

sentation advertised to be given to the person who should give the most money to the poor relations of the patron.

On the 7th March 1775, "The Lords assoilyied," &c. adhering to their interlocutor of 18th January 1775; but, in respect of Mr Gordon's circumstances, restricted the fine imposed on him to L.30."

*Act.* A. Murray, W. Campbell. *Alt.* D. Dalrymple.

1774. December 21. PEREGRINE CUST, Esq., *against* The CARRON COMPANY.

#### COMPETITION.

A competition between an assignment intimated after the death of the cedent, and a confirmation of an executor-creditor, expedite upon the same day, was found to be regulated by priority of the hour.

[*Faculty Collect.* VII. 74; *Dictionary*, 2795.]

HAILES. It is not said by Messrs Garbut and Company that the Commissary Court met before *eleven*. It was probable that their decret was not obtained for several hours after. It is certain that the assignation was intimated between *eight* and *nine* that morning; nay, more, it is probable that the decret was hurried on, because it was known that the assignation was to be intimated. Hence I have no doubt as to the preference.

AUCHINLECK. *Prior tempore potior jure*: there is satisfying evidence that the proceedings at Carron were first, *i. e.* between eight and nine, whereas the Commissaries do not meet till 10 o'clock; why should we demur in giving preference according to time?

GARDENSTON. I would favour a *pari passu* preference; but *here* there is no room for it. Whenever there is a clear priority established upon legal evidence, we must judge according to it. Where there are clear principles, I would avoid arbitrary decisions.

PITFOUR. There are cases where the judges have given preference by hours, but I always thought such cases very doubtful.

COALSTON. It is a favourite principle of our law, that *vigilantibus jura subveniunt*, and that *prior tempore potior est jure*; hence the Court has given a preference upon hours, though with difficulty. Lord Stair was against it. The Court has so found in questions between arresters and assignees: but the present case has never been determined. If the same idea had prevailed formerly as now in favour of a *pari passu* preference, I doubt whether the Court would have established such principles: are we to extend, from analogy, a decision which was not approved of by some of our best lawyers.

MONBODDO. If this interlocutor were altered, the Court would set aside the established rule as to hours; for, of the fact, there can be no doubt that there

was a difference of *hours* between the assignation and the decret in the Commissary Court.

PRESIDENT. It is natural to wish for equality among creditors. The *pari passu* has been favoured of late, but not so formerly; the assignation was *prior tempore*. I give full faith to the execution, and confirmation was certainly not expedite between eight and nine in the morning. Whenever there is an ambiguity, I would favour the *pari passu* preference. Lord Stair says that three hours would be better for determining a preference; but the Court has not so found. The case of *Cameron* against *Boswell* was narrower than this. This particular question has never been determined; but it depends on principles which have been determined.

On the 21st December 1774, "the Lords found, in respect it appears, from the instrument of intimation produced, that the same was made to the acting partner and manager, at the Carron Company's Office betwixt the hours of eight and nine in the morning of the 30th October 1771, and that it is not denied that *the hour of cause* in the Commissary Court is not till eleven o'clock in the forenoon, that the assignation in favour of Peregrine Cust was completed by the said intimation, before any step was, or could be taken upon the edict in the confirmation in favour of Garbut and Company; and therefore preferred Peregrine Cust upon his interest produced:" adhering to Lord Monboddos interlocutor.

For Messrs Garbut and Company, A. Wight. *Alt. R. M'Queen.*  
*Diss. Kaimes, Alva. Non liquet,—Coalston and Pitfour.*

1775. *March 7. COALSTON.*—This question was never formerly determined. There is no relevancy in the new objection. There was no occasion for an assignation in favour of Mr Cust being signed by Mr Cust himself. Neither is there in modern practice any occasion for the production of a special procuratory. It is plain that the assignation was intimated before the confirmation was expedite. But here lies the difficulty: assignation does not denude the cedent without intimation. When the cedent died before intimation, confirmation was necessary, before the Act 1693. I doubt whether that Act made any difference. The intention of the Act was,—1st, To take away the grievance of charges by the Commissaries; 2d, That special assignations might be made a title to pursue without confirmation: but there is an exception saving the right of creditors. If, before the date of the Act, they could have confirmed, there was nothing to hinder them to do so. Still, if this is not allowed, it is in the power of the assignee to defeat the diligence of creditors; for intimation may be constantly made, whereas confirmation requires time.

JUSTICE-CLERK. A *pari passu* preference is a taking thing; but I would not admit it unless I were satisfied that the grounds of law were dubious. If I understood the law of Scotland ever to have stood as Lord Coalston supposes, I should have no doubt, for then a special assignation would be good for nothing. When a man gets a bond assigned to him, it must be intimated, in order to cut off arrestments, &c., but I never imagined that the assignee might not intimate after the death of the cedent. Had this assignation been intimated a month before any other diligence, I suppose there would have been no difficulty. It

is strange if the Act 1693, which meant to give more security to the creditor, should in effect give him less. The Act says, that he may *pursue, i. e.* may raise an action without any intimation at all. The exception, *without prejudice*, only means that in case the creditor has confirmed, he shall be preferable. The sole question comes to be as to priority of diligence. The right of the assignee was completed before the confirmation could, in the nature of things, be completed.

HAILES. A *pari passu* preference is given when the Court cannot know *which* competitor is preferable. When there is a probability, or even a possibility, that the diligence in appearance posterior may be the first, the Court will give a *pari passu* preference, because it must determine, and in such cases knows not how to determine, otherwise than by dividing the subject in controversy. In this case I have no doubt that the assignation was completed before that the confirmation was expedited: an hour had been fixed the day before for making the assignation. Mr Garbut does not say, and I am sure will not say, that the assignation was made at an earlier hour than *nine*. It is not said that the Commissary Court ever meets before *ten*: here then there is at least an hour certain of priority. Lord Stair wished that no time less than *two or three hours* might be regarded: he meant that there should be such an interval as to prevent all ambiguity. What he wished for is *here*—If the assignation must have been at *nine* at latest, and the confirmation at *ten* at the earliest, the priority is as exactly ascertained as if the assignation had been twenty-four hours before the confirmation.

ALEMORE. The Carron Wharf Company ask too little or too much. They are preferable, or must be postponed.

MONBODDO. I have always understood it to be law, that an assignation intimated was preferable to arrestments and confirmations. Before the Act 1693, and since, the only case which has any relation to a contrary doctrine, is that in Kilkerran, *Competition, 22d June 1742, A. Mossman*. The decision went far; but it applies not to this case, for an arrestment, though it gives a *nexus realis*, does not give a complete right, which an intimated assignation does. There may be *favour* in bringing in creditors *pari passu*, but there is no *law*, when there is neither probability nor possibility that the confirmation could have been expedited before the intimated assignation.

On the 7th March 1775, “the Lords preferred Mr Cust on his intimated assignation;” adhering to their interlocutor, 21st December 1774, and to Lord Monboddo’s interlocutor.

*Act.* A. Lockhart. *Alt.* R. M’Queen.

*Diss.* Coalston, Pitfour, Gardenston, Elliock, President.