, from whom a part is drawn by an inhibition, cannot recur against the posterior annualrenter to make up his loss.

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In order to resolve this intricate question, it must be premised, that an inhibition is not a real right, but merely a personal prohibition, directed against the debtor and against lieges, forbidding them to concur in any deed prejudicial to the inhibitor; and that, consequently, it affords only a personal challenge, which does not alter nor disturb the real preferences.

The nature of an inhibition being thus ascertained, the first thing to be examined with relation to the present question, is, what effect an inhibition ought to have in a ranking. Suppose three annualrenters, A, B, C, following one another in the order of time, and ranked accordingly: C, the last annualrenter, has an inhibition striking against A, the first annualrenter: The estate is L. 800, and the sum in each of the annualrent rights L. 400. Upon this supposition, A, the first annualrenter, is ranked *primo loco*, and draws his whole sum, viz. L. 400; which, being an extinction of his annualrent-right by payment, disburdens the estate so far. B, the second annualrenter, draws all that remains, being other L. 400; and thus C, in quality of annualrenter, is cut out, and draws nothing. But then, when we consider the personal claims or objections that one creditor may have against another, we find that C, having an inhibition against A, must draw from him, by a personal action or claim, whatever he would have drawn by virtue of his annualrent-right had A never existed, which is no less than his whole L. 400; and accordingly, the ultimate division comes out as follows; B gets L. 400, C L. 400, and A nothing. With respect to this supposed case, the objector must say, that A, to make up what was drawn from him by the inhibitor, is entitled to recur against B; which lands in giving C L. 400, A L. 400, and B nothing. And he comes at this conclusion, by conceiving that C, by virtue of his inhibition, must be ranked in the first place, A in the second place, and B in the last place. But this obviously is fallacious; for first, an inhibition, as said above, gives no preference, affording only a personal challenge or ground of reduction; and next, let A and C adjust their preferences as they best can, B, the second annualrenter, against whom the inhibition strikes not, must in all events possess the second place. For to cut out B, according to the objection, is to give an extreme absurd operation to an inhibition: It is made to exclude B, though it has no cause of reduction against him; and it is made to save A, though it is against A that it strikes.

There is another case which tends to illustrate this subject. A liferentrix who has the preferable right upon the estate, consents to the preference of a creditor, which wives are frequently enticed to do; another creditor has an infeftment of annualrent interjected betwixt the liferent-right and the right consented to. The consent here cannot disturb the real preferences: The liferentrix must be ranked *primo loco*, the other creditor *secundo loco*, and the creditor consented to *ultimo loco*; and in that order they must draw their respective proportions, and the estate of consequence be disburdened. The creditor ranked in the last place, must, indeed, by virtue of the consent, draw from the liferentrix whatever he would have drawn, had the liferentrix not been in the field. But

this can never entitle the liferentrix to recur against the annualrenter, ranked in the second place : As to him, the consent is *res inter alios*, which can neither hurt him nor do him service.

Upon the foresaid doctrine, are built the following practical rules, which, from the time of Lord Stair who settled them, have been observed in all rankings. The real rights are first ranked in their order ; and after their sums are allocated to them out of the price, the estate is of course disburdened of them. Next are considered the partial challenges or reasons of reduction, that any of the creditors may have against others. As to such, the rule is, that when a preferable creditor draws his payment out of the price, he, with respect to the other real creditors, is considered as out of the field ; and whatever personal challenge may be competent against him by any particular creditor, they, the other real creditors, are by no means concerned. See Stair, b. 4. tit. 35. § 29.

To apply this train of reasoning to the case in controversy, viz. an annualrenter and two posterior adjudgers, one of whom has an inhibition striking against the annualrenter ; Lord Stair, in the place above cited, has well fixed, that the annualrent-right must be ranked first, and the adjudications in the second place *pari passu*. Then he considers the effect of the inhibitor's personal claim against the annualrenter ; but allows not the annualrenter to recur against the other adjudger for what was drawn from him by the inhibitor. The objector, on the contrary, would have the inhibiting adjudger to be ranked *primo loco*, in place of the annualrenter, because the inhibition strikes against him : He would have the annualrenter, beat out of his own place, to take up the place of the other adjudger, leaving him to be ranked *ultimo loco*.

To sum up all ; when Kippenross pleads upon his inhibition, its full effect is given to it, by striking out of the ranking all the posterior infeftments of annualrent : When he pleads upon his infeftment, he is ranked for his whole sum ; and when this sum is set apart for him, the estate is of course disburdened of the incumbrance. There is indeed a personal claim against him by virtue of an inhibition, which takes from him some share of his draught. But this inhibition militates against Kippenross solely, not against the posterior adjudgers : They cannot be in a better or worse condition than if that inhibition were not in the field.

‘ Found, That Kippenross's infeftment, being once ranked so as to draw his share in competition with the other real creditors, he cannot recur against the posterior real creditors for any part of what is drawn from him by Susanna Belshes, her inhibition.’

In a reclaiming petition, the objector endeavoured to mould his argument into another shape. He *pleaded*, according to the rule laid down by Lord Stair, b. 4. tit. 35. § 28. ‘ That the adjudgers are not to be accounted as joint proprietors, and the infeftments of annualrents as servitudes on the property.’ Whence he drew this inference, That as it is the privilege of an annualrenter, to affect any part of the ground *in solidum*, Kippenross is entitled to draw his

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whole sum out of the part occupied by the adjudger who has not an inhibition ; nay, must do so, because he is barred from attacking the inhibiting adjudger. But the *answer* was obvious, *imo*, That this argument proceeds upon a fallacy, as if each adjudger possessed a separate tenement, and as if the annualrent were a burden upon both tenements ; whereas, there is but one subject, viz. the estate of Tofts, over the whole of which, each adjudger has a right *pro indiviso*. This shows the emptiness of the objector's argument ; for there can be no partition of the land, or of the price, betwixt the two adjudgers, till the burdens that affect their joint-property, and in particular the annualrent-right, be discharged, leaving the remainder clear to be divided equally betwixt the adjudgers ; *2do*, *Esto* the objector's rule were to take place, viz. first to divide the common subject betwixt the two adjudgers as joint proprietors ; the next thing to be done, would be to divide the common burdens also ; by which means no more but the one half of the annualrent-right would fall upon the simple adjudger. It is true, the annualrenter might, notwithstanding, draw his whole sum from the simple adjudger ; but then, this adjudger would, without controversy, be entitled to recover from the co-adjudger the half of the said sum, for which he, the co-adjudger, was ultimately liable. And this comes to the same with what is determined by the Court.

' The bill was refused without answers.'

*Fol. Dic. v. 1. p. 184. Rem. Dec. v. 2. No 1. p. 1.*

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1739. February 7.

HOGG and the Other CREDITORS of the EARL of BUCHAN, *against* COLONEL GAIRDNER.

No 97.

WHERE, in a competition of creditors, one has a preferable security over two subjects, from both of which he debars a secondary creditor till he recover his payment, not only will he be obliged to assign to the secondary creditor upon payment made to him by the secondary creditor, but he will even be obliged to assign when he debars the secondary creditor, and draws his payment out of the subject ; for though that may appear an extinction of his debt, as no doubt it is in strict law, yet in practice it is considered as if the debt had been extinguished by the money of the secondary and postponed creditor.

*Kilkerran, (COMPETITION.) No 1. p. 136.*

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1739. February 7.

A. *against* B.

No 98.

IN a competition of creditors for the rents of an entailed estate, where one of them had a debt, which also affected the fee, he was found not obliged to assign to those whose debts did not affect the fee.