1779.

THRIEPLAND *v.* WALSH, &c.

On appeal to the House of Lords the appeal was dismissed, it appearing to the House that all the persons interested were not made parties to the said appeal.

For Appellants, *David Græme, Dav. Rae, J. Anstruther.*
For Respondents, *Al. Wedderburn, John Munro.*

[M. 8383.*]

Dr. STUART THREIPLAND, Physician, Edinburgh, *Appellant;*
JOHN WALSH and Others, Creditors of the York Buildings Company, - - } *Respondents.*

House of Lords, 15*th April* 1779.

BANKRUPTCY—POWER OF GRANTING LEASE.—A company after adjudications had been led against their estates, and ranking and sale was raised, but superseded, and a petition to sequestrate, presented to the Court, granted a lease of one of their estates for 99 years. Possession followed for 30 years, the company receiving rent from the tenant in the knowledge of the company creditors. In a reduction to set aside the lease by the creditors, on the head of bankruptcy, held, reversing the judgment in the Court of Session, that the lease was not reducible.

The York Buildings Company became proprietors, by purchase, of all the forfeited estates in Scotland, amongst which was the estate of Fingask.

A lease of the estate of Fingask and Kinnaird was granted
Mar. 22, 1745. by the company, of this date, to Mr. Drummond, his heirs and assignees, for the space of 99 years, to commence at Whitsunday 1745, at a yearly rent of £480. 6s. 4d. Upon
May 18, 1752. this lease possession followed, and the lease was thereafter assigned to the appellant, Dr. Threipland, for payment of the same rent, upon which assignation followed, and was continued up till September 1777, when the present action of reduction was brought to set it aside, by the creditors of the York Buildings Company, under the following circumstances:—

For some years prior to the lease, the York Buildings Company had been in difficulties. They had borrowed large sums to carry on their undertakings, many of which failed

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* This case and the one following are imperfectly reported in Morison.

and turned out unfortunate; and they were obliged to grant heritable securities over their several estates in Scotland. They had also availed themselves of an act of Parliament which permitted them to raise money by lottery, for which they were to grant annuities, and under this act they had granted annuities to the extent of £10,000 per annum:—the estates being disponed in security of these; but reserving power of sale; and also providing that the said annuities were not entitled to enter into possession by mails and duties, unless annuities fell in arrear and were not paid. Thereafter more money being required to pay the casualties of the company, it was borrowed, the company executing a trust-deed, securing the lenders over the remainder or reversion of their estates.

In 1732 the annuities got into arrear, from inability of the company to pay them; and actions of mails and duties were raised, and possession had, by uplifting the rents.

Some three years thereafter, two successive rankings and sales of the estates were raised, but dismissed from informalities in the procedure. The last of these was pending at the time the above lease was granted to the York Buildings Company; and a petition had actually been presented in December 1744, by the creditors, setting forth that the company and annuitants were not fairly managing the estates, but, on the contrary, granting renewals of the leases at low rents, far below their value, and praying the Court to sequestrate the rents. Upon this petition the Court pronounced an order, prohibiting and discharging the company June 14, 1745. from granting any leases of their estates "in the meantime." But, notwithstanding this order, the company had, between the date of presenting this petition and the date of the order pronounced, granted the lease in question.

In these circumstances, it was sought to be reduced, after possession was had upon it for a considerable number of years, and on the following grounds:—1st. That the company was insolvent and bankrupt at the time of granting it. 2d. That they were inhibited at the instance of the adjudging creditors. 3d. That they were inhibited expressly by the above order of the Court.

In defence, it was stated that the lease was gone into in *bona fide*—that the parties had been two years in treaty previously—and that, from the correspondence, it was clearly shewn that the lessee did not reap any advantage by the

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lease. On the contrary, that, from the ruinous state of the houses, &c., it was a disadvantage, and that the petition for sequestration had never been intimated to the appellants. The company may have been in embarrassed circumstances, but it was not insolvent, nor divested of its estates, and so had power of granting leases.

July 1778. Of this date, the Court, on report of the Lord Ordinary, "sustained the reasons of reduction of the tack or lease of "the lands of Fingask and Kinnaird, and reduce and decern "and declare, in terms of the libel; and find that defenders "must remove from the possession of the lands contained "in the above tack or lease." On reclaiming petition the July 24, 1778. Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Admitting the procedure to have taken place, above set forth, against the company, it did not amount, in the eye of law, to bankruptcy. The ranking and sales ended in nothing, and the trust-deed in favour of creditors, along with the adjudication, did not amount to bankruptcy. They might infer insolvency, but insolvency, however notorious, does not carry any disabling consequences along with it, and most assuredly could not disqualify the company from granting the lease in question, if they otherwise had power so to grant it. But, in point of fact, the company were not even insolvent. They were unfortunate, it is true, but in so far as their real assets were able to pay their debts, they had a prospect at the time the lease was granted of being rich. But any investigation into this is immaterial to the appellant's case, because he saw the company in the actual possession of their estates, and entered into the lease in *bona fide*. His possession has been acquiesced in for 32 years, and he has paid his rent and received discharges, which homologates that possession. The only question which remained, therefore, was, Whether the company, at the date of the lease, had power to grant leases? and if so, whether they had exercised that power in a legal manner in granting the present lease for 99 years? From the whole circumstances adduced, there was nothing which prevented the company, as unlimited owner, to grant the lease in question. The act of Parliament even permitted them to sell. And the first prohibition which appears is the Lord Ordinary's interlocutor of 14th June 1745, pronounced on the petition to sequestrate, lodged six months earlier, but the parties had been two years previously in

treaty about the lease, and the lease itself was granted three months before this action. The ranking and sales, the inhibitions and adjudications, did not form a bar to granting such lease—the former were void and ineffectual, the latter are mere incumbrances, which are ineffectual, unless possession follow, so that at the date of the lease the company had the power, and were not prohibited, from granting the lease in question.

Pleaded for the Respondent.—The York Buildings Company were notoriously bankrupt. Their whole estates were attached at the suit of their creditors, by every mode of diligence and *execution* known in law, and actually in possession of these creditors long before the lease in question. The creditors had commenced suits to compel the tenants to pay their rents, to which they, of course, were cited as parties. In these circumstances, and more especially pending an action of judicial sale, it was not in the power of the company to grant leases without the concurrence of the creditors. But the lease in question was in effect an alienation of the estate in defraud of prior creditors. It being granted for 99 years, it was tantamount to a sale of the whole estate. By the law of Scotland, a bankrupt is justly held to be divested of his effects, and his hands tied up by the diligence of his creditors, so as to prevent them from doing any act to their prejudice. No man can pretend ignorance of the records where their incumbrances and inhibitions may be seen, and none can pretend ignorance of a judicial sale; and if this lease, from its duration, be held to be a sale, then, as no private sale of a bankrupt, pending a judicial sale by his creditors, is valid, it follows that the lease in question is void and null, and the respondents have a material interest in setting it aside, because it was granted for a considerably diminished rent, and by collusion, whereby their interests have been greatly prejudiced.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *reversed*, and the defender assoilzied.

For Appellant, *Al. Wedderburn, Alex. Murray, Dav. Rae, J. Anstruther.*

For Respondent, *Henry Dundas, Ar. Macdonald, Islay Campbell.*