in the assignee: And in this, an assignation is similar to a disposition or adjudication, upon which infeftment taken after the death of the disponer or debtor establishes the subject, which in the *interim* was *in hæreditate jacente*, completely in the person of the disponee or adjudger. As for the decision cited, the circumstances are not the same; there the assignee had got a bond of corroboration, and a partial payment after the cedent's death, which has been always reckoned equal to an intimation. To conclude, the subject in dispute remained *in bonis defuncti*, notwithstanding the unintimated assignation. The confirmation was the first completed conveyance, taking the subject out *e medio*; and upon that title, the executor-creditor falls to be preferred. No 40.

'THE LORDS preferred the executor-creditor.'

Fol. Dic. v. 1. *p.* 180. *Rem. Dec. v.* 1. *No* 87. *p.* 175.

1775. *March* 8.

PEREGRINE CUST *against* FRANCIS GARBET and Company.

No 41.
A competition between an assignment intimated after the death of the cedent, and a confirmation of an executor-creditor, expede upon the same day, was found to be regulated by priority of the hour.

UPON the death of Ebenezer Roebuck merchant in London, one of the partners of the Carron Company, which happened at Carron on the 9th of October 1771, a competition ensued respecting his share in the co-partnery stock of the Carron Company, computed to be worth about L. 6000 Sterling.

Mr Cust founded upon an assignment from the said Ebenezer Roebuck, dated the 16th May 1770, to his share of the stock in the above Company, subject to the proviso, that the same should be redeemable upon payment of L. 3350 Sterling, and interest thereof, upon the 16th May 1771; but, if not paid before that time, the right was to be absolute. This assignment had not been intimated during the lifetime of Roebuck the cedent; but, after his decease, was intimated on the 29th day of October 1771, to two of the residing partners of the Carron Company at Carron. And, upon the 30th October, betwixt the hours of eight and nine in the morning, it was intimated by Mr Cust's factor to Charles Gascoigne, for himself as a partner, and as acting manager for the Carron Company, within the Company's office at Carron; where he attended for that special purpose, in consequence of his own proposal to Mr Cust's factor, and the notary, who were with him at his house at Carron-wharf, the preceding evening, in order to have intimated the same to him then.

Francis Garbet and Company of Carron-wharf, being also creditors, did, upon the 17th day of the said month of October 1771, take out an edict from the commissaries of Edinburgh, for confirming themselves executors-creditors to the said Ebenezer Roebuck; and, after the preliminary steps, a confirmation was expede in their favour, bearing date the 30th day of October 1771, in which they gave up, for the particular subject of that confirmation, the sum of L. 6000 Sterling, as the supposed value of Ebenezer's share of the co-partnery-stock of the Carron Company.

No 41. Garbet and Company maintained two different pleas. They insisted for a total preference in their favour upon the following grounds; 1*st*, That the assignment itself to Mr Cust is intrinsically null and void, in respect of the irregular execution thereof; 2*dly*, in respect of alleged irregularities in the intimation of the assignment upon the 30th October: But there appeared to be no relevancy in either; and the counsel for Garbet and Company, after one judgment of the Court had gone against them, consented to restrict their plea to a *pari passu* preference with their competitor.

Argued on this head; That they do not dispute that principle of the Roman law, when kept within proper bounds, *quod vigilantibus non dormientibus, jura subveniunt*, but the propriety of the application of it to the case in hand.

As the genius of the law of this country, as of all other commercial states, founded upon principles of material justice and equity, favours an equal distribution of the effects of a bankrupt amongst his whole creditors; whatever shall be the judgment of the law upon the authority of former precedents and opinions, in a competition between assignees and arresters, specifying the precise hours when they were severally executed, or *in poenam* of that party who neglected to specify the hour in his execution; an extension of these to the case of an executor-creditor, who has it not in his power to specify the hour of his confirmation, would be as adverse to the general principles of equity and justice, as it is unsupported either by precedents or authorities.

It is a known fact, that the usual and stated time for the meeting of the commissary court, is ten of the clock in the forenoon; and as no opposition was, or could be made to the confirmation as executors-creditors, their being decerned executors required no time; and as the subject meant to be confirmed was but one single article, viz. Ebenezer's share of the stock in the Carron Company, the confirmation might forthwith be expede; and the presumption of law is, that every thing was regular and fair. So that, for any thing that does or can appear. allowing the assignment to have been intimated at the hour of nine, which, at any rate, is doubtful and uncertain, and the confirmation to have been expede after the hour of ten, or between ten and eleven, the bare possibility, or even probability of the one being an hour or thereby prior to the other, would be too slender a ground upon which to establish the preference contended for by Mr Cust, and to exclude the other party from a rateable proportion of the sole effects in this country, which they were *in cursu* of attaching, in the only method competent to them by law.

It is thought to be a clear case, that, as the law stood before the making of the statutes 1690, cap. 26. and 1693, discharging transferences *active*, a special assignation, not intimated in the cedent's lifetime, could have been no bar to any other creditor confirming that particular subject, as *in bonis* of the defunct at his death. The exemption granted by the first to such special assignee from the necessity of confirming after the death of the cedent, being qualified by the words immediately following, ' Without prejudice always to the

competition of creditors and others, and of their rights and diligences as formerly, before the making hereof,' can be no bar to the confirmation of an executor-creditor, or any ground of preference to the assignee, in competition with such executor-creditor; and, therefore, as an unintimated special assignation, as the law formerly stood, gave no preference in competition with other creditors confirming the subjects assigned, which remained *in bonis* of the defunct, the concession made by the defenders, (upon supposition of the assignment's being regularly intimated) that Mr Cust should come *in pari passu* with them on Ebenezer's share of the stock of the Carron Company, was all that in equity he could demand, and more than by law he was entitled to. No 41.

But this is not the only ground upon which the defenders do maintain their plea to a *pari passu* preference.

It is a clear case, that the unintimated assignation did not denude Ebenezer Roebuck of his share in the stock of the Carron Company; so that, at the period of his death, it remained *in bonis* of him, attachable by his creditors. It is equally clear, that the only method known in the law by which it could be attached, was by confirmation as executor-creditor; so that, when the defenders were in *cursu diligentiæ*, and in *actu proximo* of having their confirmation expede, before that Mr Cust attempted to intimate his assignatiou, they were following out the only course that the law allowed to operate their paymen, by the attachment of that particular subject, which, therefore, could not be frustrated by intimating the assignation at that conjuncture.

Argued for Cust: In England, of which he is a native, and where he has resided all his life, the intimation of an assignation is unnecessary, and in fact is never practised. By the assignment, the equitable and substantial right was transferred to him; and, therefore, it would have been a hard case, if, through the neglect of a mere piece of form, and which Mr Cust did not know to be necessary till after Ebenezer Roebuck's death, the competitors had carried off for a debt of Ebenezer's, a subject to which they knew they had no right, but, on the other hand, knew perfectly well that, equitably and substantially, it belonged to Mr Cust.

That a *pari passu* preference of creditors has any foundation in the common law of Scotland, is absolutely denied. This *pari passu* preference is entirely the creature of statute; and, therefore, it cannot be extended to cases not provided for by statute. The general rule of the law of Scotland is, (and which must hold at this day in every case where the contrary is not expressly provided by statute) that *vigilantibus, &c.* and that *prior tempore potior jure.*

With respect to the merits of the points at issue, it is a clear case, that it is the confirmation alone that vests the right. The serving the edict, and even the decree-dative, vests no right whatever; so it was decided 23d January 1745, Carmichael *contra* Carmichael, *voce* SERVICE and CONFIRMATION; and, since that time, the point is understood to be fixed and established.

No 41.

The assignment was granted in favours of the pursuer about 16 months before Mr Roebuck's death. It is plain, that no step taken by any of his creditors could prevent the pursuer from going on and completing his right by intimation; and, therefore, the question comes to this, Whether there is satisfactory evidence, that the intimation which was made betwixt eight and nine o'clock in the morning of the 30th of October, was prior, in point of time, to the confirmation that was expede that day before the Commissaries of Edinburgh?

But, even in the case of competition in arrestments, it is by no means sufficient to create a *pari passu* preference, that the steps of diligence of the respective creditors happened upon the same day. Where, indeed, both appear to have been done upon the same day, and where no mention is made of the time of the day, as to any of them, no other rule of decision can be adopted but to prefer both *pari passu;* but, where the time of the day is mentioned, the preference must be regulated accordingly.

It is likwise an established rule, that, where one makes mention of the hour of the day, and the other does not, that in a competition the creditor is preferable, the execution of whose diligence makes mention of the particular hour. And, indeed, the principle of law by which questions of this kind fall to be governed, does not require two hours, nor even one hour, or half an hour, in order to give a preference. Any priority whatever is sufficient, if the judge shall be satisfied that there was a priority in point of time; and if the fact be certain that there is a priority, a priority of ten minutes is just as good as a priority of ten hours. The intimation of the assignation did vest the right fully and absolutely in the person of the assignee. The subject did not thereafter remain *in bonis defuncti;* and consequently, a confirmation expede after the *hæreditas jacens* of the defunct was denuded by an intimated assignation could carry nothing: And it can make no difference whether the *hæreditas jacens* was denuded ten hours or ten minutes prior to the confirmation.

It is certain, however, that the usual time of meeting of the Commissary Court is not earlier than 11 o'clock; yet, supposing it was ten, as the defenders have stated, it is perfectly clear that the confirmation was long subsequent to the intimation, and that, in place of one or two hours, which has been found by the Court to give a preference, many hours must have intervened in fact: And, independently thereof, the pursuer behoved to be preferred upon the other ground above stated, viz. that the intimation makes mention of a particular hour, whereas the confirmation makes mention of no hour; and in every such case it is held to be clear, that the former falls to be preferred.

The difference supposed betwixt the case of judicial proceedings, and the execution of legal diligence, or the intimation of assignations, upon which the defenders seem chiefly to rest their plea, can by no means vary the rule of division. A confirmation of an executor-creditor falls to be considered as a step

of legal diligence, for establishing the creditor's interest in the defunct's effects; and, in all competitions, where the contrary is not established by statute, the clear rule of law, and which holds universally, is, that *prior tempore est potior jure*. The law in such cases does not mean to establish a *pari passu* preference. Such preference arises only *ex necessitate*, when it does not appear, with any reasonable degree of certainty, that the one was prior to the other: And therefore, before the defenders can claim *pari passu* preference with the pursuer, it is incumbent upon them to show, that their step of diligence was equal, in point of time, with the intimation of the assignment; whereas this they have by no means done. The pursuer's instrument of intimation proves, that the same was made betwixt the hours of eight and nine in the morning of the 30th of October; whereas, the defenders confirmation, which mentions no hour, proves no more, as Lord Stair very properly expresses it, *but once that day*. No 41.

The present question must be regulated by the law as it now stands; at the same time, it is apprehended, the defenders are in a mistake in supposing, that prior to the 1690, or 1693, a special assignation could not be intimated after the death of the cedent.

But all this is an investigation of very little moment in the present question. The pursuer does admit, that, even subsequent to the statutes 1690 and 1693, if a creditor should confirm a debt that had been specially assigned by the defunct, before the assignation was intimated, that he would fall to be preferred to the assignee; but, on the other hand, it is equally clear, that if the assignation was intimated prior to the confirmation, even although the intimation was made after the death of the assignee, the assignee would be preferable to the creditor confirmed; and the sole question here is, Whether the intimation of the assignation, or the confirmation, was prior in point of time?

It is perfectly untenible to maintain, and for which there is neither precedent nor decision, that, because a creditor is *in cursu diligentiæ*, therefore a third party is not at liberty to complete a right which he had obtained from the debtor, before the creditor had proceeded to any step of diligence whatever. Such third party can never be interpelled, by any step of diligence against the common author, from completing a right which he derived from that author, at a time when he was at perfect liberty to dispose of the subject in what manner he inclined.

THE COURT, by two consecutive judgments, adhered to that of the Lord Ordinary, which found, 'That the intimation of Cust's assignment being made to the acting manager and partner of the Carron Company, by delivering him a schedule at their office at Carron, was sufficient; and in respect it appears, from the instrument of intimation produced, that the same was made to the acting manager at the Carron Company's office, between 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 11 o'clock in the forenoon; finds, That the assignation in favour of the said Peregrine Cust was completed

No 41. by the said intimation, before any step was, or could be taken upon the edict in the confirmation in favour of Garbet and Company; and, therefore, prefers Cust upon his interest produced.'

Act. *M'Queen.* Alt. *D. Faculty, Lockhart.* Clerk, *Ross.*
Fol. Dic. v. 3. p. 154. Fac. Col. No 169. p. 74.

SECT. VIII.

General Assignees with Creditors.

No 42.
A disposition by a husband to his wife, of his moveables upon a particular estate, was found sufficient to defend the relict in her possession of those moveables, against an executor-creditor pursuing for them.

1663. *July* 3 GORDON *against* FRAZER.

GORDON having confirmed himself executor-creditor to Forbes of Auchinvil, pursues —— Frazer, his relict, for delivery to him of the moveables, who *alleged* absolvitor, because the moveables upon the Mains of Auchinvil were disponed to her by her umquhile husband.—It was *answered*, That the disposition was simulate, *inter conjunctas personas retenta possessione*, and therefore null.—It was *duplied*, That the disposition was upon an onerous cause without simulation, because it bears to be in respect that, by the defunct's contract of marriage, he is obliged to infeft his wife in five chalders of victual out of Auchinvil, for the aliment and entertainment of his younger children, till the age of 14 years; and because he was necessitate to sell that land, therefore he disponed the moveables in lieu thereof, which is also instructed by the contract of marriage.—The pursuer *answered*, That this is but a provision to children, and could not be preferred to the defunct's creditors, especially being a provision before the children were existent; and if such were to be allowed, it were easy, upon such latent provisions in favours of children, to prejudge creditors.—The defender *answered*, That if the pursuer's debt had been anterior to the contract of marriage, he might have had ground upon the act of Parliament 1621; but this debt was posterior to the contract, and there was no reason to hinder a parent to provide his children, and dispone moveables to him in satisfaction thereof.—The pursuer *answered*, That both being yet but personal obligements, not having obtained effectual possession, the creditor, though posterior, must be preferred to the children, especially if the defunct have not sufficient estate to pay both; 2*dly*, The disposition is upon a false narrative, because the lands of Auchinvil are yet undisponed.

THE LORDS found, That the childrens' disposition ought to be preferred, unless the father were *insolvendo*, at his death; in which case they preferred the