1757. *January* 19. Creditors of the late EARL of BUCHAN *against* the EARL of BUCHAN.

This case is reported in *Fac. Coll. (Mor.* 15,406.)—It was reported to the Court by Lord KILKERRAN in the following terms :—

" In the year 1664, Sir James Stewart of Kirkhill granted procuratory, for resigning his estate of Kirkhill and Strabrock in favour of William, afterwards Sir William his second son, and the heirs male of his body, whom failing to the other heirs male of his own body, whom failing to the heirs female of his son William's body, whom failing to the second, and other younger sons of his eldest daughter Nicolas, Countess of Glencairne ; whom failing to Katherine his other daughter, and the heirs male of her body : reserving his liferent and power to himself to alter, sell and otherwise dispose at his pleasure ; and containing the usual prohibitory and irritant clauses in entails, against alienating or charging with debt, on all the heirs of entail, excepting William and the heirs male of his body, and the heirs male of Sir James his own body, who are left at liberty, and in the absolute fee of the estate : and containing this proviso,—' Providing &c. That the said William Stuart my son, and his heirs male, and the persons and heirs appointed to succeed, shall be astricted, bound and obliged, to satisfy and pay all debts and sums of money whatsoever, already contracted, or which shall hereafter be contracted by me, in my own lifetime ; and to observe, perform, and fulfil all bonds, obligations, contracts, dispositions, and other writs whatsoever, already made and granted, or hereafter to be made and granted by me, to whatsomever person or persons, in the same form and manner, as if they were served and retoured heirs to me, and as I would be obliged to do myself, if I were in life.'

" Upon the death of Sir James, William the disponee became absolute proprietor of the estate, and contracted great debts ; and having died without male issue, and that there was no other issue male of Sir James his body, nor any second son of Nicolas, Countess of Glencairne, Sir James' eldest daughter, the estate descended on Katharine his second daughter, who intermarried with Henry Lord Cardross, father to the last, and grandfather to the present Earl of Buchan.

" I have told your Lordships, that great debts had been contracted by William, who was absolute fiar of the estate. These debts the Lord Cardross paid, and took assignations to them, in name of his trustee George Thomson, with intent, no doubt, to keep up at least the principal sums as a burden upon the entailed estate, and in his name led an adjudication in 1683 ; the accumulate sum whereof, extended to upwards of L.30,000 Scots, and at the same time, another adjudication was led by Archibald Hamilton merchant in Edinburgh, for upwards of L.5000, upon which he expede charter and infeftment in 1684.

" As this adjudication by Thomson, was the proper estate of the Lord Cardross, partial conveyances thereof were, pursuant to his directions, made by his trustee to certain of the Lord Cardross' creditors, in security of their debts, and thereafter a total conveyance thereof to his son David, master of Cardross, the last Earl of Buchan ; with an exception from the warrandice of the former partial conveyances, and which are the very preferable securities now in process.

" Upon the death of Henry, Lord Cardross, David, his son, afterwards Earl of Buchan, succeeded to him in his estate of Cardross, and had, as has been said, right to Thomson's adjudication; but the estates of Kirkhill and Strabrock remained with Katherine, his mother, the heir of entail, who lived many years thereafter.

" As David had but small matters while his mother lived, and little remains of the estate of Cardross, he came to be in straitened circumstances; and after his mother's death, having no other funds for their payment than the rents of the tailyied estate of Strabrock, he prevailed upon his son, the present Earl of Buchan, to consent to the sale of an estate in England, and which had descended to him by his mother, the price whereof was applied to the payment of his debts; in recompence whereof, he assigned him to an annuity of L.300 Sterling, out of the rents of Strabrock, during their joint lives.

" Many creditors remaining yet unpaid by the price of this estate, some led adjudications in order to affect the Earl's liferent; others laid on arrestments. Multiplepoindings were raised by the tenants, which brought on a sequestration and a competition for the rents among the creditors, who were of these classes: 1*st*, The creditors who had right to Thomson and Hamilton's adjudications; the Lord Cardross for his annuity of L.300; and the personal creditors of the Earl who had adjudications or arrestments.

" That the creditors who had right to Thomson's adjudication were preferable was admitted, and they were accordingly preferred by the Ordinary in 1737; and as for Lord Cardross's annuity, to which the personal creditors who had adjudged pleaded a preference, this was not determined till the 1741, when it was found by your Lordships, after advising a proof, to have been acquired for an onerous cause, and to be also preferable to the personal creditors.

" I have said that the creditors who had right to Thomson's adjudication were preferred in 1737, and such of them as thought fit to apply obtained warrants on the factor for their payment; in consequence whereof several partial payments were obtained, some of annualrents, others of principal sums to the extent of L.1600 Sterling, whereby certain of these real debts were paid off, and are no more in being.

" The personal creditors, foreseeing that by these warrants the rents in the factor's hands might be exhausted, which were the only funds for their payment, applied to your Lordships, craving that if the real creditors whose debts were secured upon the fee, should attach the interim rents during their debtor's life, which was the only fund for their payment, which it was therefore emulous to deprive them of, it might be found that so far as they should draw payments, they ought to assign their real security upon the fee to them the personal creditors, whereby they might make their debt effectual against the estate itself; and upon answers for the real creditors, your Lordships' deliverance upon this petition was, THAT THEY OUGHT NOT TO ASSIGN. But here I must take notice of a mistake in the third page of the information for the Earl, where it is said that this interlocutor was pronounced upon advising answers for Lord Cardross. It is not so; his name is not mentioned in either petition or answers, nor could it be, as he was not preferred till 1741.

" The personal creditors being thus left without remedy, were advised to purchase in the real debts; that having both in their person they might have the same

power which their authors had, and which accordingly they did; and from that time no further payments were made by, or warrants sought upon, the factor; and such as had been obtained were not made use of, whereby there came to be in the factor's hands at Lord Buchan's death, about L.2600 Sterling, and that over and above the Lord Cardross's annuity, whereof after his preference in 1741, he got full payment.

" Thus matters stood at the time of the Earl of Buchan's death in 1745; when the personal creditors, being possessed also of the preferable debts, waved the preference which their authors in the real debts had obtained on the rents in the factor's hands, and claimed them in virtue of their adjudications of the Earl's liferent.

" And compearance being made for the present Earl, as heir of entail, a variety of objections were by him made to this claim of the personal creditors, which were reported by the Lord Murkle in January 1752, and after long reasoning on the points reported, the Lords superseded determining till parties should be heard upon a new point pled for the Earl upon the proviso in the entail, whereby the heirs are obliged to pay the tailyier's debts which had not been laid before the Ordinary; and, therefore, remitted to him to hear parties on that point. Accordingly parties were heard, and the debate upon that point was also taken to report; and had the Ordinary lived to restate the case, this new point had been all that the Lord Ordinary should have had to trouble your Lordships with. And as when matters so stood, the case was upon his death remitted to me, this, properly speaking, was for no other end than to make the additional report. But as the matter has lain long over, and that so great a change has happened in the Court since that time, it becomes necessary for me to volunteer a little, and to state the whole case.

" Your Lordships see the question between the parties is, whether the rents of the estate uplifted by the factor during the late Earl's life can only be applied in payment of the debts affecting the estate? or whether, now that the personal creditors are possessed of the real debts, they may wave the preference which their authors in the real debts had obtained, and affect these rents upon their adjudications of the late Earl's liferent, and keep up the real debts to affect the fee?

" It was PLED for the creditors, that it had been lawful for their authors, the real creditors, to have superseded the payment of their debts, and to have allowed the Earl to have applied the rents as he pleased, or to have left these rents to be evicted by the diligence of his proper creditors. And if this was competent to the preferable creditors, had these debts remained with them, so there is no rule in law why the personal creditors, now that they are also possessed of the real debts, may not do the same. On the contrary, the rule is, as both rights are in their person, they may use both rights in such manner as is most beneficial to themselves.

" It was on the other hand admitted for the Earl, that had the real creditors lain by, and permitted the late Earl himself to levy and squander the rents, or allowed them to be evicted by less preferable creditors, there should have been no help for it. But, says he, *res devenit in alium casum* after the proceedings that have been had in this case. In so far as they not only did not lie by, but appeared in the competition with the personal creditors, and obtained a preference, and in consequence of that preference obtained warrants upon the factor, and in virtue of these warrants actually drew payment from the factor, after which

the real creditors could not wave the preference they had obtained in prejudice of the heir of entail, for that they were precisely in the case of an adjudger who has obtained a decreet of mails and duties and entered into possession, who cannot desert his possession, and much less invert it to another purpose than that for which he had obtained it. And if the case would have so stood, had the debts remained with the real creditors, it must *a fortiori* be the same now when these debts are acquired by the personal creditors.

" But, 2*dly*, says the defender, this point is truly already a *res judicata* by the judgment of your Lordships in 1738, by which it was, after debate, found that the real creditors ought not to assign, which was, in other words, to find that the real creditors ought to draw their payment out of the rents.

" The Earl at the same time admits, that even after this interlocutor, the creditors might assign upon payment; but insists that, if they did assign, whether to a personal creditor or to a stranger, that assignation could have no force to defeat the effect of the interlocutor, whereby it was found, that the personal creditors could not be allowed to affect the rents, whereby the real debts might be kept up upon the fee; and as a further confirmation that such was the import of the judgment in 1738, appeal was made to an interlocutor in 1741, when, after Lord Cardross was preferred for his annuity, the factor finding himself in a strait, how he could both pay the annuity and answer the warrants to the preferable creditors, your Lordships appointed a sum certain to remain in his hand for the preferable creditors, and only the balance to go for the annuity.

" It is in the last place said for the defender, on this head, that in reality the real creditors have already got payment from the factor upon your Lordships' warrant, and for this he appeals to the bonds granted by Shawfield and others of the personal creditors to the factor, a copy whereof is subjoined to the information for the pursuers, which, though of date prior to their purchasing the real debts, yet, as all these negociations were carried on at the same time that the money was advanced by the factor to Shawfield during the treaty between him and the real creditors, this must have the same operation as if the money had been taken up from the factor after Shawfield was possessed of the real debts, where it could have been no otherwise understood than taken up in pursuance of the warrants, as the rents had been particularly alienated by the Court by the interlocutor in 1738 for payment of the preferable debts. This is the argument if I understand it.

" It was ANSWERED for the pursuers to the first, That though the real creditors obtained a decreet of preference, there was no rule in law or equity that obliged them to insist on that preference. On the contrary, a creditor is allowed to use all the diligence of the law for securing his debt, and may stop short at any period before actual payment. Nor did it vary the case, that the creditors had obtained warrants on the factor, for these warrants were not payment. A creditor may obtain a poinding of the ground, and after he has levied the rent for one year, may stop short and use any other diligence, and from this rule there is no exception but one, and that is, where an adjudger has obtained decreet of preference and entered to possess. And that is a gross mistake in point of law, that the real creditors, after they had by virtue of their warrants got some payments from the factor, were precisely in the case of an adjudger, obtaining a decreet of mails and duties and entering into possession; for as here the estate was seques-

trate, no possession could be attained; the creditors were, therefore, not within the exception but within the rule, and, therefore, might stop short when they pleased, and leave the rents to be taken up by less preferable creditors, without hurting their diligence.

"And now that both debts, real and personal, belong to the personal creditors, it must be competent to them to do what their authors might have done, as there is no law which can oblige a creditor, who has two debts in his person, to use the one in prejudice of the other.

"Nor, say the creditors, is it any objection to this doctrine, that your Lordships by your interlocutor in 1738, found that the creditors ought not to assign, for that the interpretation put upon the interlocutor by the defender is an unjust construction of it. The expression in the interlocutor, that the creditors ought not to assign, is a little uncommon, owing very plainly to this, that in framing the interlocutor the clerk has adapted it to the prayer of the petition, which prayed that it might be found, that the creditors ought to assign. But plainly it imported no more than that the Lords found that the creditors were not obliged to assign, and, therefore, refused the desire of the bill. There was no such question stirred whether the creditors had it in their power to assign; and it had been very improper to have been stirred, as it was not in the power of the Court to restrain them from assigning, if they should be so minded. But the question stirred was singly this,—Whether, from the equitable rules which your Lordships follow, it was to be found that the creditors were obliged to assign? and as matters then stood, your Lordships found, that they were not obliged to assign. But now that the creditors have assigned, the question is,—Whether, by any rule in law the assignees are bound to use their assignations to their own prejudice? The creditors say there are none; for, on the contrary, the rule is, That one having two rights in his person, cannot be obliged to use the one in prejudice of the other.

"And as to what was said, in the last place, for the defender, That the money got from the factor upon bonds granted to him *tanquam quilibet* must impute in extinction *pro tanto* of the preferable debts;

"The pursuers treat this as a thing out of all sight, that their borrowing money from the factor on bond such as any other person borrowing from the factor would have granted, and this before they had assigned the real debts, should, after they did purchase the real debts, operate extinction of the real debts:—this, I say, they treat as a matter out of all sight, which does not merit a serious answer.

"And I do not know but they might have added, that when they were advised to purchase preferable debts, they were also advised, that if they were to borrow money from the factor they should do it before the purchase, to avoid any handle that might be taken from their taking that money from the factor after they were in the right of the preferable debts, and, for my own part, am apt to believe that it had been a rational part of the same advice."

The Lords found, "That the creditors were entitled to apply the rents in question to the payment of the personal debts due to them, after payment of the annualrents of the heritable debts affecting the entailed estate, incurred during the life of the deceased David Earl of Buchan."