No 46.

An indorsation on a bill of lading cannot be more effectual than a power of attorney, which it truly is in an abridged form. The only right it conveys is, that of demanding implement of the shipmaster's obligation; a right which, being accessory to that which the consigner has to the disposal of his goods for his sole benefit, must as such bear the character, without transgressing the limits of the principal. The *jus exigendi* thereby conferred is therefore totally different from the civil possession, which still continues to be held by the consigner; as was lately determined in the case of Allan and Steuart *contra* Creditors of Stein, No 45. p. 14218.

The Lord Ordinary reported the cause, when

The Court "preferred the Trustee on the estate of James Stein to the spirits in question."

A reclaiming petition was presented, followed with answers, and refused.

Reporter, *Lord Dreghorn.* Act. *Rolland, Hope.* Alt. *Maconochie.* Clerk, *Home.*

Fol. Dic. v. 4. p. 252. Fac. Col. No 80. p. 144.

*** A similar judgment was given in the House of Lords in another case relative to the same bankruptcy, viz. Farquhar Kinloch *contra* Craig, May 13. 1790, which made it unnecessary to appeal the case of Young.—In an English case, Liekbarrow *versus* Mason, it was decided in the House of Lords, June 14. 1793, that a bill of lading being indorsed by the vender to the purchaser, and by him to a third party for value, the onerous indorsee was entitled to the benefit thence arising, *i. e.* the cargo, or its price, although the purchaser had become bankrupt, and the vender had transmitted another copy of the bill of lading to his attorney, in order to stop the goods from being delivered, which was intimated to the master when the ship arrived. See Appendix.

1798. *November* 20.

The Viscount of Arbuthnott *against* Alexander Paterson, Trustee for the Creditors of James Bisset and Son.

No 47.
Grain having been sold to a person who became bankrupt before the price was paid, it was found, that in the circumstances of this case, the delivery

On the 2d January 1796, the Viscount of Arbuthnott, by a minute, "sold to James Bisset and Son, of Montrose, 1000 bolls of oatmeal, and 600 bolls of bear," part of his farm-grain, which were "to be delivered at Gourdon, or any other place where the tenants are obliged to deliver the same." The Viscount agreed to give a list of the tenants, "who are to deliver the said meal and bear, with a precept thereon, requiring the tenants to deliver the same to Bisset and Son, in terms of their leases." The purchasers granted bills for the price, payable at Whitsunday following.

No 47.
of the grain had not been completed, and that therefore the seller had a preference on the price of it, in competition with the purchaser's other creditors.

The grain was payable by the tenants betwixt Candlemas and Whitsunday.

Bisset and Son stopt payment on the 14th May 1796, before paying their bills.

By this time, part of the grain had been received, and sold by them.

What remained was in three different situations. Some of the tenants had not accepted the precepts issued on them by the Viscount. Others, by a marking on the back of the precepts, had agreed to deliver the quantities charged against them to Bisset and Son. Others had not only done so, but had delivered the grain into one of the Viscount's granaries, upon receiving the precepts discharged by the purchasers. The Viscount's ground-officer had the custody of the key of the granary.

The Sheriff, on application from the Viscount, ordered the whole to be sold, and the price lodged with a banker, till the right to it should be ascertained.

On the 9th of June, Bisset aad Son were rendered bankrupt, in terms of the act 1696, and on the 1st of July their estate was sequestrated.

A competition ensued between the Viscount and Alexander Paterson, trustee for their creditors, as to the price of the grain *in medio* at the bankruptcy; the former claiming a preference, the latter contending, that he could rank only as a personal creditor on the bills granted for the price.

The Viscount's preference on the price of the grain, as to which the precepts had not been accepted by the tenants, was hardly disputed.

As to the case where the precepts were accepted, but the grain not delivered by the tenants, the Viscount

Pleaded; When a purchaser is disabled by bankruptcy, from paying the price, he, or his creditors, cannot demand delivery of the subject sold to him. Ersk, B. 3. T. 3. § 2. Although the seller has quitted possession, he may resume it, if the subject be still *in transitu*, and not actually delivered to the purchaser. Nay, even after delivery, he may plead retention, if he recover possesssion by legal means; 26th January 1785, Hill against Buchanans, No 37. p. 14200.

The acceptance of the precepts was not equivalent to actual delivery of the grain. It was merely an acknowledgement by the tenants, that the quantity charged against them was correct. Their situation was like that of a shipmaster, who has granted a bill of lading, containing *in gremio* the name of the person to whom the goods are to be delivered, or indorsed in his favour; in which case, it is established, that, though the bill has been transmitted, the person who shipped the goods may, on the bankruptcy of the purchaser, prevent their being delivered. And it would not affect his right to do so, that the shipmaster had, on his arrival, by a marking on the bill of lading, obliged himself to deliver the goods to the purchaser, which would be considered as nothing more than a renewal of the obligation in the bill of lading.

No 47. *Answered*, Lord Arbuthnot was not proprietor, or in possession of the grain mentioned in the minute of sale; for, though the fruits in possession of the tenant are sometimes said to be the property of the landlord, this expression is used merely to mark the extent of his right of hypothec, and is not strictly true. The creditors of the tenant may attach them by diligence, and he may himself dispose of them voluntarily, while the creditors of the landlard can only arrest the rents due to him.

The Viscount, therefore, could not deliver the grain, nor was delivery necessary to transfer the *jus exigendi*, which alone was vested in him. This incorporeal right was to be transferred, not by delivery of the subject to which it related, but by an assignation intimated to the debtor. Suppose the Viscount had been creditor to his tenants by a bond, and that he had assigned it to Bisset and Son, who had intimated the assignation to the tenants, and that they had granted a collateral obligation for payment; there would have been here a complete *delegatio creditoris*, divesting the Viscount of all connection with the bond; and if Bisset and Son had become bankrupt, before paying the price of the assignation, the Viscount would have ranked only as a personal creditor. To give him a preference, it must have been reserved in the assignation. In the present case, the precepts are equivalent to a formal assignation; the acceptance and obligation to deliver, to intimation with a collateral security for payment.

Even if delivery had been essential, it would have been held to have taken place. When the subject sold is already in possession of the purchaser, a mere act of will by the owner is sufficient to transfer the property; and when it is in the hands of a third party, an order by the owner, with an obligation by the possessor to deliver, is sufficient; De L. 18. De acquir. et amitt. poss. L. 77. De rei vindicatione. The grain here was at the risk and disposal of the purchasers and this is the essence of delivery.

The present differs from the case put, with regard to a bill of lading, in this material circumstance, that the goods shipped are not the property of the shipmaster who grants the bill, whereas the grain was the property of the tenants. Besides, even as to the right of preventing delivery of goods after transmission of the bill of lading, the decisions have not been uniform; 13th June 1764, Buchanan against Cochrane and Swan, No 42. p. 14208.; House of Lords, 10th April 1770, Hastie and Jamieson against Arthur, No 43. p. 14209.; 2d February 1787, Bogle against Dunmore, and Company, No 44. p. 14206.

Replied, Although the Viscount were not held to be proprietor of the grain, but to have merely a *jus crediti* against the tenants for payment of it, upon the purchasers' failing to pay the bills, he would be entitled to recall the precepts from them, *condictione causa data, causa non secuta.* And, in the assignation of a personal right, the rule, with some exceptions, is, that the creditors of the assignee are in no better situation than himself. See Bank. vol. iii. p. 78.

As to the grain in the granary, the question hinging upon the point, Whether the grain was to be considered as in possession of the Viscount, through

his servant, or actually delivered to the purchasers; the latter averred, that it was part of the bargain that they should have the use of the granary; that they might have employed any person they thought proper to take charge of the grian when deposited there, which was at their own risk; and that though they happened to pitch on a servant of his Lordship, he was paid by them, and accountable to them alone for his conduct. They at first added, that the key of the granary was given to him by them, but they seemed afterwards to admit, that he had previously the charge of it from the Viscount. No 47.

It was *alleged*, on the other hand, that it was not part of the bargain that they should have right to the granary; but that it had been the practice of the family of Arbuthnot to indulge the purchasers of their farm-grain with the use of it; that the key was uniformly kept by the ground-officer; that there was grain in the same granary belonging to the Viscount; and that the servant receiving a gratuity from the purchasers, would not affect the question.

The Judges were at first much divided in their sentiments. The principal grounds of the opposite opinions have been already given.

THE LORDS, upon advising a petition for the Trustee, with answers and replies, (25th November 1797), "Found, That the petitioner as trustee for the creditors, has right to the price of the parcel of grain which was in the granaries, the key whereof was in the custody of a person employed by him, and also to the price of the parcel of grain which was under accepted precepts by the tenants;" but "found, That the respondent has right to the price of the parcel of grain which was in the hands of tenants who did not accept the precepts upon them."

A petition by the Viscount of Arbuthnot was answered, and the LORDS (19th June 1798), "Altered the interlocutor complained of, and preferred the petitioner to the price of the parcel of grain which was in his granaries at the time of the bankruptcy; and also to the price of that part of the grain which was in the hands of the tenants who had accepted the precepts."

The Trustee reclaimed. Answers followed. But the interlocutor was almost unanimously adhered to.

For the Viscount of Arbuthnott, *John Dickson, Arch. Campbell*, junior.
Alt. *Hay, Ro. Craigie.* Clerk, *Menzies.*

D. D. *Fac. Col. No* 89. *p.* 204.

1804. *November* 23. COLLINS *against* MARQUIS'S CREDITORS.

JOHN MARQUIS, shipmaster in Dysart, commissioned from William and Thomas Collins, in Kent, a cargo of timber. It was shipped (26th March 1801) on board a vessel freighted by Messrs Collins *. No 48. The delivery of a part of a cargo does not end the

* This was disputed, but the Court was satisfied of the fact.