1758. *January* 31.
ALEXANDER CUNNAND, *against* ADAM TURNBULL and JOHN KIRKALDIE, Creditors of JAMES CUNNAND.

No 231.
An insolvent person, after calling a meeting of his creditors, and proposing to execute a trust disposition, granted heritable bonds to certain creditors. Other creditors inhibited and adjudged. The bonds were found to afford no preference; but they were brought in *pari passu* with the adjudications.

JAMES CUNNAND was possessed of some heritable subjects in the town of Inverkeithing, in which his wife was infeft for her liferent. In the year 1750, he called his creditors together, and agreed to grant a trust-disposition to Adam Turnbull and John Kirkaldie, two of his creditors, to be disposed of by them for the behoof of the other creditors; but he and his wife afterwards refused to grant this deed. The creditors proceeded to take separate measures; and John Kirkaldie obtained an heritable bond for his debt; and Adam Turnbull, soon after, obtained heritable bonds for his debts; upon which each of them was infeft, preceding the 12th of April 1751. Alexander Cunnand, another creditor, some months thereafter, executed an inhibition, and also obtained an adjudication against James Cunnand, upon the 30th of July 1751.

In August 1752, James Cunnand sold his heritable subjects; and the purchaser having brought a multiple-poinding, it was *objected* by Alexander Cunnand, against Turnbull and Kirkaldie's heritable bonds, That they could not be preferred to him, in respect that these bonds were granted in security of prior debts, and soon after a meeting of the common debtor's whole creditors, at which Kirkaldie and Turnbull were also present, where a trust-disposition was agreed to be granted, and the creditors to be paid proportionally; and that after this agreement, it was a fraud in Kirkaldie and Turnbull to take these heritable bonds.

Upon the 11th of January 1757, 'the Court found, That John Kirkaldie and 'Adam Turnbull could have no preference in virtue of the heritable bonds and 'infeftments produced for them.'

A question occurred, Whether, in terms of this interlocutor, these bonds were to be considered as absolutely null, so as to give Alexander Cunnand a preference by his adjudication; or if Kirkaldie and Turnbull were entitled to be ranked *pari passu* with him?

Argued for John Kirkaldie and Adam Turnbull, That they were in this case guilty of no fraud, but were entitled to act for themselves, after the common debtor refused to grant a trust-disposition: That, in this case, the common debtor was not a bankrupt in terms of the act 1696; and was therefore at full liberty to grant the heritable bonds: That though the Court had refused to give them a preference upon their heritable bonds; yet the same equity ought to bring them in equally with the adjudger, agreeable to what was intended by the trust-disposition.

Answered, By the interlocutor of the Court it was found, That the heritable bonds could give no preference; and it is a consequence, that they cannot entitle the creditors to be preferred equally with the adjudger; and, independent of the interlocutor, it is equitable, that those creditors who attempted to take an

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.

1788. *July* 8. John Hay *against* Andrew Sinclair and Company.

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.

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 infeftment, it was expreſsly declared, that their efficacy ſhould not depend on the priority of the diſpoſition or other conveyance, but on that of the infeftment, 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 granter, 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.