

No 45.
Found as above.

1732. *July.* CHILDREN OF LORD KIMMERGHAM *against* His CREDITORS.

A GENERAL assignation of moveables, with a power to intromit and enter to possession immediately upon the granter's decease, though possession be apprehended accordingly, is not sustained in our law as a transmission of the property, but these goods must be confirmed; and, without confirmation, the disposition, though clothed with possession, will be found no better right than a *jus crediti* for the value. The reason is, that the power to apprehend possession is a procuratory, *quod perit morte mandantis*, as procuratories did with regard to land rights before the act of Parliament; and, if confirmation be necessary, the assignee can stand upon no better footing than any other creditor. Thus, an assignation, in a contract of marriage to the wife, of the whole household plenishing that should belong to the husband the time of his decease, was found only to make the wife creditor for the value upon the implied warrandice, so as to bring her in *pari passu* with other creditors confirming within six months; but she was found to have no preference, though she got into the natural possession after her husband's decease, and also confirmed the subject prior to any step of diligence by the creditors. See SERVICE and CONFIRMATION.

Fol. Dic. v. 1. p. 180.

1794. *June 6.*

JAMES HARDIE DOUGLAS, and Others, *against* The TRUSTEE for the Creditors of THOMAS HAY.

No 46.
An assignation to a sublease, in security of debt, intimated to the principal lessee, but on which no possession had followed, found to be a valid ground of preference in competition with personal creditors of the cedent.

THOMAS HAY granted assignations of a sublease of a farm possessed by him to James Hardie Douglas and two other creditors, as a further security for debts due to them. None of the assignees entered into possession. Upon Hay's being made bankrupt, in terms of the act 1696, two of them intimated their rights to the principal lessee; the other did so, soon after, but not till Hay had executed a trust-deed in favour of his creditors. The deed declared, that the rights and preferences which creditors had already acquired should not be affected by it.

The trustee having sold the sublease, brought a multiplepoinding against the creditors, that their claims on the price might be ascertained. The assignees, none of whom had acceded to the trust, claimed a preference. The other creditors had executed no diligence against the estate of the bankrupt. The trustee for their behoof

Objected; An assignation to a sublease is ineffectual in a competition of creditors, unless it has been followed by possession; Ersk. b. 3. tit. 5. § 5.; Bank. b. 3. t. 1. § 16.; Stair, b. 3. t. 1. § 8. Intimation to the principal lessee, even although not liable to the objection of having been made after the bankruptcy

of the cedent, cannot supply its place. The sole object of intimation is to prevent a debtor from making payment to his creditor after the latter has transferred his right; but the principal lessee, instead of having any thing to pay to his subtenant, has rent to receive from him. It would be dangerous to allow latent deeds, like the present, to give a preference over creditors who had contracted with their debtor on the faith of his being still proprietor of the subject. An assignation of moveables, without transference of possession, is presumed to be collusive, and is therefore ineffectual in a competition of creditors. Kames's Eluc. art. 2. The same rule should apply to a lease, which is a mere personal right, although by statute made effectual against singular successors.

Answered; The trustee is in no better situation than the personal creditors for whom he acts. His right is derived, not from any legal diligence affecting the subject, but from a voluntary deed executed by a bankrupt after two of the assignations were intimated; and which deed was not completed by intimation, or by any public act equivalent to it, till the other assignation had likewise been intimated. At the time the trust-deed was executed, the assignees were entitled to have entered into possession; and they would have done so, if the trust-deed had not expressly declared, that it should not affect the rights or preferences which creditors had already acquired.

An assignation to a lease, not followed by possession, may perhaps be insufficient to prevent the subject from being carried off by a more complete right; but there is no reason why it should not convey a valid personal right. A lease is in reality a personal contract between the landlord and tenant; and when the latter is allowed to assign, the assignation, as in the case of any other personal subject, is completed by intimation to the only other party concerned, *i. e.* to the landlord, or, as in this case, to the principal lessee. The presumption of collusion from an assignation *retenta possessione*, holds only in moveable subjects; Forbes, p. 275. 27th July 1708, Boigs against Watson, *voce* PRESUMPTION.

The bankruptcy of the debtor is no objection to the intimation, as no diligence had been raised against his estate by the other creditors. Indeed, intimation was altogether unnecessary in this case; for although, in competitions between different assignees, the preference depends upon the date of the intimation, in those between assignees and other creditors, the former rank according to the dates of their assignations; 8th July 1785, Hay *contra* Sinclair*.

THE LORD ORDINARY sustained the objections to the interest of the assignees, as being 'assignations to a lease *retenta possessione*, and not intimated till after 'the bankruptcy of Thomas Hay.'

A petition against this interlocutor was followed with answers. The Court ordered memorials; upon advising which, it was

Observed on the Bench; The trust-deed is reducible on the act 1696; at any rate, it was not intended to affect the rights which creditors had already acquired. The assignees must therefore be preferred to the trustee.

No 46.

Possession is so far essential to the conveyance of a lease in security of debt, that without it the assignee has only a personal right, consequently a subsequent assignee or adjudger getting first into possession would be preferred. At the same time, were a process of adjudication to be brought, the assignee might insist to be put into possession before the right of the adjudger could be completed, and a summary application to the Judge Ordinary to that effect would be competent.

The intimation, in the present case, had no effect in completing the right. When the principal lessee assigns his lease, the right of the assignee is completed by intimation to the subtenants, requiring them to pay their rents to him; when again the subtenant is the granter of the assignation, the right of the assignee can only be completed by actual possession of the subject, though, in the mean time, an intimation to the principal lessee may be proper in order to render the transaction public. It is no objection to the intimation, that it took place after the bankruptcy of the cedent. That event does not prevent creditors from taking any step for their own safety, which can be done without the intervention of their debtor.

THE LORDS, by a considerable majority, 'altered the interlocutor reclaimed against, repelled the objections to the interests produced for the petitioners, (assignees), 'and preferred them upon the funds *in medio*, arising from the sale of the lease.'

A reclaiming petition was refused without answers, on the 24th June 1794.

Lord Ordinary, *Stonefield*.
D. D.

For the Assignees, *Dav. Williamson*. Alt. *Montgomery*.
Fol. Dic. v. 3. p. 152. Fac. Col. No 122. p. 272.

SECT. IX.

Assignees with Apprisers and Adjudgers.

1637. March 2. SMITH *against* HEPBURN and BARCLAY.

No 47.
Assignation
intimated,
preferred to
a posterior
comprising,
although the
denunciation
was made be-
fore intima-

ONE Barclay having made Geills Smith assignee to a bond of money addebt-
ed to him, after which assignation, one Hepburn, creditor to Barclay, having
denounced this bond to be comprised; after which denunciation, the prior as-
signee intents summons against the debtor of the sum assigned for the payment
thereof to him as assignee, which he alleged to be a sufficient intimation, and
whereby he craved preference to the compriser, who, although he had denoun-