

No 231. undue advantage, should be caught in their own snare, and be deprived of every advantage from that security which they had unduly elicited. This is agreeable to the practice of the Court in other cases. A disposition by a bankrupt being reduced on the act 1696, the Court refused to give it the effect of bringing him in *pari passu* with the other creditors; 2d December 1704, Man against Reid, No 226. p. 1183. ; 19th July 1728, Smith against Taylor, No 228. p. 1189.

THE LORDS found, That the heritable creditors are entitled to be ranked *pari passu* with the adjudger.' See FRAUD.

Act. Geo. Wallace.

Alt. Johnstone.

Fol. Dic. v. 3. p. 62. Fac. Col. No 92. p. 164.

W. Johnston.

No 232.

A person assigned his shares in a mercantile adventure. The assignment was not intimated till within 60 days of his bankruptcy. Found, that the assignment, being made, though not intimated, before bankruptcy, was effectual.

1788. July 8. JOHN HAY against ANDREW SINCLAIR and COMPANY.

A DEBTOR of Andrew Sinclair and Company, in security of certain sums instantly advanced to him, and also of other debts antecedently due; assigned to that Company several shares which he had in a mercantile adventure.

The deed of assignment was dated in the month of January 1770; but no intimation followed till the 2d of October of the same year; and within much less than 60 days thereafter, as was alleged by Mr Hay, the trustee for the creditors in general, the assigner was rendered bankrupt in terms of the act of 1696.

Thus the question occurred, whether the effect of the assignment was to be regulated by its date, or by that of the intimation? For Mr Hay it was

Pleaded: The enactment of 1696 had in view, not only the setting aside of those deeds of a bankrupt which were really fraudulent; but also to annul such latent transactions as tended to continue a man's credit after he was entirely divested of his effects. Hence, with regard to rights capable of infestment, it was expressly declared, that their efficacy should not depend on the priority of the disposition or other conveyance, but on that of the infestment, by which last alone the transference became publicly known. It may perhaps be said, that this part of the enactment does not extend to the case of personal rights. But in the application of a law intended like this, for the benefit of commerce, it is not the words, but the meaning and purpose of the legislature that is to be attended to. And surely, it would be singularly absurd to suppose, that while a conveyance of landed property, how insignificant soever, might be annulled on the head of *latency* alone, the wrong occasioned by a concealed assignment of moveable effects to the greatest extent was without a remedy. Indeed, it may be doubted, how far with regard to the latter any express provision was necessary; an assignment of a personal right, though it is held without intimation to be effectual against the grantor, being of no force whatever, unless followed by intimation, in a question with third parties, who have obtained a subsequent conveyance, whether voluntary or judicial, to the same right.

Answered: So far as the statute of 1696 is merely declaratory of the common law, by avoiding conveyances which are really fraudulent, it is no doubt to be construed largely, so as effectually to answer the purposes of the legislature. It has also been justly held, even with respect to that part of the statute which is of a correctory nature, by introducing certain legal criteria of fraudulent intention, that every act purposely framed to elude its enacting words, may be annulled, as done in fraud of the law itself. But where a transaction is neither intrinsically fraudulent, nor calculated to disappoint the provision of the statute, no case which the words of the law do not accurately reach can be governed by it. Thus, although in the case of land-rights, the taking of infeftment may be gone through with as much secrecy, as the executing of the disposition or conveyance itself, so that it is by the subsequent registration alone, that the alienation can be known to third parties; it has been repeatedly found, that unless where the recording has been intentionally delayed, in order to deceive, the transference is valid, if the sasine has been published, as the statutes direct. As to the operation of the common law in cases like the present, it cannot admit of dispute. It is true, that in a competition between assignees of personal rights, either legal or voluntary, it is the intimation that regulates the preference. But actual bankruptcy, without a sequestration, or some other species of legal execution, gives to the creditors in general no right whatever to the effects of the debtor. And it cannot be denied, that long before any proceedings of this sort, the assignation had been rendered complete; 17th February 1715, Creditors of Mr John Menzies *contra* Dr Menzies, No 96. p. 981. and *infra b. t.*; 13th December 1782, Douglas, Heron, and Company, *contra* Maxwell, *infra b. t.*

THE LORD ORDINARY sustained the defences.

The question was afterwards considered by the Court, in a reclaiming petition and answers, and the same judgment was given.

Lord Ordinary, *Rockville.* A.G. *Buchan-Hepburn.* Alt. *John Pringle.* Clerk, *Gordon.*
Craigie. *Fol. Dic. v. 3. p. 58.* *Fac. Col. No 28. p. 45.*

1791. *March 1.* CREDITORS OF M^rKELLAR *against* M^rMATH.

IN this case, No 190. p. 1114, the Court were of opinion, That payment of the debt, on which ultimate diligence had been used, was not sufficient to take off the effects of public bankruptcy; and that this could only be done, by showing that the debtor had afterwards been in a situation to pay all his debts due at the time.