

No 103.

draw any thing from Davidson, who is ranked before him : His adjudication on which he is ranked, and can only draw, does not proceed upon his original bond ; and if he should pretend that his bond is secured, on which he may adjudge, such adjudication could draw nothing, as being excluded by the other adjudgers, with whom it could not be brought in *pari passu* ; and consequently could be no ground of reduction *ex capite inhibitionis*, the debt contracted, *spretæ inhibitione*, being of no prejudice to a security which could not draw. A debtor, by bond, being inhibited, and afterwards granting a bond of corroboration, on which the creditor adjudged, it was found the bond of corroboration, and adjudication upon it, could not be supported against the inhibition by the original bond, Fountainhall, v. 1. p. 706. 29th January 1696, Wilson and Logan Penman, *voce* INHIBITION.

Replied, If it were necessary for Horsburgh to adjudge again on his first bond, such adjudication would be effectual to reduce Davidson's bond on the inhibition ; for the other adjudications, which are themselves excluded by infestments, cannot be brought into consideration, to hinder him from drawing ; but, without this necessity, the inhibition secured the debt on which he was infest, and has adjudged.

Duplied, An inhibition does not secure a ground of debt, but the bond, decret or process on which it is led.

THE LORDS, 5th June, found that Henry Davidson could make no use of his infestment, to the prejudice of the bond on which the inhibition was led : and therefore that Horsburgh was preferable to, and behoved to draw back from Davidson the principal sum and interest contained in the bond on which the inhibition was led ; and appointed the scheme of division of the price to be made out accordingly : and this day refused a bill, and adhered with this explication, that Horsburgh behoved to be paid first the sums due upon his first bond ; that Davidson behoved to be paid after him upon his infestment ; and Horsburgh *tertio loco* on his bond of corroboration and infestment.

Reporter, *Monzie.* Act. *H. Home.* Alt. *Fergusson.* Clerk, *Forbes.*

Fol. Dic. v. 3. p. 154. D. Falconer, v. 2. No 139. p. 163.

No 104.

A disposition in security, and assignation to the rents of lands, followed by infestment, found preferable to an arrestment of these rents.

1780. July 13. DR ALEXANDER WEBSTER *against* HAY DONALDSON.

MR WALKER of Saintford granted to Dr Webster an heritable bond over his estate for L. 2000, containing an assignation to the mails and duties, on which the Doctor was infest, but did not enter into possession, nor intimate the assignation to the tenants.

Another creditor of Mr Walker's was Donaldson, to whom he owed L. 500 by a personal bond, and who used arrestments in the hands of his tenants.

In a process of multiple-poining, a competition ensued between Webster and Donaldson; the one claiming a preference upon his heritable right, the other on the arrestments used by him.

Pleaded for the heritable creditor: The design of this disposition in security, and assignation to the rents of the debtor's lands, was, agreeably to the nature of such a right, to give the creditor a preferable title to the lands for security of the sum lent, and to the rents of them for security of the interest, as it should become due upon that principal sum. This security having been completed by infestment, which likewise serves the purpose of intimating the assignation, must be effectual; November 2. 1748, Creditors of Kelhead *contra* Lady Kelhead, No 102. p. 2901. It is true, the property of the lands cannot be attached but by adjudication, so as to be applied for payment of the principal sum by sale or otherwise; nor can the rents be *brevi manu* levied from the tenants, if they refuse to pay, without a process of mails and duties, or of poining the ground. But by neither of these processes is the creditor's right rendered more complete in itself, than before. It is only carried into execution, as the proprietor's own right would be in the same situation; for neither could he *brevi manu* compel payment: and the annualrenter is as well entitled as he to receive voluntary payment.

Answered for the arrester: The right in security, apart from the assignation to the mails and duties, confers no power of levying the rents; Stair, b. 2. tit. 10. § 1. Nor can this assignation be now effectual, as it neither has been intimated, nor has the creditor been in possession; Gray *contra* Graham, No 1. p. 565. Nay, though the assignation had been intimated, it could not avail the creditor; Erskine, b. 3. tit. 5. § 5.

Besides, the rents attached by the arrestments are due for crop 1778; and as the creditor's annualrents for that year are already paid, the rents of the lands for the same year have been disburdened of them.

The Court considered the infestment on the heritable bond as equal to an intimation of the assignation to the mails and duties; and that the heritable creditor was preferable to the arrester, not only for the annualrents, but for his principal sum also.

Accordingly, though some of the Judges thought there ought to be a distinction on account of the interest for the year, the rents of which were arrested, being already paid, this idea was in general disregarded.

THE LORDS found the heritable creditor preferable on the rents *in medio*.

Lord Ordinary, *Monboddo*.
For Arrester, *Elphinston*.

For Heritable Creditor, *H. Erskine*.
Clerk, *Orme*.

Fol. Dic. v. 3. p. 152. Fac. Col. No 114. p. 213.