APPENDIX.

PART I.

INHIBITION.

1777. *July* 19.

GEORGE MONRO of POINTZFIELD, *against* The Creditors of ADAM GORDON of ARDOCH.

No. 1.
An inhibition found effectual to secure a preference, in competition with arresters of the price after sale.

IN 1761, Adam Gordon, by a minute of sale, sold his estate of Ardoch to George Monro, at a price of 30 years purchase of a rental produced. The rental was found to be in some respects erroneous, and the estate was much encumbered; so that there came to be a submission for adjusting the amount of the price, and a multiplepoinding for dividing it.

Gordon executed a disposition in April 1765, and Monro paid off preferable debts to a considerable amount, taking conveyances. One of the debts so paid, supposing it to be preferable, was a sum of £400 due to a Captain George Sutherland, upon which he had used inhibition against Gordon prior to the sale.—Upon this and the other debts conveyed, Monro obtained decree of adjudication, on 29th January 1766, which was followed by horning against superiors; and upon 19th February 1766 Monro was infeft upon a charter of resignation, in execution of the procuratory contained in the disposition mentioned.

In the multiplepoinding, a remit was made to an accomptant to settle an order of ranking, which was done and reported. The business lay over in this state for some years. At last objections were given in by Monro to the accomptant's report, by which creditors whose debts had been contracted prior to Sutherland's inhibition, and who had arrested the price in the hands of the purchaser, were preferred, and that inhibition was rendered entirely unavailing, as the price was exhausted by the debts so preferred.

The Lord Ordinary (Elliock) repelled the objections, and approved of the report.

No. 1. The question was brought before the Court, in a petition for Monro the purchaser of the estate, as in right of Sutherland's inhibition, and in answers for the creditors preferred.

Argument in support of the inhibition.

The inhibition secured the creditor resorting to that mode of diligence against any sale of the estate to his prejudice. The assignee, therefore, who followed out the security by an adjudication, could not be disappointed by the sale, or by arrestments consequent of the sale. Whatever objection to the sale would have affected the late proprietor himself, must militate equally against his creditors arresting subsequent to the sale. These could not be in a better situation than he himself would have been; and it is implied in all sales, as in this it was particularly stipulated, that all incumbrances should be purged before payment of the price: In reality, therefore, the sale could not take place, till the inhibiting creditors, and all others who had done any diligence of whatever kind, by which the lands might be affected, were satisfied.

It is true an inhibition is only a prohibitory diligence, giving the creditor a right to reduce posterior voluntary deeds, from which he could qualify a prejudice. It has no positive and immediate effect towards transferring the property or possession of the debtor's estate to the inhibitor—nor has it any retrospect against prior creditors, who are notwithstanding at liberty to operate their payment by every mode of diligence known in law. Consequently, if the inhibiting creditor cannot qualify any damage by any after sale, he will not be allowed to reduce,—because as he could derive no advantage, were he to prevail, he would have no interest. This was what was found in the case of Carlyle against Trustees of Mathieson, 1st February 1739, No. 44. p. 6971.

That case, although it has been cited in aid of the plea on the other side, is in fact illustrative of the argument in favour of the inhibition. It is stated only shortly by Lord Kilkerran, who is the reporter of it. The circumstances more at large were these:

Gilbert Mathieson was proprietor of some houses in Leith, on which he contracted heritable debts nearly equal to their value. He also had personal creditors, one of whom raised inhibition, but which was posterior to his other contractions. Soon thereafter he executed a trust-deed of all his effects for behoof of his creditors. All of them led separate adjudications within year and day of each other, by which it is obvious they all came to be *pari passu* with the inhibitor. The Trustees sold the property for behoof of all concerned. The inhibitor raised a reduction of the sale. The Trustees pleaded in defence:—"The pursuer could not better himself by the reduction, as the heritable creditors were preferable to him, and the personal creditors behoved at any rate to come in *pari passu* with him in virtue of their adjudications. The sale being for an adequate value, and the price *in medio*, no prejudice whatever had been done to the inhibitor; therefore he ought not to be indulged in objecting to the sale. If it were set aside, the subjects might perhaps not bring so good

a price again."—In these circumstances, the Court most properly assoilzied the Trustees. But the present case is entirely different. The inhibiting creditor has a substantial and clear interest to challenge the sale, to the effect of making good his adjudication of the lands, and consequently securing his preference as an adjudging creditor, in competition with the other personal creditors, who have no such diligence, but have only arrested the price in the hands of the purchaser. In order to this, it is obvious that the minute of sale must be so far set aside as to give effect to the adjudication. There can be no room for arresting the price, while the debt in question remains unsatisfied. The arrestments used could only affect the price, but no price was due until the lands should be freed of incumbrances. The adjudication was indeed used by the purchaser himself, but that is of no importance. He adjudged, not *qua* purchaser, but in right of the debt, by means of Captain Sutherland's assignation. If Captain Sutherland was entitled to adjudication, so was his assignee. Thus did the debt in question remain a burden upon the lands, which was clearly preferable to the personal debts, upon which no diligence had been done prior to the sale. The challenge of the sale by the inhibiting creditor could communicate no benefit to the personal creditors, whose debts may have been contracted prior to the inhibition; for an inhibition does not found a catholic reduction, as if proceeding upon the head of fraud, or of facility and lesion. An inhibitor can go no farther than to reduce, so far as the deed is to his prejudice. He has no interest to proceed greater length. The minute of sale, therefore, must remain good as to every other creditor. No. 1.

It has been said, that the adjudication, being posterior to the sale, could not be effectual, the common debtor having been denuded. But Gordon of Ardoch was not denuded, by entering into a personal minute of sale. He remained in the feudal right of the lands until after the adjudication was led. The adjudication was led in January 1766, the purchaser was not infeft until the February following. But there is no occasion to insist on this; for supposing the fact to have been otherwise, and that the purchaser had been infeft before the adjudication was led, still the inhibition remained effectual, and was a legal ground for setting aside the sale. The effect of it never could have been removed by a voluntary sale, or any other posterior act or deed whatever of the common debtor, without payment of the debt. To say that the common debtor was denuded by the sale, is in other words to say, that an inhibition may be defeated and rendered of no avail whatever, by the voluntary act of a bankrupt in selling his lands. A voluntary sale may be good to all other purposes, but *quoad* the inhibitor is certainly not so. It is reducible at his instance *ex capite inhibitionis*, and he is entitled to adjudge the lands, as if no sale had been made. Nor is it of importance whether the purchaser has been infeft or not. *Quoad hoc* the purchase is illegal, and contrary to the judicial prohibition contained in the letters of inhibition. One purchasing notwithstanding the prohibition, does so *lege prohibente*, and he knows the consequence,

No. 1. viz. so far as the interest of the inhibiting creditor goes the sale is reducible; therefore he never can be safe until the inhibiting creditor be paid off and the incumbrance removed.

An inhibition strikes against all posterior *voluntary* rights of whatever kind, whether onerous or gratuitous, and all rights are considered as voluntary, to grant which there is no prevous specific obligation, such as can be made effectual by way of process. See INHIBITION, Sect. 4.

It is not enough to say that the sale is onerous and the price adequate.—To support it against reduction *ex capite inhibitionis*, it is necessary further to say, that the interest of the inhibitor is not affected by the sale, for that he will still draw according to his legal right by the inhibition, as if the sale was not yet made. If the interest of the inhibitor would be affected by a sale, and he consequently may reduce it *ex capite inhibitionis*, in order that he may attach the lands and secure his payment out of them, surely he must be preferable to a mere personal creditor, who has no inhibition, and has done nothing to attach the lands. See 7th January 1680, Hay, No. 27. p. 6959. Bankton, V. 1. p. 196. Ersk. B. 2. T. 11. § 11. These authorities show that a challenge *ex capite inhibitionis*, though in the form of a reduction, is in reality no other than a declarator that the inhibiting creditor shall have the same access to affect the lands, as if no posterior deed had been granted. Captain Sutherland, then, or the pursuer in his right, had no occasion to arrest the price, nor would that have been the proper mode of proceeding. He had a right to adjudge the lands and to hold the sale as null *ex capite inhibitionis*; not because the price was inadequate, or the sale unfair, but because it was made *spreto inhibitione*; of which circumstance he was entitled to avail himself in competition with other personal creditors, who had neglected the same steps of diligence.

The price is not *in medio* in the present case in the same sense in which it was so in the case of Mathieson above mentioned. There the interest of parties was not varied by the sale. Here the arresting creditors are contending to be entitled to exhaust it to the prejudice of the inhibiter. If the plea of the arresting creditors were good, the consequence would be that a debtor might at pleasure at any time disappoint inhibitions, by making a private sale, and giving notice to favourite creditors to arrest the price—or even without arrestment he might sell to a postponed creditor, who having the price in his hand, might set it off against his debt by the simple operation of compensation or retention. Thus would inhibition, so easily frustrated, be the most inept and idle of all diligences.

The case is not altered by the consideration, that after a minute of sale is entered into the price becomes moveable, and descends to executors. The present question neither regards the seller's interest in the price, nor the purchaser's obligation to pay it. The adjudication must be good against the lands, whether the price was heritable or moveable. The claim of preference founded

on the inhibition goes to the lands themselves, and to the price only as coming in place of the lands. No. 1.

The process of multiplepoinding was brought before the adjudication was led upon the inhibition, from whence it has been argued, that, the matter having been rendered litigious, *pendente lite nihil innovandum*. But this maxim can have no application in the present question regarding the effect of an inhibition. If an inhibition may be defeated by a sale, then arresters of the price will carry it, and an inhibitor will be cut out. But if an inhibitor's interest remains entire notwithstanding of a sale, and may be rendered effectual at any time by an adjudication, then certainly this adjudication cannot be prevented by means of the purchaser raising a process of multiplepoinding, or any other process whatever.

Argument for the creditors, against the inhibition.

The adjudication was *funditus* void and null, and an inept diligence at the time it was led, because Gordon of Ardoch was at the time denuded; 11th July 1637, Robertson against Brown, No. 64. p. 2820; Smith against Hepburn, 2d March 1687, No. 47. p. 2804; 26th February 1724, Stirling, No. 69. p. 2831.

An inhibition does not *ipso jure* void a sale, but is only a ground for voiding it, and the sale is in all respects to be held effectual, till the date of the decree reducing it. See Crichton, No. 117. p. 7050. Now, the inhibitor ought not to be permitted to plead that he has suffered prejudice,—for why did not he or his cedent immediately on the sale arrest the price. If therefore he be disappointed, that is the consequence of his own negligence.

It is not by the sale that the inhibiting creditor suffers prejudice. Nothing happened by the sale except that Ardoch's whole creditors, (none of whom had done any previous diligence for appropriating the estate to themselves,) behoved, for that purpose, to apply themselves to the proper diligence against a moveable estate, in place of that against an heritable one. The law was equally open to them all in the one case as in the other. The inhibitor then cannot say he suffered that injury by the sale, which has arisen only from his own neglect of the proper step to secure himself a preference, viz. arrestment.

The circumstance that it is the purchaser himself who is pleading that in virtue of an inhibition the sale is null, ought to found a strong personal exception against him.

If an inhibitor suffer another creditor to adjudge year and day before him, that creditor becomes preferable; Stair, B. 4. T. 50. § 23. Bankton, V. 1. p. 196. Inhibition then may be rendered ineffectual by *posterior* diligence upon *prior* debts. This is totally adverse to the idea of an inhibition being an *incumbrance* on the lands. In that view, no posterior diligence or infeftment, in implement of a prior personal obligation, could defeat it; which it cannot be disputed may be the case. If an inhibition were an *incumbrance*, and there were a variety of inhibitions to an amount in whole exceeding the value of the estate, without other diligence, a *ranking* of inhibitions would take place on a

No. 1. sale, and the first would be preferable, a thing unknown in the law of Scotland. An inhibitor cannot even rank with an adjudger, against whom his inhibition strikes, but can only draw back from him his proportion of the sum which that creditor draws, in the same way as if that creditor was not in the field; and if he would draw nothing, although that creditor were not in the field, he draws nothing from him in consequence of his inhibition. If then an inhibition is not an incumbrance, which must *at all events* be purged, but may be cut out by posterior diligence upon prior debts, the claim of preference in the present case is void of foundation, and the ranking must proceed upon the footing of the arrestments.

The case figured on the other side, of a debtor privately selling his estate to a favoured creditor, or giving private information of a sale to certain creditors that they may arrest, supposes fraud, and fraud is an insuperable objection to any transaction whatever; but sales will not be reduced, merely because it is possible to commit fraud in them.

Fraudulent schemes may be figured for preferring an inhibiting creditor, as well as any other. If, for instance, it be true that an inhibiting creditor after a sale is entitled to a preference to other creditors, prior as well as posterior, although if the estate had remained unsold the prior creditors to the inhibition would have been at least equal, if not preferable to him; the consequence might be, that the moment a man knew himself to be bankrupt, he might desire a favourite creditor to use inhibition, and proceed instantly to sell his estate, by which the inhibition would obtain a preference over the whole creditors: In short, it is possible to figure the commission of fraud in every transaction among men; but this is no reason for setting them all aside. If there is evidence of positive fraud having actually been committed in a particular case, when the transaction is annulled no one is entitled to complain.

The decision of the Court was as follows: (19th July 1777.) "The Lords "having advised this petition with the answers thereto, and heard procurators, "they find the petitioner as in right of Captain Sutherland preferable upon his "inhibition, and that he is entitled to retain the sums contained in the said "grounds of debt, and that the other creditors fall to be ranked in their due "course upon the remainder of the price and interest thereof, and remit to the "Lord Ordinary to proceed accordingly."

Lord Ordinary, *Elliock*. For the Petitioner, *Ilay Campbell*. For the Respondents, *Chas. Hay*.

W. M. M.

*** See particular reference made to this case in the deliverations on the Bench in the case of M'Clure and Others against Baird, No. 3. APPENDIX, PART I. *voce* COMPETITION.