1770. *February* 16.

Mrs Agnes Stewart of Phisgill and Husband *against* The Earl of Galloway and Others, Trustees for the Creditors of the deceased Captain John Stewart of Phisgill.

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A party, after bringing an action against a debtor, and raising inhibition on it, submitted the matter to arbiters. In the submission and decree-arbitral, the inhibition was not mentioned. The Court found, the sums awarded by the decree-arbitral were not secured by the inhibition, but reserved to the pursuer to insist in the depending processes, for decree to the amount of the sums decerned for by the decree-arbitral.

The pursuers having several claims of debt against Captain Stewart, brought an action for the same; upon the dependence of which an inhibition was raised and executed.

Captain Stewart executed a disposition of his estate in favour of the Earl of Galloway and others, as trustees, for payment of his just debts, and other purposes expressed in the trust. The trustees accepted, and raised a multiplepoinding, calling all Captain Stewart's Creditors into the field, to ascertain their respective interests.

The pursuers thereafter entered into a submission with the trustees; wherein, upon the recital of the depending actions against Captain Stewart, the parties 'Submit and refer the foresaid three several actions, whole conclusions, and 'import thereof, so far as yet undetermined, defences there against, and whole 'steps and procedure had thereon, with the proof *hinc inde* adduced, to the 'final determination, sentences and decreet-arbitral, &c.' 'And upon due con-'sideration of the whole, to find, decern, and declare, the said Mrs Ann Stew-'art and husband a just, true, and lawful creditrix of the said deceased Cap-'tain Stewart, to such an extent, and for whatever sums the said arbiter shall 'think just and see cause, in lieu of, and in full of the conclusions, import, and 'intention of the said three actions, or all that can or may follow thereupon; 'to the end they may, in consequence of such sentence and decreet-arbitral so 'to be given and pronounced, produce the same in the multiplepoinding, and 'be entitled thereby to claim their preference, and draw a share of the funds of 'division suitable thereto, in competition with the other creditors of the said 'Captain Stewart.'

The submission took no notice of the inhibition; and the decreet-arbitral found that the pursuers were lawful creditors to a certain amount, and that they were entitled to be ranked therefor along with Captain Stewart's other creditors.

The pursuers produced the submission and decreet in the multiplepoinding, and claimed to be preferred in right of the inhibition, and upon the dependence of the action against Captain Stewart But this being objected to by the other creditors, the Lord Ordinary 'Sustained the objection to the inhibition, &c. and finds, that as the same proceeded on a depending process, and that process was sopite by a decreet-arbitral and a submission, without any reservation or provision concerning the inhibition, the effect thereof ceases.'

In a reclaiming petition, the pursuers *pleaded*;

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1*mo*, It was certainly a mistake to suppose, that by the submission and decreet-arbitral there was no reservation and provision concerning the inhibition, as the effect thereof was undoubtedly reserved by both. The submission was only between the trustees, as in place of Captain Stewart and the pursuers; the other creditors were no parties thereto; and the declared purpose thereof was, to ascertain the just amount of the debt due arising upon the different claims, that they might on that ascertainment resort to the multiplepoinding, and make their demand. As the ascertainment of the debt, therefore, was all that was in contemplation, it could not be presumed that the pursuers were to give up a security for their debt, whatever it might amount to, and in whatever manner that amount might be established; as if the actions had been carried on to the length of obtaining decree, the inhibition would nevertheless have remained effectual.

2*do*, As the other creditors were not parties to the submission, they could not be bound by the decreet. Upon the supposition, that the arbiter had ascertained a greater sum as due than the other creditors might think just, they would certainly have been entitled to have stated objections thereto, as if no decreet-arbitral had been pronounced. And as it could not be denied but that they would have been entitled to argue in this manner, and to say, that they could not be bound by the decreet, it was equally clear, that they never could derive any benefit from that transaction; which was precisely, however, what the creditors were now attempting.

3*tio*, If the inhibition was supposed to be included in the submission, or by that procedure to fall to the grouud, the most unjust consequences would result. 1*mo*, The other creditors might, as they were not parties to the submission, hold by or repudiate the decreet as they should find it most for their advantage. 2*do*, Suppose that any of these creditors had served inhibition upon their depending processes, it would undoubtedly be very singular, that their diligence should operate its full effect, whilst that of the pursuers should be totally cut down. The absurdity of this doctrine was to be carried still farther; for supposing the inhibitions of the other creditors to be even posterior in date, they would still, upon the footing of the interlocutor reclaimed from, be preferred to the pursuer's prior diligence.

Answered for the Trustees;

1*mo*, When an inhibition was used on a dependence, it could only be effectual in the event of the dependence being closed by a decreet; and if no decreet should ever follow, the inhibition could have no effect. But if the subject matter of the dependence was taken away by a voluntary transaction between the parties, as the depending action was thereby clearly at an end, the inhibition must also fall; and it could make no difference whether the action and ground thereof were taken away by a private compromise betwixt the parties, or by arbiters upon their reference. The depending action was sopited as

No 62. much in the one case as in the other; and the diligence raised upon the dependence must fall with it. The point was determined, Falconer, 3d July 1751, Reids and Campbell *contra* Napier, No 57. p. 6993.

2*do*, The presumed intention of parties, that the inhibition was not to be included in the submission, was neither of importance nor well founded. The pursuers behoved to know, that the decreet-arbitral would put an end to the depending action; so that, in entering into the submission, they must have meant to give the inhibition up; nor was it difficult to suppose, that they may have considered it as more for their advantage to have their claims ascertained by arbiters, than in a court of law, with the inhibition as the security.

3*tio*, It was not in the power of parties, by private agreement, to alter the mode or form of legal diligence, or give it an effect which the law did not confer. For suppose it had been stipulated in the submission, that the effect of the inhibition should not be cut off, and that a reservation to that import had been entered in the decreet-arbitral, these clauses would all have been useless and ineffectual. The inhibition would not thereby have been saved, but would have been as much gone as if these deeds had contained no such clause. *A fortiori*, the inhibition could have no effect when the submission contained no such reservation: And as to the last argument, though it was not in the power of the trustees, by any deed of theirs, to hurt the creditors, yet it was assuredly in their power to benefit them; and if by any transaction they had done so, the creditors were entitled to take advantage of it.

At advising, the Judges who spoke were of opinion, that though the pursuers could not plead the inhibition in support of the decreet-arbitral, any more than in a private bargain, yet there was no reason why they might not still insist on their libel for the sum ascertained by the decreet-arbitral. The creditors who were not parties to the submission might object to the *quantum*; but if they could support the extent, nothing hindered them from getting a decreet *in foro*, by which they could still reap the benefit of the inhibition. Being therefore of opinion that the Lord Ordinary's interlocutor went too far, they found "the sums awarded by the decreet-arbitral are not secured by the inhibition, without prejudice to the petitioner to insist in the depending processes for decreets, as accords; and remits to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Auchinleck*. Clerk, *Gibson*.

For Stewart & Husband, *Lockhart*. For the Trustees, *Macqueen*.

R. H.

Fac. Col. No 23. *p.* 55.