

No. 2. The Lord Ordinary (14th May 1799) “found, That as the annuity payable
 “to Ann Mason was heritably secured by Alexander Robertson on his lands
 “of Giffin, exceeding the amount of the rents thereof; and as credit is claimed
 “and allowed to William Robertson’s creditors for the whole of those rents
 “during his surviving his father, whom he must be held to have represented,
 “and even down to his mother Janet Mason’s death; her creditors or repre-
 “sentatives are entitled to take credit, in accounting with William’s creditors,
 “for the said annuities, in so far as the same were paid by her to the said Ann
 “Mason.”

The creditors of William petitioned the Court, when it was found, (25th
 May 1803), “That the bygone annuities due to Ann Mason, secured upon the
 “lands of Giffin, fall to be charged upon the price of these lands in the first
 “place; and with this explanation, adhere to the interlocutor of the Lord
 “Ordinary, and remit to his Lordship to proceed accordingly.”

Upon again advising a petition, with answers thereto, the Court (13th
 December 1803) “found, That the bygone annuities due on Alexander Robert-
 “son and his wife’s bond to Ann Mason at and subsequent to the death of
 “Alexander Robertson, so far as they exceed the rents of Giffin for the same
 “period, fall to be charged upon the price of the lands of Giffin, as a prefera-
 “ble debt thereon, in respect that the annuity was secured by heritable bond
 “and infestment upon that particular subject; and with this explanation adhere
 “to the former interlocutor.”

Lord Justice-Clerk, *Eskgrove*.
 Agent, *Ja. Thomson, W. S.*
 Clerk, *Home*.

For William’s Creditors, *Solicitor-General Blair*.
 Alt. *George Jos. Bell*. Agent, *Wm. Mollé, W. S.*

F.

Fac. Coll. No. 129. p. 285.

1807. November 19. JEAN M’LURE, and Others, *against* WILLIAM BAIRD.

No. 3.
 If a creditor use an inhibition against his debtor, and if, after the inhibition, but before any diligence used by any other creditor to affect it, an heritable subject belonging to his debtor be sold by voluntary sale, then the

JAMES REYBURN was proprietor of a small tenement in Wallacetown. He owed £100. to David Cumming, and various sums to other creditors. Cumming raised letters of inhibition against Reyburn on the debt due to him, which were regularly executed and recorded on the 2d May 1775. No other creditor did any diligence against Reyburn’s estate. In this situation, Reyburn soon after sold the tenement to William Baird, who then held it as tenant for rent. Cumming went abroad in the naval service. His wife, Jean M’Lure, having in vain endeavoured to get payment of the debt due to her husband, at last raised, in his name, an action of constitution of this debt, in which she obtained decree, and afterward an action for reduction of the sale on the inhibition, concluding also for payment of the rents. She obtained decree in this action also, extracted it, and thereon charged Baird, who presented a bill of suspension, and after-

ward brought a reduction reductive of the former proceedings, in which a long and intricate litigation took place. While this depended, an adjudication was led in name of Cumming, whose remaining in life began to be uncertain; and on the other part, Baird got an assignation to the other debts due by Reyburn, and thereon likewise raised an adjudication, within year and day of the adjudication in Cumming's name. A judicial factor was appointed on the estate of Cumming, who was at last ascertained to be dead; and his wife and children sisted themselves in the proceedings above-mentioned instead of him. In the action of reduction reductive the defenders were assoilzied, and the inhibition found good.

No. 3.
inhibiting
creditor will
have a pre-
ferable claim
upon the
price of that
subject, in
virtue of his
inhibition.

The question then, 1st, As to the tenement itself,—2dly, As to the rents since the time of the sale,—took this shape. Jean McLure and the children of Cumming claimed the estate, on the inhibition and adjudication in name of Cumming. They also claimed the rents on the inhibition, from the time of the sale, or at least from the time of the decree of reduction; and on their adjudication from the date of it.

Baird maintained, that the adjudication in name of Cumming was void as being led without any authority from him, and that an inhibition alone gave no right to either land or rents, so that they were both carried by his own adjudication, which was the only valid one.

The Lord Ordinary, (29th May 1804) to whom the cause had been remitted, found, “ That the inhibition executed by David Cumming in the year 1774, “ remained latent till the year 1796, and that this negative or prohibitory dilige-
“ gence could create no preference on the rents from the date of the disposi-
“ tion to Baird in the year 1794, prior to the adjudication led in the name of
“ David Cumming in the year 1800, and that Baird is not liable to account for
“ said rents: And in respect that the principles adopted by the Court with re-
“ gard to the action brought by Jean Maclure, and the authority under which
“ she was understood to have acted, may be considered as sufficient to support
“ the adjudication led by her in his name; and as Baird's adjudication was
“ within year and day thereof, finds these adjudications are come *in pari passu*,
“ and decerns.”

On a representation for Baird, his Lordship's interlocutor was: “ In respect
“ the adjudication upon which the respondents found in the present competition,
“ was led in the name of David Cumming alone, though out of the country,
“ without mention of his wife or any other person, as his attorney, finds said
“ adjudication cannot be preferred *pari passu* along with the representor's ad-
“ judication regularly deduced; therefore finds the representor preferable upon
“ the rents which fell due subsequent to Cumming's adjudication; so far alters
“ the interlocutor represented against, and decerns.”

The cause came into the Inner-House by petition against these interlocutors, with answers. A variety of arguments are contained in these papers, which it is not necessary to report.

No. 3. On advising the cause, the Lord President observed, That the points on which this cause depends had been decided so long ago as the year 1777, in the case of Monro of Pointzfield, on a solemn hearing in presence, a decision of great importance, though unfortunately it is not known, because the decisions for that year are not yet reported. [His Lordship produced the papers in the cause, and notes of the opinions of the Judges, particularly Lord Braxfield and President Dundas.] From these, his Lordship said, it appeared, that in that case there had been an inhibition against the estate of a proprietor of land, who owed other debts besides that to the inhibitor. That after the inhibition, but before any other diligence was done against the estate, it was sold, and then, after the sale, adjudications were led by the creditors who had not inhibited, and a competition ensued. In that case the Court were clear, that the inhibitor was preferable for his debt without any further diligence at all. It was held that the sale rendered all diligence by other creditors against the estate void; because as to them it was a good sale, and conveyed away the property from their debtor. Their only claim it was found must be on the price in the hands of the purchaser. But the inhibiting creditor was entitled to disregard the sale altogether, because as to him it was struck at by his inhibition, therefore he might adjudge the estate. But further, his debt being the only one on which diligence could be done against the estate, without regard to the rights of the purchaser, was equivalent to a real incumbrance on it, which the purchaser was entitled to see cleared off before he paid the price, or to pay off himself with the first end of the price. Adjudication by the inhibitor was therefore, though competent, not necessary, because he was sure of payment out of the price of the estate, in preference to all the other creditors. This was solemnly laid down as law by the Court, and particularly explained by the able judges above named in the above mentioned case, and the same rule of law applies to the present case.

Here there is an inhibition; then a sale; then adjudications by the creditors who had not inhibited, and no doubt also by the inhibitor. This last adjudication may be put out of the case. It is argued to be inept, perhaps it is so; but at all events it is unnecessary; the preference of the inhibitor in no degree depends upon its validity, (especially as it may be renewed in more proper form,) but rests upon the effect of the inhibition combined with that of the sale.

By the inhibition the sale to Baird is reducible as to the inhibitors Maclure, &c. Then by the sale all diligence against this tenement by the other creditors of Reyburn is void, since the property was carried out of him, by a conveyance valid as to them, before that diligence was executed. The adjudication, therefore, on their debts, is of no effect at all, and can never compete with the inhibitors if they should adjudge even now. This they might do, and their adjudication would still be the only effectual adjudication of this tenement. But it is not necessary for them to do this, because they must be paid in full by the purchaser Baird, who cannot hold the estate, without getting this debt purged

on which the inhibition has been raised. Unless, therefore, Baird is willing to give up the estate to them, he must pay this debt, since the seller Reyburn cannot pay it. He may, no doubt, retain it out of the price, but it must be paid to the inhibitors. Now, as it may be presumed Baird will not give up this estate, it is not necessary to enter into the other points argued in the papers.

This view a great majority of the Court adopted; and accordingly the interlocutor of Court (19th November 1807) was: "The Lords alter the said interlocutor, and find that the adjudication led by William Baird is inept, and that the petitioners became preferable creditors on said subjects and rents thereof, from the fifteenth day of June seventeen hundred and ninety-six, the date of the decree of reduction obtained against William Baird, in virtue of the inhibition executed by David Cumming in seventeen hundred and seventy-four, and decret of adjudication following thereon, to the extent of the debt contained in the said adjudication *."

Lord Ordinary, *Hermand.*

Act. *David Douglas.*

Alt. *Robt. Corbett.*

P. Robertson, and Thos. Grierson, W. S. Agents.

Scott, Clerk.

M.

Fac. Coll. No. 7. p. 26.

* This form of the interlocutor does not prove that the adjudication was in itself unexceptionable, but the creditors having no interest to object to it, it was no longer challenged by any body, and therefore stood as valid.

M.

* * The case of *Monro of Pointzfield*, alluded to in the above report, and the other cases during that period, which had not formerly been reported, will now be found in this Appendix. See APPENDIX, PART I. *voce* INHIBITION.