1741. *November* —. NISBET *against* BAILLIE.

No 118.
Inhibition secures not only the debt, but all diligence following thereon.

ALEXANDER NISBET having, in 1677, purchased the lands of Carphin from Baillie of Carphin, got from the Lady Jerviston, Carphin's wife, a disposition to the lands of Jerviston, in real warrandice; and having been obliged to redeem an adjudication led against the lands of Carphin by Jordanhill, in 1691, upon a debt, upon which inhibition had been executed against Baillie of Carphin, in the 1675; in an action of recourse upon the lands of Jerviston, at Nisbet's instance, it was *argued* for the heir of the Lady Jerviston, That no recourse was competent, further than to the extent of the principal sum, annualrents, and penalty in the bond, on which the inhibition proceeded, but not for the annualrents of the accumulated sum in the adjudication; because no further could Jordanhill have reduced Nisbet's disposition *ex capite inhibitionis*.

Which the LORDS "Repelled, and sustained the recourse for the accumulated sum in the adjudication, and annualrents thereof."

Fol. Dic. v. 3. *p.* 324. *Kilkerran*, (INHIBITION.) *No.* 2. *p.* 285.

1741. *December* 3. DUNBAR *against* STEWART's Creditors.

No 119.
Found in conformity with the above.

IN the ranking of the Creditors of James Stewart of Castlehill, John Dunbar of Burgie, having produced a decree of the Privy Council, against Castlehill, for L. 2000 Scots, with inhibition upon it, in 1705, and adjudication thereon, in 1737, the LORDS found, "That he was preferable to the creditors, whose debts were contracted after the inhibition, not only for the sum in the decree, but also for the accumulations in his adjudication."

Fol. Dic. v. 3. *p.* 324. *Kilkerran*, (INHIBITION.) *No.* 3. *p.* 286.

*** Clerk Home reports this case.

IN the ranking of the Creditors of Castlehill, Dunbar of Burgie produced a decreet in the year 1705, of the Privy Council of Scotland, against Castlehill, for L. 2000 Scots, with an inhibition thereon, in January 1705, and an adjudication on this ground of debt, in November 1737; and craved that he might be preferred to the other creditors for the principal sum and annualrents due thereon, since the date of his adjudication. The other creditors likewise produced several heritable and moveable bonds, granted by the common debtor, posterior to the inhibition, and agreed that Burgie should be preferred for the sum contained in the decreet, upon which inhibition was used; but objected, that the creditors, who are infeft prior to Burgie's adjudication,

No 119.

though their grounds of debt are subsequent to the inhibition, must be preferred to Burgie, in so far as concerns his annualrents, which were not due by the decreet, upon which inhibition was used, but only became due upon the adjudication, which was led a great many years after; that an inhibition secures the sums contained in the ground of debt upon which it is used, and interpels all posterior contractions, to the prejudice thereof, but cannot secure a debt which, at that time, had no existence; and such are the annualrents now claimed, which, at the date of the inhibition, were neither due by any act of the party, nor by the operation of law, but became due by an after contingency, which was then uncertain if it should ever happen or not. The creditors who contracted were interpelled by the inhibition, only to the extent of the sums therein mentioned, but were not bound to conjecture whether the inhibiter might afterwards, by any legal diligence, either of denunciation or adjudication, establish to himself a claim for annualrents. The adjudication in this case cannot be drawn back to the inhibition; because, the intervening rights of the creditors, who obtained infeftments betwixt the date of the one and the other, are so many *media impedimenta*, which hinder the adjudication to be drawn back to any further extent than the sums actually secured by inhibition. See 9th February, 1683, Trotter, No 116. p. 7048.

Answered, That inhibition must, from the nature of the thing, secure not only the particular sums specified in the ground of debt, upon which it is founded, but also all the natural consequences of the diligence deduced thereupon: That the very common stile of inhibitions imports, that the creditor inhibiting was about to do diligence, and sue execution against his debtor's lands and estate; and that the debtor intended to disappoint his diligence by voluntary alienations; and therefore it is, that inhibition is issued out to prohibit him so to disappoint the creditor, and to interpel the lieges. Every party, who thereafter contracts with the debtor, must know, that he cannot compete with the diligence to be done by the inhibiter, for affecting his debtor's estate; though adjudication is not then led, yet it is apparent that inhibition is used with a view to such adjudication afterwards to be led; for, without it, the inhibiter cannot affect the subject, nor draw any part of his debt out of it; and, therefore, the inhibition and adjudication must necessarily be connected together, as if they were one and the same diligence; the one is no more but a competition and following out of the other. And it is not tenible to say, that the intervening infeftments can hinder the inhibiter's adjudication from being drawn back to it; if they could, no inhibition should ever have any effect: For, unless the adjudication is drawn back to the inhibition, the inhibiter can have no preference upon the subject, not even for the original debt: When he is preferred for that, it is only upon this footing, that his adjudication gives him a legal right to the subject, which the creditors, who contract after inhibition, are excluded from challenging; and, if

the subsequent adjudication is not liable to challenge at their instance, it must subsist and be effectual, in the manner, and to the effect for which it was led; that is, to make the adjudger a redeemable proprietor of his lands, from the date of his adjudication. See 24th Feb. 1666, Grant, No 114. p. 7045. No 119.

Replied, The objection against the preference claimed for the annualrents is still good; seeing the debt itself, by its original constitution, did not bear annualrent; and no diligence was done thereon, whereby interest could be created upon it, for upwards of 32 years; during all which time, no person could be interpelled or debarred from contracting with the party, except in so far as concerned the debt in the inhibition; and the mistake seems to lie in this, as if the annualrents in question were the natural consequence of the debt; which, in this case, it is not, but is purely casual, proceeding upon diligence optional to the creditor to have used or not; and, therefore, can have no effect, till it is used. The case, indeed, might be different, where the interest arose from the obligation; for, in that case, a posterior creditor is at least in some sort interpelled; but where the interest is not part of the obligation, but is created only by the operation of the law, and is the consequence of the diligence, and not of the debt, it is then to be considered as a new and separate debt, arising *ex nova causa*, and can no more be secured by the inhibition, than if it were contained in a separate bond, granted to the inhibiter himself, upon which inhibition had not been used; and, consequently, such separate bond would not be secured or affected by the inhibition; and, if it were otherwise, it would give an effect hitherto unknown in law, to this sort of diligence, and make it productive of annualrent, although the obligation on which it proceeded carried none. An inhibition is, indeed, a prohibitory diligence, and affords a security to the debt on which it proceeds; but then this security can go no further than the precise terms of the prohibition: Every creditor, who sees an inhibition, must lay his account to be no further liable than to the extent of the debt on which it proceeds; were it otherwise, creditors might be greatly ensnared; which applies strongly to the present case, where the diligence, which creates the interest, was not followed out for so long a time after the existence of the debt. See July 27th, 1666, Lord Borthwick, No 22. p. 6953. As to the observation upon the stile of inhibitions, that it supposes the inhibiter is about to do diligence, and, therefore, must secure such diligence, the argument will not hold; for that is no more a proof of the creditor's intention, than it is of the design of the debtor to alienate his lands, to disappoint the inhibiter. Words of mere stile can, in such case, prove little; and, surely, cannot extend the effect of the inhibition beyond the debt, upon which it proceeds; and it is as little to the purpose, what is further observed, that the adjudication must necessarily draw back to the inhibition, otherwise the adjudger could never have a preference: For, although this is true, that the adjudication draws back to the inhibition, yet

No 119. this can only be in so far as concerns the debt on which the inhibition proceeds, but cannot reach that which is the consequence of the adjudication only, and not of the ground of debt or inhibition, to the prejudice of the intermediate real creditors, posterior to the inhibition, but prior to the adjudication.

The Lords found, that the inhibiter was to be ranked for his accumulations *retro* from the date of his inhibition.

C. Home, No. 185. *p.* 307.

Inhibition, Competing with other diligence. *See* Competition.

Execution of Letters of Inhibition. *See* Execution, and Sect. 1. of Inhibition.

Inhibition on debts conditional, or *in diem*, or upon a dependence. *See* Legal Diligence.

Registration of Inhibition. *See* Registration.

Inhibition of Teinds. *See* Tack.

See Appendix.