Dame Eſther Gray, Widow and Executrix of Sir James Gray, Bart. her late Huſband, deceaſed, - - - - - - - - - *Appellant;*

Edward Callander, Writer in Edinburgh, - *Reſpondent.*

Caſe 109. Kaims, Jan. 1723.

1ſt April 1724.

Aſſignation General.—An aſſignation to a creditor of as much of the firſt and readieſt o' the rents of his lands that ſhould happen to be due to him at the time of his deceaſe, as would ſatisfy and pay a certain ſum, gave no preference in a competition of creditors after the debtor's death.

Creditors of a defunct —Act of Sederunt, 1662.—After expiration of ſix months from the debtor's death, one creditor cites the executor in an action of conſtitution on the 18th of June, and ſame day the executor cites that creditor, and the general aſſignee above-mentioned, in a multiple poinding: the latter afterwards, on the 27th of June, cited the executor in an action of conſtitution; the creditor, giving the firſt citation, alſo got the firſt decree of conſtitution, and is by the Court preferred to the other; but the judgment is reverſed, and both are preferred *pari paſſu*.

AFTER the determination of the appeal, No. 1, of this collection, by which the Duke of Hamilton was ordered to pay to Sir James Gray, Bart. the ſum of 1000*l.* with intereſt thereof, upon an agreement of the parties, Sir James advanced ſo much money as, with the principal and intereſt then in arrear upon the ſaid bond, made up 1400*l.* And for ſecuring the repayment thereof, the Duke, on the 25th of March, 1709, executed a bond to Sir James in the ſum of 1400*l.* of principal, payable with intereſt on the 15th of May, 1710; and in that bond the duke aſſigned to Sir James as much of the beſt and readieſt of the rents of the Dukedom of Hamilton, whenever he ſhould happen to ſucceed thereto, as would ſatisfy the ſaid 1400*l.* and intereſt. Of the ſame date, the duke executed another deed, by which he aſſigned to Sir James as much of the firſt, readieſt, and beſt of the rents, or arrears of rents of his lands in Scotland, that ſhould be due to him at the time of his deceaſe, and as much of the firſt and readieſt of all his moveable goods, debts, and ſums of money, and others whatſoever, that ſhould happen to pertain and belong to him at the time of his deceaſe, in caſe his mother ſhould ſurvive him, as ſhould be ſufficient to pay the ſaid bond.

The duke, in his lifetime paid ſeveral ſums of money to account of the intereſt of the ſaid ſum of 1400*l.* but died in November, 1712, in the lifetime of his mother, and no part of the principal money was paid. The Court of Seſſion, in March thereafter, appointed one Crawford, factor, to receive the arrears of rents due to the duke at the time of his death; and to this factor Sir James intimated, in due form, the aſſignments of the arrears of rents made by the duke in his favour.

The late Duke of Hamilton was alſo indebted to the reſpondent in the ſum of 900*l.* ſterling with ſeveral years intereſt upon a bond dated 22d November 1703; and upon this bond the reſpondent had raiſed and executed letters of horning againſt the duke in 1706.

The preſent Duke of Hamilton was confirmed executor to his father deceaſed on the 16th of June 1722, and immediately gave up an inventory of all his father's perſonal eſtate, and particularly of the arrears of the rent that were due at the late duke's death, and which had been received by the factor, or continued in the hands of the tenants. His grace alſo raiſed an action of multiple poinding before the Court of Seſſion, in which he called all his late father's creditors as parties.

In this action of multiple poinding both the appellant and reſpondent received citations on the 18th of June 1722; and on the ſame day the reſpondent cited the duke as executor in an action of conſtitution of his debt before the commiſſaries of Edinburgh. On the 4th of July the commiſſaries ſuſtained proceſs at the reſpondent's inſtance; on the 17th of July, they found the debt proved, and decerned againſt the executor; but the final decree of conſtitution, was not given out till the 21ſt of that month. Upon this decree, the reſpondent took out letters of horning and charged the executor; but further proceeding was ſtopped by the multiple poinding.

The appellant's huſband on the 27th of June 1722, alſo cited the duke before the commiſſaries, and applied by petition to be conjoined in the reſpondent's action, but this was refuſed. Sir James Gray, on the 17th of July, obtained an interlocutor for ſuſtaining proceſs againſt the executor; but did not follow out a decree for payment of the debt.

The action of multiple poinding coming to be heard before the Lord Ordinary, Sir James Gray, inſiſted that by virtue of the aſſignation by the late Duke of Hamilton in his favour, of all the perſonal eſtate, he ſhould die poſſeſſed of, and particularly of all the rents of his eſtates that ſhould be due at the time of his death, Sir James, ought as to the perſonal eſtate to be preferred to all other creditors merely perſonal. The reſpondent on the other hand founded on his prior citation before the commiſſaries. The Lord Ordinary having reported this cauſe, the Court on the 18th of January 1723, "preferred the reſpondent." Sir James Gray reclaimed, and the Court, after anſwers for the reſpondent, on the 8th of Februray 1723, "found that Mr. Callander had no right "to the heirſhip moveables by virtue of his decree before the "commiſſaries; and found that the petitioner Sir James Gray "could have no preference upon his aſſignation, but remitted to "the Lord Ordinary to hear parties, how far the petitioner and "Mr. Callander upon their reſpective diligences were preferable "*pari paſſu* or not."

Sir James Gray in the mean time died, having left the appellant his executrix, and the cauſe being transferred againſt her, upon report of the Lord Ordinary, a hearing was ordered by the Court upon

upon the point of preference with reſpect to the diligence: and after a debate thereon, the Court on the 15th of November 1723, " adhered to their former interlocutor, preferring the reſpon- " dent."

The appeal was brought from " ſeveral interlocutory ſentences " of the Lords of Seſſion of the 18th of January, the 8th of " February, and 15th of November 1723." Entered, 21 Jan. 1723-4.

Heads of the Appellant's Argument.

As Sir James Gray had a judgment againſt the duke, ſo long ago as 1708, and might have then ſued it to execution, and recovered his payment: ſo out of friendſhip to his grace, he took the ſecurity in queſtion, in order to ſecure his payment in all events; and the duke having executed the ſaid aſſignment for a conſideration ſo beneficial, Sir James ought to have the benefit thereof, and be preferred to any creditor who had no ſuch ſecurity.

Sir James by this general aſſignment had a hypotheck upon or conventional pledge of all the aſſignor's perſonal eſtate, for payment of his debt; and conſequently the preſent duke who was confirmed executor, ought to be conſidered as a truſtee for the aſſignee, ſo far as his debt extends; and his poſſeſſion of the perſonal eſtate ought to be for the benefit of the aſſignee, and the executor being in the eye of the law the ſame perſon as the deceaſed, it is not neceſſary to give notice to him. Nor does it alter the caſe, that the aſſignor continued in poſſeſſion, becauſe the aſſignment was of ſuch things as could not admit of a preſent poſſeſſion, viz. the perſonal eſtate, the duke ſhould die poſſeſſed of. And Sir James having given notice of his aſſignment to the factor appointed by the Court of Seſſion to receive part of the very ſubject of the aſſignment, Sir James ought to be preferred to any other creditor as to theſe arrears, the factor being the only perſon to whom ſuch notice could properly be given.

A debt thus fairly contracted, and ſecured by ſuch an aſſignment, if it ſhould not give a preferable right to the aſſignee, ought at leaſt to entitle him to come in equally with any other creditor, and be paid in a due proportion, as far as the aſſets will go.

It is true that in order to prevent one creditor, who might be in a good correſpondence with an executor, from carrying off all the effects to the hurt and excluſion of the others, an act of ſederunt in 1662, was made by the Lords of Seſſion, declaring " that all " creditors of defunct perſons uſing legal diligence at any time " within half a year of the defunct's death, by citation of the " executors and intrometters with the defunct's goods, &c., ſhall " come in *pari paſſu* with any other creditors, who have uſed more " timely diligence." But there is no law or ſtatute which enacts, that after the expiration of the ſix months, a creditor giving a citation one day, or one hour before another creditor ſhall be paid in the firſt place. The appellant conceives, that all creditors having an equal right by the nature of their debts, who appear before aſſets are actually applied, ought to be paid equally; the Act of Sederunt. 28 Feb. 1662.

caſe would otherwiſe be extremely hard. The reaſon of this regulation relative to creditors doing diligence within ſix months of the debtor's death, favours the appellant; for if all creditors, who commenced their actions within ſix months of the debtor's death, ought to be paid equally in order to prevent ſurprize, for the ſame reaſon ought creditors, who ſue within ſix months after confirmation, to be equally paid; the executor being the only proper perſon to be ſued.

Sir James in this caſe, not only cited the executor a few days after his confirmation, but had prayed to be admitted to plead preference in the reſpondent's ſuit, and had even obtained ſentence againſt the executor, as ſoon as the reſpondent, and all this before any payment made by the executor, for to this hour he is poſſeſſed of the whole effects, and has not paid any part to the reſpondent.

The citation in the multiple poinding was given to Sir James, and to the reſpondent on the ſame day, that the reſpondent cited the duke before the commiſſaries: and this citation by the executor to both creditors, ought to be conſidered as equivalent to, and the ſame as if Sir James had then cited the executor, ſince it put a ſtop to any effectual proceedings before the Commiſſary Court, and brought the matter to be properly determined in the Court of Seſſion; and Sir James in that Court could have recovered a decree, juſt as if he had cited the executor.

Heads of the Reſpondent's Argument:

The law of Scotland, for the benefit of commerce, has long ſince repudiated all private ſales, or impignorations of goods or effects, unleſs the goods and effects ſo ſold, or pledged be actually delivered to the buyer or creditor, or to ſome third perſon in truſt for him. It is certain that the late Duke of Hamilton might, during his life, ſell or diſpoſe of any part of his perſonal eſtate, and that the ſame was ſubject to be taken in execution by any creditor, notwithſtanding of this aſſignment to Sir James Gray, which after the late duke's death, ought no more to protect his perſonal eſtate, than it did or could do in his lifetime.

By the law and cuſtom of Scotland, creditors were preferred according to their diligence, the creditor who gave the firſt citation being preferred to all the reſt. But in the year 1662, the Lords of Seſſion, conſidering that creditors, living at a diſtance, were often without any fault or delay of theirs excluded by the prior diligence of creditors, who lived near to the deceaſed, and thereby got quicker intelligence of his death, did therefore make an act of a federunt ſettling a rule, that all creditors giving citations within ſix months of the death of the debtor, ſhould be preferred *pari paſſu*. But if the creditor did not come forward in that time, the Lords of Seſſion thought he deſerved no relief; and therefore after the expiration of that time, the old law ſtill takes place, and creditors are preferred according to the priority of their citations; and *vigilantibus jura ſubveniunt*. Were it otherwiſe the executor might prefer whom he pleaſed by inſiſting on dilatory

Stair B. 3. Tit. 8. § 68, 69.

pleas

pleas againſt one creditor, in order to *retard* his obtaining a decree, and allowing another creditor to get a decree without diſpute.

The commiſſaries could not by the forms of their Court, admit the appellant into the reſpondent's action before them; every perſon who has a juſt claim, and brings his action, gets a ſeparate decree againſt the executor; but though the commiſſaries had granted this requeſt, it could have been of no ſervice, the preference depending upon the date of the citation.

The appellant ſtated, that Sir James obtained a decree of the commiſſaries on the ſame day that the reſpondent obtained his: but the interlocutor which the appellant points at, is that of the 17th of July, ſuſtaining proceſs at her huſband's inſtance; and the reſpondent had obtained an interlocutor of the ſame nature with that upon the 4th of July, and upon the 17th, he obtained a further judgment, finding the libel proved, and decerning to pay, which is what neither Sir James, nor the appellant ever obtained; ſo that in effect, the appellant has no decree of the proper court in her favour. Nor could the Lords of Seſſion upon the multiple poinding have given her ſuch a decree; for in that action they can prefer no creditor, unleſs ſuch creditor have a decree conſtituting his debt againſt the executor, or an action pending before the Court of Seſſion for that end, neither of which the appellant ever had: whereas the reſpondent has a final decree of the Commiſſary Court of the 21ſt of July 1722, conſtituting his debt againſt the executor; and ſo has not only the firſt citation, but alſo the firſt and only decree.

After hearing counſel, *It is ordered and adjudged that the interlocutor complained of in the ſaid appeal of the* 15th *of November* 1723, *adhering to the interlocutor of the* 18th *of January* 1723, *be reverſed: And it is hereby declared, that it is the opinion of this Houſe, "that the appellant in virtue of her diligence is entitled to a proportionable ſhare, with the reſpondent of the perſonal eſtate, and executry of James late Duke of Hamilton, and that the appellant and reſpondent are preferable, and be paid pari paſſu accordingly.* Judgement, 8 April, 1724.

For Appellant, *Ro. Dundas. C. Wearg. Will. Hamilton.*
For Reſpondent, *Dun. Forbes. C. Talbot.*

In the Dictionary vol. I. p. 207. *Creditors of a Defunct*, the judgment of the Court of Seſſion, though here reverſed, is mentioned as an exiſting deciſion: the ſtatement appears alſo to be erroneous in mentioning the caſe, as if the creditor who gave the laſt citation obtained the firſt decree. It is alſo ſtated by Mr. Erſkine, Inſtit. B. 3. tit. 9. § 46.