

1763. December 7. M'VIGAR against GORDON of Ardoch.

No 61.
Inhibition secures only the sum in the deed on which it is founded, not what may afterwards accrete by a bond of corroboration, or by an adjudication.

DONALD GUN being creditor to Alexander Sutherland of Littletorboll in L. 1000 Scots by bond, brought an action upon the passive titles against John Sutherland the debtor's heir, concluding payment of the sum in the bond, with annualrent and penalty; and upon the depending process raised an inhibition, 'inhibiting and discharging all subsequent contractions whereby the estate of Littletorboll may be evicted in defraud of Donald Gun the complainer, anent the implement and fulfilling to him of the said decret when obtained, and payment making to him of the debts and sums of money to be contained in the said decret.' Decree passed accordingly in January 1727, followed by an heritable bond of corroboration upon the estate of Littletorboll, upon which the creditor was infeft January 1729, as also with an adjudication dated 3d December 1735, upon which the superior was charged.

The said John Sutherland of Littletorboll, granted to Alexander Gordon of Ardoch, *anno* 1725, an heritable bond for 5500 merks, upon which infeftment was taken *anno* 1728, followed by a decree of adjudication 18th December 1734.

In a process of sale of the estate of Littletorboll, a competition arose betwixt these two interests; and as Ardoch was first infeft, his competitor had no ground of preference except upon his inhibition, which was insisted on as entitling him not only to be preferred for the sums contained in his decree upon the passive titles, but also for the additional sums contained in his bond of corroboration and subsequent decree of adjudication. And several precedents were urged to shew that this naturally was the effect of an inhibition. To which it was *answered*, That to determine the present point, there is no occasion to enter deep into the nature of an inhibition; it being sufficient to observe, that by the express tenor of the letters, the effect of the inhibition is confined to the sums contained in the decree upon the passive titles, which accordingly was found by the Court.

Fol. Dic. v. 3. p. 322. Sel. Dec. No 209. p. 276.

* * * This case is reported in the Faculty Collection :

1763. December 8.—IN 1725, John Sutherland of Littletorboll, granted an heritable bond to Alexander Gordon of Ardoch, for 5500 merks.

Upon this bond, Alexander Gordon was infeft in 1728; and personal diligence having been used against the debtor in 1733, a decret of adjudication was obtained upon the 18th December 1734, for the accumulated sum of L. 4736 Scots.

In 1749, Captain Adam Gordon, the son and heir of Alexander Gordon, brought a process of ranking and sale against William Sutherland, eldest son of the said John Sutherland of Littletorboll.

In this process, an interest was produced for Neil M'Vicar of Fergushill, consisting of the following writs; *1mo*, An extract of a contract of marriage, dated 26th April 1688, betwixt Donald Gun and Margaret Sutherland, daughter of John Sutherland of Littletorboll, with consent of her father, and Alexander Sutherland her brother, by which the said John and Alexander Sutherlands became bound to pay L. 1000 Scots of tocher to the said Donald Gun; *2do*, A bond dated 31st May 1698, granted by Alexander Sutherland, then of Littletorboll, and William Sutherland his brother, whereby in corroboration of the marriage-contract, they became bound to pay to Donald Gun the above sum of L. 1000 Scots, with annualrents, from Martinmas 1698; *3tio*, General retour of Alexander Gun to the said Donald Gun his father; *4to*, Inhibition at the instance of Alexander Gun, executed upon a depending action in 1724; *5to*, Decreet of constitution obtained against Alexander Sutherland last of Littletorboll, in 1727; heritable bond and infestment in corroboration thereof, in 1729; and decreet of adjudication following thereon, for the accumulated sum of L. 4089 Scots, in 1735, with a disposition of the said debts and diligences from the said Alexander Gun in M'Vicar's favour.

A debate ensued between M'Vicar and Captain Gordon, as to the extent of the former's preference in virtue of his inhibition.

Pleaded for M'Vicar; That the inhibition secured not only the principal sum and interest due upon the bond of corroboration 1698, but also his accumulations, and that he ought to be preferred, *primo loco*, for the whole accumulated sum contained in the decreet of adjudication 1735, and interest from the date thereof.

Answered for Captain Gordon and his assignee; *1mo*, An inhibition is merely a prohibitory diligence, and is only introduced to secure the debt due at the time when it is used. It does not, of itself, make void the posterior debts or deeds of the person inhibited, but only affords a title to the user of the diligence to reduce them, in so far as they are hurtful and prejudicial to him. It is, therefore, only necessary to inquire what was the amount of the debt when the inhibition was executed; had it been used simply upon the L. 1000 bond granted in 1698, the amount of the debt to be secured by it would have appeared clearly at the time it was used; but, as it proceeded upon a depending action, the decreet which followed upon that action is the only measure for estimating its effect.

This inhibition, therefore, can, at most, only secure a preference to the extent of the sums contained in the decreet 1727; and, as the inhibitor could not be hurt by any after deed of the common debtor, so neither can the heritable bond and infestment granted in favour of Gordon of Ardoch be hurt or affected by any posterior deed of the said common debtor. By this heritable bond and infestment, Ardoch was invested in the property of the estate, in security of the debt due to him. This security, indeed, was not absolute; the user of the inhibition had a title of preference for the debt due at the time his

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inhibition was used, and ascertained by the decree which was pronounced in the depending action upon which it proceeded ; so far it was liable to be opened ; but in all other respects it was indefeasible. The common debtor was totally disabled to overturn or weaken it in the smallest degree ; he could not, therefore, by accumulating the principal sum and interest due by him to the user of the inhibition, diminish or affect the right of property in the estate, which had been formerly granted to Ardoch in security of his debt. This accumulation, by which interest was made to bear interest, created a new debt, which was not due at the time the inhibition was used, or at the time the decree was pronounced in the action upon which it proceeded ; and, as inhibitions afford only a title to reduce posterior contractions, this new debt cannot be brought in competition with another debt which was prior to it.

This being the case, Mr M'Vicar can be entitled to no preference for the accumulations contained in the heritable bond of corroboration 1729 ; and, if so, he can as little pretend to any preference for the accumulations contained in the decree and adjudication obtained by his father in 1735, as that adjudication proceeded only upon the bond of corroboration, and not upon the decree pronounced in 1727, in the action upon the dependence of which the inhibition was used. See 16th June, 1750, Horseburgh *contra* Davidson, No 103. p. 2901. and No 54. p. 6985 ; 8th July, 1725, M'Lellan *contra* Allan, No 61. p. 4967. ; Pittarrow against Arbuthnot, No 102. p. 7035. ; Trotter against Lundie, No 116. p. 7048.

2do, Although, in common cases, where inhibitions used upon depending actions do not mention particular sums as concluded for, but only bear a general reference to the summons, such inhibitions will secure every sum decerned for, expenses as well as principal and interest ; yet, where the inhibition particularly mentions certain sums said to be concluded for in the action, it ought not to operate further ; and therefore, as the inhibition in question narrates particularly, that Alexander Gun had raised summons and action upon the passive titles, at his instance, against John Sutherland of Littletorboll, ' touching the ' decerning the said John Sutherland to make payment to the complainers of ' the sum of L. 1000 Scots money, of principal, L. 200 money foresaid, of ' liquidated penalty, and the bygone annualrents of the said principal sum contained in the bond,' &c. ; it could secure the expenses of process to no greater extent than the said L. 200 of liquidated penalty.

Replied for M'Vicar ; An inhibition is a legal prohibition, discharging the debtor from doing any deed whereby his lands, &c. may be evicted, to the prejudice of the user of the inhibition, and discharging the lieges to accept of any right or obligation from him, to the prejudice of the debt upon which inhibition is raised ; and when it is used upon a depending action, the prohibition is extended to all deeds, so far as they are prejudicial to the sums which shall be decreed.

The legal effects of both kinds of inhibitions in competitions or rankings, is, to set aside all deeds granted *lege prohibente*, so as that the inhibitor may be

ranked upon any diligence he may have used for affecting the lands of his debtor, in the same manner as if such deeds had never existed. The inhibition itself gives no preference; it is merely a personal prohibition against the debtor and the lieges, which may exclude, but cannot prefer; and hence it follows, that, in all processes of sale, an inhibitor does never draw his payment in virtue of his inhibition, but in consequence of what other real attachment he has got over the estate, which is generally by adjudication. How many voluntary deeds soever may have been granted by the debtor to affect his estate, subsequent to the inhibition, they go for nothing, and the inhibitor is ranked upon his adjudication as if they never had existed; because, in law, they are held to be void, as having been granted and taken contrary to the prohibition of the law.

Such being the law, Mr M'Vicar must have the full benefit of his adjudication, so far as his debt is secured by the inhibition; and he cannot be hurt in that respect, either by Ardoch's heritable bond, or by the adjudication afterwards led thereupon.

The only question, therefore, is, Whether he is entitled to the benefit of the accumulations arising from his heritable bond of corroboration? And, if the effect of his inhibition be such as he has pleaded it, it must be equally effectual for securing to him the benefit of those accumulations, as it will with regard to his adjudication; because, Ardoch's heritable bond being set aside, as granted *spreto mandato inhibitionis*, Mr M'Vicar must have the benefit of every deed in corroboration of the sum secured by the inhibition. In short, so far as respects the debts secured by inhibition, Ardoch's heritable bond must be held as not existing, and Mr M'Vicar's must be ranked as if it was not in the field.

2do, The inhibition being raised upon a depending action, what is set forth in the narrative part of it, before the will, is of no consequence; because, it is the will and warrant of the letters of inhibition, that has the effect; and, as they expressly prohibit all contractions or alienations prejudicial to the decret to be obtained in the said depending action, and payment making of the sums of money to be therein contained, it must secure the whole expenses awarded.

THE LORDS found, 'That the inhibition founded on by Neil M'Vicar secures the sums, principal, annualrents, penalty, and expenses decerned for by the decret 12th January 1727, but no accumulations either in the posterior bond of corroboration, or decret of adjudication deduced on said bond.'

For Neil M'Vicar, *Montgomery-A. W.*

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For Captain Gordon, *Wight. Clerk, Tait.*

Fac. Col. No 124. p. 292.