

No 83.

Thereafter it was *alleged*, That the inhibition was null, in respect the execution thereof did bear, that the same was execute at the common debtor's shop, by delivering a copy to his wife there, whereas all executions ought to be personally, or at the dwelling-house. THE LORDS sustained the objection against the inhibition, unless the inhibitor would offer to prove, that the shop was a part of the dwelling house.

Thereafter it was *alleged* for Anderson the arrester, That he had obtained a decret of adjudication of the tenement, whereof the mails and duties were craved ; and therefore ought to be preferred, not only since the decret of adjudication, but since the citation, which was the ground of the adjudication ; in regard the act of Parliament declares a citation upon a summons of adjudication, to be equivalent to a comprising, and infestment following thereupon ; and true it is, that a comprising, and infestment thereupon, would be preferable to Crichton's arrestment. THE LORDS preferred the adjudger, only since the decret of adjudication ; and found, That the act of Parliament, declaring citations of adjudications to be equivalent to a comprising and infestment, was only in a competition with voluntary rights, but did not prejudge legal diligences, such as arrestment.

President Falconer, No 77. p. 51.

1763. July 27.

STRACEY TILL and Others, *against* ROBERT, MARGARET, and WILLIAM
JAMIESON.

No 84.

An assignation granted by a woman before, but not intimated till after, her marriage, found preferable to the legal assignation by the marriage.

JOHN HAMILTON, merchant in Glasgow, bequeathed to his niece Margaret Jamieson L. 200 Sterling, one moiety payable eighteen months after his own death, and the other at the first term after the death of his wife.

Mr Hamilton having died upon the 1st of April 1759, Margaret Jamieson, by her assignation for love and favour, dated the 7th of June thereafter, conveyed the legacy above mentioned to Robert Jamieson her father ; but, with this proviso, that, in case of his predecease, the whole should return to herself in life-rent, and to William Jamieson, her brother, in fee, in the event of her having no children.

The said Margaret Jamieson was married, upon the 17th of August 1759, to Robert Mason linen-draper in Northallerton, who left her the same day ; and the first account that she got of him afterwards was, that he was a bankrupt, and imprisoned in York Castle.

Upon the 19th September 1759, a commission of bankruptcy issued against the said Robert Mason ; and, upon the 22d of October thereafter, he was declared a bankrupt by the major part of the commissioners, who, of that date,

executed an assignment of his effects to Stracey Till of Fen-Church Street, and others.

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The assignation in favour of Robert Jamieson was not intimated till May 1760; and the executors of John Hamilton having brought a process of multiplepinding, a competition arose between the assignees under the commission of bankruptcy, and the said Robert Jamieson.

Pleaded for the assignees under the commission of bankruptcy; The *jus mariti* vests in the husband the moveables belonging to the wife; without the necessity of intimation; the law considering the marriage as a sufficient notification of his right; and therefore, as in common cases, the second assignation, if first intimated, is preferred. There is no reason why the *jus mariti* should not give the same preference to the husband, in a competition with the wife's assignation, not intimated before marriage.

Answered for Robert Jamieson; Although, in a competition between two persons, each of whom had right by assignation from Margaret Jamieson, the first intimated would be preferable, the present case is extremely different: For, *imo*, The reasons which gave occasion to the introduction of intimations will not here apply. Intimations are not necessary, either to divest the cedent or to complete the right of the assignee, and were only introduced to guard against the granter's fraud, by uplifting the debt assigned, or by executing a second assignation, upon which payment might be received, to the prejudice of the first assignee. But here there can be no competition upon double rights; for, in fact, there is but one assignation, viz. that which was granted to Robert Jamieson; and as it is impossible to suppose, that, by her-after marriage, Margaret Jamieson intended to convey to her husband what she had formerly granted to her father, so it will be absurd to suppose, that the law could mean to carry to the husband a right which no longer belonged to his wife. *Secundo*, The legal assignation by marriage is an universal right to the whole of the wife's moveables, subject to all her prior debts and deeds affecting these moveables; and as the assignation by Margaret Jamieson to her father bears warrandice from fact and deed, the husband, and those in his right, must be barred from pleading upon the *jus mariti*, in prejudice of the obligation which his wife, by that clause, came under to make good the assignation.

Replied; The wife, in this case, did not incur the warrandice. The contravention of warrandice from fact and deed implies some tortious act of the cedent, with an intention to defeat a prior obligation: But this can never be presumed from a party's entering into marriage; and, if latent assignations between conjunct persons should be available to frustrate the husband's legal right by the marriage, a door would thereby be opened to frauds, which it would be impossible to guard against.

'THE LORDS preferred Robert Jamieson, the father.'

Pleaded in a reclaiming bill, besides the points formerly insisted upon; that the creditors of the husband ought at any rate to be preferred for the rever-

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sionary right which was reserved to Margaret Jamieson and her children *nascituri*, by the assignation to her father, and which undoubtedly fell under the *jus mariti*.

Answered for Margaret Jamieson, and her brother William, their father being then dead; The proviso, that in case of Robert Jamieson's predeceasing his daughter, the subject assigned should return to her in liferent, and to her brother in fee, failing heirs of her own body, was no more than a substitution, and cannot be considered as a right subsisting in her person at the time of the marriage, so as to fall under the *jus mariti*.

'THE LORDS adhered to their former interlocutor, in so far as it found the assignation in favour of Robert Jamieson preferable to the legal assignation by the subsequent marriage; but remitted it to the Lord Ordinary to hear parties upon the effect of the substitution contained in the said assignation to Robert Jamieson, and the claim of the husband's creditors founded thereon.' See HUSBAND AND WIFE.

For the Assignees under the Commission of Bankruptcy, *Lockhart*.
Walter Stewart and Ferguson.

For the Jamiesons,
Clerk, *Home*.

A. W.

Fol. Dic. v. 3. p. 153. Fac. Col. No 117. p. 276.

1764. July 24.

The REAL CREDITORS, against The PERSONAL CREDITORS of JOHN GILLESPIE.

No 85.

A person held lands by disposition and infeftment, which were afterwards reduced. While he possessed the lands he granted heritable bonds. After the reduction, his personal creditors insisted the heritable bonds were granted a *non habente potestatem*, and were not preferable. The heritable bonds were preferred.

UPON the 10th of September 1720, Mary Young, proprietor of the lands of Greenhill, with consent of Alexander Renton her husband, granted an heritable bond to John Gillespie, for infefting him in an annualrent corresponding to the principal sum of L. 333 : 6 : 8.

In 1721, the said Mary Young and her husband granted another security of the like nature to Gillespie, for infefting him in an annualrent corresponding to the principal sum of 2000 merks.

Upon these two bonds Gillespie was duly infeft.

In November 1723, Gillespie obtained an adjudication upon these two bonds against Mary Young and her husband, adjudging their several rights and interests in the hands of Greenhill, for the accumulated sum of L. 8906 : 6 : 8; but no charter or infeftment followed upon this adjudication.

Several other bonds were afterwards granted by Mary Young to Gillespie; and, upon the 15th of December 1732, her husband being then abroad, she sold the lands of Greenhill to him at the price of 19,600 merks, out of which he was allowed retention of 14,000 merks, as the amount of the debt due to him.

Gillespie was infeft upon the disposition of sale, and entered into possession; but Renton the husband, having returned to this country, he, in 1742, brought