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There being other points in the petition, particularly how far the son might be allowed to charge his claim on the estate, to enable him to compete with other creditors, though it should be found he could not insist personally against his father. It was remitted to the Lord Ordinary to hear parties thereon. See No 3. p. 1390.

Act. Graham, sen,

Alt. Haldane.

Clerk, Murray,

D. Falconer, v. 1. p. 80.

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In a competition among annualrenters, in a case where an inhibition was prior in date to them all, it was found, that the deficiency of funds did not affect equally, or *pro rata*, all the annualrenters, who stood preferred the one to the other, but affected only the last.

1747. January 10. LITHGOW against The other Creditors of ARMSTRONG.

In the ranking of the creditors of Francis Armstrong of Whitehaugh, there were three infestments, and an inhibition prior to all the infestments, with an adjudication on the ground of the inhibition, and which debts did more than exhaust the subject. John Lithgow had the first and preferable infestment over the whole subjects belonging to the debtor, next to him, William and Henry Elliots had infestment on the lands of Whitehaugh, and after them, William Elliot of Bradly; and, upon the other tenement of Snobberty, John Elliot of Binks had an infestment after John Lithgow. But then the Earl of Leven had the inhibition prior to all the infestments; which, how soon it appeared in the ranking, the other creditors, whose infestments were posterior to John Lithgow's, purchased at L. 175 Sterling; and, by the scheme of division, this sum was allocated proportionally upon the shares drawn by each of the infesters, who were all struck at by the inhibition.

Of this allocation, John Lithgow the first infester complained, insisting, that he ought to bear no burden of any part of the sum drawn by the inhibitor, but that the same ought to be laid wholly upon the last infestment; and that upon these principles, that an inhibition has no operation for the benefit of any person whatever, other than the person at whose instance it is served, and that even in his favour it has no operation against any debt, though contracted after the inhibition, further than in so far as that debt prevents the inhibitor from drawing what he would have drawn if it had not been contracted, and that no infester can be prejudiced by the contraction of debts after his infestment.

*Answered* for John Elliot of Binks the last infester, That the scheme is in this case made out in the very same way that all schemes have been made, as far back as there is record of the practice of the Court: There is first a general ranking of the several debts according to the dates of the infestments; but when the creditor has drawn in this general ranking, and that an inhibitor is to be satisfied of his debt, there is a second ranking or draught whereby he, the inhibitor, takes back proportionally from each creditor in the general ranking struck at by the inhibition, without distinction of the priority of the infestments among themselves: And the reason is, that an inhibition is a legal prohibition issued out against the debtor, discharging him to do any deed whereby

any part of his lands may be evicted from him in prejudice of the complainer, and discharging the whole lieges to accept of any right from him, whereby any part thereof may be evicted from him; and, the effect of it is, to set aside all deeds simply and absolutely, which are granted *lege prohibente*, the first as well as the last; and as the inhibitor reduces all deeds done after his inhibition, he is not allowed to load one and free another; but the law lays the burden proportionally. And therefore it is, that if a creditor has a general infeftment on two tenements, and the debtor thereafter sells the two tenements to different purchasers, which ever of the two purchasers the inhibitor should think fit to attack, he will be obliged to assign against the other; and if each of the purchasers is entitled to demand an assignation, it is impossible this can resolve in any other issue than a proportional allocation of the common burden upon each of them *pro rata*. And, it is no less certain, that the creditor from whom an inhibitor draws any part of the sum, for which such creditor was preferred in the general ranking, cannot recur against the other creditor, though posterior to his infeftment, for the sums so taken from him; because *quoad* them, he has already drawn his whole debt, and cannot draw it over again, which were to make them liable to repair a damage he had suffered upon the account of a defect in his own right.

And as these were said to be the principles upon which the rule pleaded for is founded, it was said to be in practice established in the case of the ranking of the creditors of Sir William and Sir Thomas Nicolson, No 92. p. 2876., which has been ever since followed uniformly (except in the case of the creditors of Ross of Galstoun, where the accountant was said to have departed from the Lords) viz. in the ranking of the creditors of Hallgreen, of the creditors of Dalmahoy, of the creditors of Tannachy, of Hamilton of Abbayhill, of Mr William Stirling, of Lindsay of Mains, of Boswell of Balbertoun, and of Belches of Tofts. (See GENERAL LIST of NAMES.)

And to obviate an objection, that, at this rate, it would not be in the power of a creditor who lends upon an infeftment after an inhibition to secure himself by any form of law, it was said there were many methods in law whereby he might obtain a security liable to no challenge; such as, *first*, By advancing a little more money to clear the inhibition; or, *2dly*, By causing the debtor grant infeftment to the inhibitor, by which his debt may be secured as well his own; or, *3dly*, By inhibiting the debtor upon his warrandice, upon which he may have recourse against other subjects belonging to him; or, *4thly*, By taking infeftment of warrandice against the effect of the inhibition. But if none of these methods is used, he has himself to blame if he suffer by the inhibition he saw on the record before he lent his money: Nay, if none of these methods is taken, it may happen that an infester may lose his money were the estate of ten times more value than to pay both the debt secured by inhibition, and the debt secured by infeftment. *E. G.* Where the heir of the debtor sells the land, and the purchaser pays the price, but retains to the value of the annualrent; in that

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case, the purchaser is liable to the annual renter, but has no concern with the inhibition, yet the inhibitor will draw from the annual renter to the extent of his sum. It is not, therefore, peculiar to this case where the subject is wholly exhausted by infestments, that an infester is not secure against the effect of a prior inhibition, unless he take the proper methods which the law allows for his security.

*Replied* for John Lithgow, That it may be true, that the schemers have often followed the method which the answer sets out with, as the universal practice, without distinguishing the cases in which the loss occasioned by the inhibition should be allocated proportionally among the creditors struck at by the inhibition, and when not; though even that practice, as should be hereafter shewn, has not been so universal as is alleged; yet, however that be, the reasonings in point of principle, brought in the answer to justify it, were said either to be such as have no foundation in law, or are altogether misapplied.

Of the first kind was said to be the leading proposition, and which is the foundation of all the rest, That an inhibition affects equally all debts posterior to it, as being all contracted *spreta inhibitione*; a proposition by no means true, as an inhibition is not a prohibition to the debtor to contract any debt whatever, but only to contract debt whereby the debtor's estate may be evicted in prejudice of the inhibitor; and therefore it affects only such debts as prejudice him, but affects not debts whereupon even the lands are evicted, where that eviction does no prejudice to the inhibitor: And it was said, that there are two cases wherein this happens, and that there is not a third.

One is where the inhibitor can draw nothing, though the debt struck at by the inhibition had not been contracted; for example, where there are adjudications upon debts prior to the inhibition, which exhaust the debtor's estate; and that the inhibitor has omitted to adjudge on his debt within year and day of the first effectual adjudication: In that case, if a creditor, whose debt is after the inhibition, has adjudged within year and day of the other adjudgers, he will draw proportionally with them; nor can the inhibitor challenge his debt, because he is not prejudiced by it, seeing that *esto* it had not been contracted, he could have drawn nothing, the estate being supposed to be exhausted by debts, against which the inhibition does not strike.

The other cannot be better exemplified than in the present case, where the inhibitor has nothing to do but to put out his hand and take his money (supposed to be lying on the table) from the creditor who in the ranking of the creditors struck at by the inhibition is the last drawer; and, which is the case in all finished rankings, and where the matter is brought to the making up the scheme of division; for in that case he cannot say he is prejudiced by the creditor who is preferable in that ranking, when he draws all that he is entitled to; nor can the last drawer oppose him, unless it could be maintained that the last drawer could plead a benefit to himself from the inhibition, which neither in reason, nor agreeable to principles, any one can do other than the inhibitor

himself, and even not he himself further than he is prejudiced by the debt he challenges as has been said.

Nor is this rule, for determining upon which of the creditors struck at by the inhibition, the loss occasioned by it lies, peculiar to the present case, though as being the most simple case that can occur in a ranking, it is the plainest example of it, where the inhibition strikes against the whole other creditors; for, every case that can occur must be governed by the same rules. Suppose, for example, that, in this case, John Lithgow's infestment had been prior to the inhibition, it must be admitted, that as he was also prior to all the other infesters, he must have drawn his full payment, as he was not struck at by the inhibition, and then the same rule would have taken place with respect to his present competitors, that the last drawer would have sustained the whole loss occasioned by the inhibition: And indeed, nothing can better illustrate the present case than this instance, for, what can it import the other infesters, that his infestment is posterior to the inhibition, when still preferable to theirs, unless they can be heard to take the benefit of another's diligence.

In short, the just conception of this whole matter, and which applies to every case that can occur, is, that the interest which falls to the whole creditors struck at by the inhibition, is considered as a fund out of which the inhibitor (who all along is supposed to have adjudged) draws *primo loco*, and all the others take the same rank among themselves upon the remainder which formerly they had; and the consequence is, that what the inhibitor gets by his inhibition comes off the last drawer, who is affected by the inhibition; and, if the part falling to such creditor, does not satisfy the inhibitor, he takes next off the penult creditor, and so upwards, in the reverse order of the ranking.

And it makes no difference in the question, that some of these creditors may have been ranked *pari passu* with each other, which happens to be the case here, and must always be the case of more infesters, who, though prior in point of time to each other, yet are infesters on different subjects, and therefore, in the sense of law, neither prior nor posterior to each other; I say, it makes no difference in the question other than this, that as in the ranking they draw proportionally, so they bear the loss proportionally occasioned by the inhibition: And in that, or the like case only it is, where two or more creditors, who are struck at by the inhibition, are ranked *pari passu*, that the loss occasioned by the inhibition is, as to them, allocated proportionally; for, as they are ranked *pari passu*, each must bear his proportion of the loss; as the inhibitor has no further interest than to be fully paid, nor power to disturb the order of the ranking, further than is necessary to obtain his own payment; and, the law will not allow him *in emulationem*, to take any more from one creditor who is in *pari casu* with another, than his just proportion. And, would it not be a strange consequence, that, because the allocation of the loss is proportional on creditors who have a *pari passu* preference, therefore it should also be pro-

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portional between two creditors, one of whom has, in the ranking, a preference to the other?

And as to the practice, which was admitted to have frequently gone agreeable to the manner in which the present scheme is formed, there were other instances condescended on, besides that of the creditors of Galston above mentioned, wherein the schemes were framed as they always ought to be, laying the loss occasioned by the inhibition upon those struck at by it, who were the the last drawers. Thus, in the second scheme of division of the price of Mr William Stirling's lands approved in February 1743, both interlocutor and scheme exempted one debt posterior to the inhibition from suffering by what the inhibitor was to draw, because the inhibitor got his full payment off other debts posterior to that debt in point of ranking: But the truth of the matter was said to be, that the practice in either shape has been no other than a practice resting upon the interlocutors of Ordinary's, not objected to by parties concerned, often for not understanding their own interest, and which was right or wrong, according as more or less accurate schemers happened to be employed, which leaves it entire, now that the matter is litigated, to have judgment given agreeable to principles.

And whereas, it had been *urged* in the answers, that as every creditor whom the inhibitor might attack, was entitled to ask an assignation, and, if one be entitled to it, another is no less so, which occasions a circle no otherways to be extricated than by a proportional allocation of the loss on the whole; besides, the reply to this, in effect already made, that the inhibitor has it not in his power to attack whom he pleases, nor is the postponed creditor entitled to demand such assignation, it was further *replied*, that supposing the postponed creditor to obtain such assignation upon paying the inhibitor, it would not alter the case; for still the preferable infester would not allow him to possess or draw upon his postponed infestment, and if he drew upon the inhibitor's interest, the matter just returned where it was.

THE LORDS having considered the scheme of division, and above debate, found, ' That the inhibition being prior to, and therefore affecting all the annualrent-rights, the deficiency arising from the shortcoming of the funds does not affect equally or *pro rata* all the annualrenters, who stand preferred the one to the other, but must affect the last; and remitted to the Ordinary to direct the scheme of division accordingly.'

*Kilkerran, (COMPETITION.) No 5. p. 138.*