

No 58.  
‘ a horning,’  
without men-  
tioning that  
the bond on  
which the  
horning pro-  
ceeded was  
produced.

*Pleaded* for the pursuer, A horning, which could not have been got without a bond, is evidence of the debt. Inhibitions pass on decreets without their grounds; on summonses; and against heirs on general charges; and there are condescended on from the register 176 inhibitions on simple hornings.

*Pleaded* for the defenders, A horning referring to a bond is no proof of any debt without production of the bond; a decret imports an obligation; inhibitions are granted on dependences, on which decret must follow; and have been allowed on general charges, because it was thought an heir could not be summoned to make a dependence within the year of deliberation; but it is contrary to all rule to grant them on a horning; and the practice, as irregular, ought not to be sustained.

*Observed*, That practice only determined on what foundation this diligence might proceed; as it was difficult to know on what principles this was settled at first.

THE LORDS repelled the objection.

Reporter, *Drummore*.

Act. *A. Pringle*.

Alt. *J. Stewart*.

*Fol. Dic. v. 3. p. 321. D. Falconer, v. 2. No 216. p. 260.*

\* \* See Lord Kilkerran's account of this case in the two last paragraphs of No 55. p. 6989.

1757. *August 11.*

No 59.  
Inhibition re-  
called upon a  
debt not yet  
payable.

WALTER STIRLING, Merchant in Glasgow, *against* PATRICK NISBET, Merchant there.

WILLIAM STIRLING granted bond to Janet his daughter, the wife of Patrick Nisbet, for L. 250, to be paid at the first term after the death of Elizabeth Murdoch.

He afterwards conveyed his whole estate to Walter, his only son, declaring, ‘ That Walter, and the subjects conveyed to him, should be affected with the payment of his just debts, and the provisions made in favour of Janet and the other children.’

Patrick Nisbet, after the death of William Stirling, used inhibition and arrestments against Walter Stirling, for security of this sum, which was not payable till the death of Elisabeth Murdoch, an event which had not then happened.

Walter applied to the Court to have the inhibition recalled, and the arrestments loosed without caution; and *argued*, That this was a debt not yet due; and therefore that no diligence could be taken out upon it, unless the debtor were *vergens ad inopiam*; which could not be pretended in this case, as Walter's affairs were in a good situation: That of old, the diligence of inhibition was not allowed to go out till probable evidence was given, that the creditor had cause to apply for it; that, in latter times, the diligence had been allowed

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.

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*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 infest, *against* The ADJUDGING CREDITORS infest on that estate.

IN the ranking of the Creditors of Langton, it was *insisted* for the Adjudging Creditors not infest, That the sums to be drawn by the creditors-inhibitors, 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 infest, 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 inhibitors would first affect the creditors not infest, and next the least preferable infestments, 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 infest, 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 inhibitor, 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

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Inhibition affects the least preferable of the rights against which it strikes, and not all the rights *pro rata*.