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was justified in what they did. The case came on, in the first instance, before the Lord Ordinary; and he pronounced a judgment, reducing the judgment in the proceedings before the Presbytery. The case came on afterwards on two successive hearings before the Lord Ordinary; and he adhered to his former judgment. It afterwards came on before the Court of Session; and the Court of Session were of opinion, that it was a case that called for the interposition of their authority for the purpose of setting aside the proceedings; it appearing to them to be inconsistent with the provisions of the Act of Parliament, which gave a jurisdiction and authority to the Presbytery to pronounce a final judgment. Under these circumstances, my Lords, I humbly submit to your Lordships the propriety of confirming the judgment of the Court below. In this case I should not recommend to your Lordships to give costs.

Appellants' Authorities.—Act of Convention, 1560; Statutes, 1567, c. 11.; 1581, c. 1.; 1592, c. 16.; 1690, c. 5.; 1707, c. 6.; Acts of Assembly, 1565, 1567, 1638, 1642; Book of the Kirk, 1567, p. 31.; Book of Policy, 1578, c. 9. § 10.; Spottiswoode, p. 164. 297.; Kames, Stat. Law, App. No. 3.; 1633, c. 5.; 1662, c. 4.; 1693, c. 22.; 1. Ersk. 5. 24.; 1. Pardovan's Coll. 5.; M'Culloch, Dec. 26. 1793, (7471.); Acts of Assembly, June 3. 1799, May 28. 1809; Deer, May 24. 1813, (in General Assembly); Hume, p. 42.; Robertson, Aug. 11. 1780, (7465.); M'Queen, July 25. 1781, (7466. and 7469.); Corstorphine, March 10. 1812, (F. C.); Dumfries, July 7. 1818, (F. C.); Moodie, May 18. 1819, (F. C.); Rutherford, Nov. 17. 1785, (7469.); Allardice, Feb. 18. 1809, (F. C.); Milne, June 28. 1814, (F. C.); Chivas, July 11. 1804, (No. 12. App. voce Jurisdiction); 2. Hume, p. 368.; M'Kenzie's Crim. voce Privy Council, § 6. p. 191.; Maclaurin's Crim. p. 28. and 586.

Respondent's Authorities.—Young, June 28. 1814, (F. C.); 1686, c. 18.; Dickson, Feb. 6. 1768, (7464.); Pardov. c. 2. and 4. § 14.; Act of Ass. April 18. 1807; Robb, Nov. 19. 1824, (3. Shaw and Dunlop, No. 218.); Corstorphine, March 10. 1812, (F. C.); Russell, Jan. 18. 1764, (7353.); Loudon, May 18. 1793, (7398.); King, July 9. 1515, (7318.)

MONCREIFF, WEBSTER, and THOMPSON—RICHARDSON and CONNELL,—Solicitors.

No. 31.

WILLIAM BENNET, (Trustee for the Creditors of JOHN CRAWFORD and Company), Appellant.—*Adam—Ivory—Keay.*

ROBERT M'LACHLAN, (Assignee in trust for the Creditors of JOHN CRAWFORD), Respondent.—*Sol. Gen.* (*Tindal*)—*Brown.*

Bankrupt—Stat. 1661, c. 21.—54. Geo. IV. c. 137.—Held, (affirming the judgment of the Court of Session), that a general adjudication under the Bankrupt Statute, of the estates of an heir in favour of the trustee on his sequestrated estate, within three

years from the death of the ancestor, constitutes complete diligence in favour of the creditors of the ancestor, so as to give them a preference over his estates, without the necessity of leading separate adjudications.

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1st Division.
Lord Eldin.

For several years prior to 1811, John Crawford of Broadfield carried on business at Port-Glasgow, under the firm of John Crawford and Company, along with three of his sons, James (the eldest), Andrew, and Joseph. He retired on the 28th of February of that year, but without formal notice or advertisement. The business continued to be carried on by his three sons, under the same firm. Mr Crawford died on the 3d August 1813, leaving both heritable and moveable property; estimated at upwards of L. 100,000. He left personal debts to the amount of L. 25,000. By a deed of settlement he conveyed his whole property to his widow and his three sons, James, Andrew, and Joseph, in trust, for payment of his debts, and distribution of the residue among the family. James, as the eldest son, made up titles to, and was infeft in a large portion of the heritable property, and remained in apparency as to the rest. The moveable funds were realized by him and the other trustees; but it was alleged, that scarcely any part of the debts were paid, the money being employed in the commercial operations of the Company. Early in 1816 the Company became bankrupt; and on the 19th February of that year a sequestration of the estates of the Company, and of James Crawford as an individual, was awarded by the Court of Session; and thereafter of the estates of the two other partners, Andrew and Joseph. This sequestration was granted on the application of the parties themselves, with concurrence of a creditor whose debt had been contracted subsequent to the death of the father. On the 5th of March 1816, the appellant, Bennet, having been elected trustee, was confirmed in that office by the Court of Session, and the usual general decree of adjudication pronounced.

The original debts of the father remaining unpaid, and his estate having become liable for about L. 20,000 more, in consequence of no notice of his retirement having been given prior to his death, his creditors proceeded to take measures for attaching his separate estate; and the respondent, and others, (for whom he now acted as trustee), in that character raised actions and got decrees of constitution, reserving all objections contra executionem, between the 22d of March and 11th June 1816. The trustee was not called to any of these actions. On the 20th April he obtained a special adjudication of nearly all the property in which James Crawford had been infeft. In the meanwhile the creditors had raised actions of adjudication,—some of them in the

Court of Session, and others in the Sheriff Court,—(against the progress of which they alleged the trustee threw obstructions); but they, in one of them, obtained in the Court of Session decree on the 3d July, which was recorded, and a charge given to superiors on the 2d of August 1816. The three years from the death of the father expired on the following day. On the 20th December of the same year, and 3d March 1818, the trustee obtained special adjudication of the remaining part of the heritable estate.

Among other subjects in which the father had died infeft, was an heritable bond of L. 6000 over the estate of Blair. Both parties adjudged it, and the debtor thereupon brought a multiplepoinding;—the respondent, on behalf of himself and other creditors, claiming to be preferred under the statute 1661, in virtue of the diligence done by them; and the trustee, on the footing that that diligence was inept, and that he had right under the sequestration.*

* The following is the statement of the case given by the trustee in his appeal case, p. 4.—' The appellant, in supporting his claim to the debt, maintained, That, subsequent to the sequestration of James Crawford, the son, any adjudication at the instance of the respondents, as creditors of the father, was totally inept; that it might be possible for the respondents, if they could show that they had really secured a preference over the proper creditors of the son, under the statute 1661, c. 24., to plead their right to that preference in ranking under the sequestration; but that they could, on no account, create a separation in the property of the subjects, as they had stood in the person of the bankrupt at the date of sequestration; and that the whole must be carried by, and administered under, the adjudication of the appellant, in his character of trustee, subject only to such claims of preference as might be substantiated by the various classes of creditors, whether of the father or of the son. On the other hand, it was contended by the respondent, That the effect of the Act 1661 was, within the three years, to create an entire separation between the estate of the ancestor and that of the heir; that the creditors of the ancestor were therefore entitled to attach it, notwithstanding the sequestration of the heir; that, in order to secure their preference under the statute, it was indispensable that they should do complete diligence against the ancestor's estate; that the prohibition contained in the bankrupt statute, (sect. 42.) of all adjudications other than the adjudication by the trustee, applied only to the peculiar estate of the bankrupt heir, as contradistinguished from that separate estate which had belonged to the ancestor, and which remained within the three years exclusively subject to the diligence of the ancestor's own creditors, and, as in a competition with them, altogether uncarried by the sequestration; that the appellant's adjudication, qua trustee of the bankrupt heir, only attached any reversion which might remain over, after satisfying the primary diligence of the ancestor's creditors; that so far was the appellant from being entitled to administer the subject in competition, as carried by his adjudication, and as being subject only to a preference in favour of the ancestor's creditors, that the property was to all intents and purposes carried by the diligence of the latter as their own absolute subject; and that, therefore, it being totally insufficient to satisfy their debts, so that no reversion could be left, they were entitled to be preferred in the competition simpliciter. This argument prevailed, and

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The Court having preferred the respondent, a private arrangement was made with the trustee, whereby he was allowed to dispose of the whole heritable subjects belonging to Mr Crawford at the time of his death, which had been adjudged by the respondent; and he was taken bound to make a fair and rateable division of the free proceeds among the bona fide creditors of Mr Crawford, whose debts were comprehended in the adjudication, according to their respective rights and interests; but this without prejudice to any objections which might exist against the diligence of these parties. The estates were thereafter brought to sale, and their prices realized, which remained in the trustee's hand as a fund of division among that class of creditors who had effectually secured their preferences as creditors of the father. A claim was thereafter lodged by the respondent, founding on diligence done within the three years; and the trustee being advised that it was objectionable, refused it. The respondent thereupon presented a petition to the Court of Session, complaining of this judgment. The case having been remitted to Lord Eldin, the respondent maintained, 1st, That, assuming that the diligence was inept, still the sequestration and relative adjudication under the Bankrupt Act against the heir, James Crawford, within the three years from the date of the father's death, was effectual diligence under the statute 1661, and available to give a preference; but, 2d, That their diligence was unobjectionable.

Lord Eldin found 'the adjudication at the instance of the trus- 'tee sufficient to vest the creditors of John Crawford in the sub-

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'the following interlocutor was pronounced by Lord Alloway:—"The Lord Ordinary "having heard the competing parties on their respective claims of preference in this "multiplepoinding, prefers the claimant Robert M'Lachlan, merchant in Port-Glas- "gow, for himself, and the other creditors of the deceased John Crawford, for whom "he is trust-assignee, upon the interest produced for him to the sums due by and in "the hands of the raiser of the multiplepoinding, or which have been consigned by "him for payment to the said Robert M'Lachlan of the whole sums contained in and "due by said interest; and decerns in the preference, and against the raiser of the "multiplepoinding accordingly." The respondent, in his statement of the case, explained, that the trustee had maintained that the diligence was inept by being rendered incompetent by the act of sequestration and adjudication in his favour; and that, in a petition by him to the Court, he had stated, that 'the petitioner will hardly ad- 'mit that the sequestration of the estate of James Crawford, and the general adjudi- 'cation to the trustee, would have the effect of superseding the necessity of completed 'diligence by the creditors of the ancestor within three years from his death, to the 'effect of saving their preference. This is a question which it is not very necessary to 'discuss. Though it has not been decided, there may perhaps be ground for main- 'taining, that the general adjudication of the trustee, as an adjudication for all con- 'cerned, might have this effect. But it is true that the petitioner has not admitted this; 'and he does not mean here to discuss the question.'

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'jects therein contained, according to their respective rights and 'interests, without the necessity of any further proceeding, so as 'to entitle them to their preferences as creditors who had done 'sufficient diligence within three years of the death of the said 'John Crawford; and, separatim, that the adjudications at 'the instance of John Crawford's creditors, brought into the 'Court of Session in the month of July 1816, are sufficient to 'establish preferences in their favour as creditors of the said John 'Crawford, who had done diligence within three years after his 'death, and that in respect the trustee interrupted the course of 'the said adjudications, whereby the creditors were prevented from 'following out their diligences, and completing them within the 'three years; therefore sustained the said adjudications; but found 'that the adjudications conducted before the Inferior Courts were 'inept and inhabile; and sustained the trustee's objections against 'these adjudications.'

The case having come before Lord Medwyn, he recalled Lord Eldin's interlocutor, ordered informations to the Court, and issued the subjoined note.* On advising the informations, the

* 'The Lord Ordinary entertains great doubts of the interlocutor pronounced in 'this case, in all its branches, so far as submitted to review. The first branch of it 'holds, that the general adjudication in favour of the trustee on the heir's estate, being 'within three years of the ancestor's death, is sufficient, without any proceeding on the 'part of the creditors of the ancestor, to constitute in their favour a preference, as if 'they had done complete diligence in terms of the Act 1661. This is a view of their 'right which the creditors themselves had not adopted; for they proceeded to adjudge 'the ancestor's estate, and obtained decree on 3d July 1816. Neither did this view 'occur to the parties or the Court in the competition which took place for Blair of 'Blair's bond, 20th June 1820; and it seems very questionable, although the Lord 'Ordinary cannot concur with all the reasoning of the representer on this matter. 'The effects of the adjudication in favour of the trustee, introduced by the Bankrupt 'Act, must be regulated by the precise enactment; and its object is for the benefit of 'the general body of the creditors, whom the trustee represents, and whose interests he 'is to attend to, in order to entitle him, "for behoof of the whole creditors, to rank in "the same manner upon the heritable estate, as if it had been a common decree of "adjudication, obtained and rendered effectual at the date of the first deliverance, so "as to rank pari passu with any prior effectual adjudication within year and day of the "same." The object is thus to cut down, in favour of all the postponed creditors, any 'adjudication within year and day, and introduce a pari passu preference among them; 'but, according to the view taken in the interlocutor, its effect would be to create a 'preference over the general body of the creditors, even where the individual creditor 'had used no diligence, and perhaps could not have used any effectually. Suppose that, 'a few days within three years of the ancestor's death, the heir becomes bankrupt: in 'consequence of citation, intimation, or perhaps charge to enter heir, if his titles are not 'complete, the creditors of the ancestor could not, within due time, secure any prefer-'ence by doing diligence in terms of the Act 1661; but if sequestration is awarded 'against the heir, and if the adjudication of his heritage to the trustee is held to be a 'diligence for the special benefit of the creditors of the ancestor, there will thus be con-

June 15. 1829. Court (15th June 1826) found 'the general adjudication in favour 'of the trustee sufficient, without farther proceedings at the in-

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'stituted a preference in their favour against the general interest of the creditors, and 'contrary to the precise and definite effect ascribed to the adjudication in favour of the 'trustee in the statute; and embracing not merely the heritable property vested in the 'son by feudal titles, but that in which his right was only personal, and even that in 'which the ancestor's right was also personal. This consequence follows from the pro- 'vision in the section 31. Further, the general adjudication declares all the bank- 'rupt's right in the estate to be in the trustee, "to the end that the same may be sold, "levied, and recovered, and converted into money for payment of the creditors," mean- 'ing, of course, the general body of the creditors whom the trustee represents; and 'therefore the adjudication introduced in favour of the trustee, can apply to nothing 'which he has not the power of converting into money for the general behoof; so that 'it cannot apply to any estate over which a privileged creditor, or class of creditors, 'whose interests are adverse to the general body of creditors, has a claim, and for whose 'behoof the particular estate had been, or may be attached, and taken out of the com- 'mon fund. Thus, in the competition for the bond due by Blair of Blair, the subject 'was withdrawn from the operation of the trustee's adjudication, so that it could not 'be sold and converted into money, but was carried by the adjudication at the instance 'of the ancestor's creditors; and if his adjudication could not carry it for creditors, for 'whom alone his adjudication was to operate, it would be an odd effect if it were to 'constitute a preference against them. It is, no doubt, provided, that "no other "adjudication led or made effectual, after the date of the first deliverance aforesaid, "shall have any effect;" but the application of this, so far as regards an adjudication 'by the ancestor's creditors, seems sufficiently guarded by the exception in section 31. 'which declares, "that the rules of preference or ranking between the creditors of the "ancestor and those of the heir, by the law of Scotland, are not meant to be altered "by any thing contained in this Act;" and, accordingly, in the second branch of the 'interlocutor, it is taken for granted, that an adjudication by the creditor of the ances- 'tor may be led after sequestration. This declaration seems introduced for such a 'case as the present, to enable the creditors of the ancestor to proceed with diligence 'against the estate, although the heir has been sequestrated; and it would have been 'quite unnecessary to have introduced the declaration, if the adjudication in favour of 'the trustee, eo ipso, created a preference to the ancestor's creditors without any pro- 'ceedings on their part. As to the separate finding in the interlocutor, the Lord 'Ordinary cannot see that the trustee did any thing incorrect by receiving an outgiving 'of an adjudication, only called in Court on 5th July 1816. It was quite impossible 'to obtain decree before the Court rose, if it were for no other reason than this, that 'being a first adjudication of the subjects contained in it, it was necessary to intimate 'it for twenty days; and therefore the Lord Ordinary considers this decree of adjudi- 'cation, in which the pursuers have not thought it worth while to take decree to this 'hour, utterly ineffectual. The interlocutor takes no notice of the decree of adjudica- 'tion pronounced on 3d July 1816, and completed by a charge against the superior 'the day before the three years expired from the period of the ancestor's death. This 'was the diligence founded on by the petitioners before the trustee, the claim on which 'he rejected; and against this judgment the petition, which was the origin of the pre- 'sent judicial proceedings, has been brought; and the claim of preference is there 'rested solely on this adjudication. Some objections, in point of form, have been 'stated both to the decree and the process of constitution on which it proceeded; but 'these do not seem, to the Lord Ordinary, to be well founded; and therefore he would 'be inclined to support the preference in favour of such of the creditors as have

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'stance of the creditors of John Crawford, to entitle those credi-
'tors, according to their respective rights and interests, to their
'preferences under the Act 1661, as creditors who had done
'diligence within three years after the death of John Crawford:
'And appointed the trustee to alter the scheme of ranking com-
'plained of, and to rank and prefer the creditors of the said John
'Crawford in terms of the above finding.'*

Bennet appealed.

Appellant.—By the judgment of the Court of Session, the question is now confined to the single point, as to the effect of the adjudication in favour of the appellant. There is no question before the House as to the regularity or the effect of the diligence by the respondent. It must be assumed in hoc statu as unavailing.

In regard to the point at issue, it must be recollected, that at common law, before the statute 1661, the creditors of the ancestor had no privilege whatever in competition with the creditor of the heir, but ranked like the other personal creditors of the heir. The ancestor's estate became as it were a common fund, which was divided without reference to its former ownership. But that statute declared, that the creditors of the defunct shall be preferred to the creditors of the apparent heir in time coming, as to the defunct's estate, on the condition that the defunct's creditors should do diligence against the apparent heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death. Two inferences thus follow:—1. That the statutory privilege, which must be strictly construed, is conferred upon the ancestor's creditors, expressly

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'adjudged, and over the subjects contained in this adjudication, rejecting the effects of
'the general adjudication in favour of the trustee, as creating a preference over the
'other creditors in favour of the ancestor's creditors, although they had done no dili-
'gence to bring themselves within the scope of the Act 1661, c. 24., as well as the
'incomplete adjudication which was only called in Court. But as the question is new,
'and involves a point of some importance in the interpretation of the Bankrupt Statute,
'it has been thought most expedient to report the case to the Court.'

* 4. Shaw & Dunlop, No. 433. The appellant stated in his appeal case, that 'he
'was anxious that the Court, in pronouncing the above judgment, should at least give
'full effect to the principle ultimately contended for by the respondents, and apparently
'adopted in the fullest extent by their Lordships, by inserting a finding that the sepa-
'rate adjudications which had been led by the respondents were illegal and incompe-
'tent. But the Court refused to insert any such finding.'

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as creditors of the ancestor, and not as creditors of the heir. 2. That the estate over which the privilege extends, must be proceeded against expressly as the ancestor's estate. The mere circumstance of being an ancestor's creditor, is not sufficient to attract the privilege. He must take the means to vest in himself the preference, by doing complete diligence against the estate within three years of the ancestor's death. But complete diligence is apprising, or adjudication with infeftment, or a charge against the superior to infeft. The lands must be laid hold of, and vested in the creditors. But in the present case, and abstracting at present from the effect of the appellant's adjudication, there has, ex hypothesi, been no diligence done by the respondent at all.

Therefore the question comes to be, whether the Bankrupt Act confers on him the benefit of complete diligence? On attending to the history, object, and spirit of the Bankrupt Statutes, it will appear, that they bestow no such preference as that contended for. It is plain that the Bankrupt Statute, 12. Geo. III. c. 72. could not have created any such preference; for it was confined to the *personal* estate, whereas the Act 1661 related to the heritage. The next Act, 23. Geo. III. c. 18. although extended to the real estate, is little more than an extension and continuation of the previous Act, and clearly had reference only to the bankrupt's own proper estate and creditors. It no doubt declares, (when directing that the trustee shall complete the bankrupt heir's title to property of an ancestor), that the rules of preference of ranking between the creditors of the ancestor and those of the heir, by the law of Scotland, are not meant to be 'altered.' This provision, therefore, just leaves matters as they were; that is, if the ancestor's creditors have done complete diligence, they will take their preference; if they have not, they will lose their preference. The clause in the present Act, 54. Geo. III. c. 139. is precisely the same, and is liable to the same observation. But farther, the object and spirit of all the Bankrupt Acts is to prevent, not to create preferences; and it is expressly declared, that effect is to be given only to those preferences which have been obtained prior to the sequestration. Therefore the plea of the respondent is contrary both to the spirit and to the letter of the statute.

But farther, by the Act 1661 the estate must be adjudged as that of the ancestor. It is true, that the diligence is directed against the heir; but then it must be to the effect of attaching

the estate as that of the ancestor. The sequestration and relative adjudication are directed only against the heir in his individual, and not in his representative capacity, and against his private estate, and not against that which was left in hæreditate of the ancestor. It is therefore impossible to assimilate such a process to the diligence required by the statute 1661.

Respondent.—It is true, that before the Act 1661, c. 24. there seems to have been no distinction between the rights of those to whom the ancestor had been indebted, and those who were proper creditors of the heir. The heir being held to be eadem persona cum defuncto, every creditor of the ancestor became the heir's creditor by the force of representation; and his whole estate, as well that to which he had succeeded, as that which he might have separately acquired, became indiscriminately attachable by the creditors. But the Act 1661, c. 24. introduced a regulation highly beneficial to that particular class of the creditors of the heir whose debts had been contracted by the ancestor. It provided, that they should have a preference with relation to the ancestor's heritable property, if they executed diligence against that property within three years. But this statute left untouched the general principle of the heir's responsibility. Since the statute, as before, he is the debtor, and the only debtor in all the debts, and of all the creditors. He is the debtor in two classes of debts, differently privileged,—the one contracted by himself directly, and the other secondarily or by representation. The only effect of the statute, therefore, is to create a preference in favour of the debts of the latter kind, with relation to a certain class of subjects belonging to the debtor, viz. those which he took by succession from the ancestor; and it is clear that the statute does not separate, in any other sense, the creditors of the heir from the creditors of the ancestor, or render these two characters incompatible. The creditors of the ancestor, in doing diligence against his property, are not barred from claiming as creditors of the heir. If they do such diligence, they have their preference, and still remain creditors for any balance against the heir's remaining estate. The statute merely creates in their favour a capacity of receiving a certain preference by diligence, if that diligence be done within the three years after the ancestor's death. But how are the rights of parties privileged by it affected by 54th of Geo. III. c. 137.? Its object is to prevent the expense of separate legal measures

June 15. 1829. by the creditors of the bankrupt. But the creditors of the ancestor are also creditors of the heir in his representative capacity; and it is highly expedient that separate diligence by them should be prevented. With this view a sequestration, accompanied by an adjudication, is ordained to be granted in favour of a trustee, for behoof of all the creditors without distinction. And then it is specially enacted by section 31. 'that 'in case the bankrupt's own titles to any part of the estate, 'heritable or moveable, real or personal, which belonged to him 'at that period, or to which he had then succeeded as apparent 'heir, nearest in kin, or otherwise, to any predecessor, have not 'been so completed as to vest the right properly in him, the 'trustee shall take the most safe and eligible method of complet- 'ing the bankrupt's title in such way and manner as the law 'requires; which title shall accresce to that already acquired by 'the trustee, in the same way as if it had been completed prior 'to the disposition by the bankrupt, or adjudication against 'him.' And then there is the following saving clause:—'Declar- 'ing, that the rules of preference or ranking between the credi- 'tors of the ancestor and those of the heir, by the law of Scot- 'land, are not meant to be altered by any thing contained in 'this Act;'—a clause which can have no other meaning but the reservation in favour of the particular class of creditors privileged under the Act 1661, of the effect attendant on the adjudication, in so far as it affected lands which had belonged to the bankrupt's ancestor. By the 42d section it is declared, that 'no other 'adjudication, led or made effectual after the date of the first 'deliverance aforesaid, shall have any effect in competition with 'the right of the creditors under the sequestration.' All that is required to give the creditors of the ancestor the preference created by the Act 1661 is, diligence within the three years. But the statute of 54. Geo. III. provides, that the adjudication by the trustee shall be complete diligence from the first deliverance for behoof of all the creditors of the bankrupt; and in declaring such to be its effect, it reserves the preference between the creditors of the heir and the creditors of the ancestor; so that the adjudication of the trustee, if within the three years, must have that very operation in favour of the creditors of the ancestor, which an adjudication at their own instance would have had if there had been no sequestration. The creditors, therefore, in the debts originally contracted by John Crawford, the ancestor, or in those for which he was legally responsible at his death, are, in virtue of the combined operation of the Act 1661,

c. 24. and the Act of 54. Geo. III. c. 137., entitled to a preference, in regard to the heritable property of the ancestor, over the creditors in debts contracted by the heir.

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The House of Lords ordered and adjudged, that the interlocutor complained of be affirmed.

Lord Chancellor.—There is a case, Bennet *v.* M'Lachlan, in which I shall move your Lordships for the judgment of the House. In this case, my Lords, John Crawford, in partnership with his sons, carried on business at Port-Glasgow as merchants. John Crawford ceased to carry on business in the year 1811,—he died in 1813. He was succeeded in his business by James Crawford, his eldest son, who continued business afterwards in partnership with his (James Crawford's) two brothers; but the business of the firm was still carried on in the names of John Crawford and Company. In the year 1816 John Crawford and Company became bankrupt, and a sequestration was issued, and Mr Bennet was appointed and confirmed trustee, both with respect to the estate of the partnership, and also with respect to the estates of two of the individual partners.

Now, my Lords, at the time of Mr Crawford's death he left debts to a large amount, and he left a considerable estate. James Crawford was the heir of his father, and in a settlement made by Mr Crawford, James was directed to make up titles to the estate, which was to become the property, in certain proportions, of James Crawford and the other sons of Mr Crawford. Those titles were partly made up; but the debts of the father were not paid, at least to their full extent. There was a very large claim remaining unsatisfied at the time of the bankruptcy. By the law of Scotland, founded on an Act passed so long ago as the year 1661, as between the different creditors of the heir and the ancestor, a preference is given against the ancestor's estate, in favour of those persons who were creditors of the ancestor. That preference is given upon a certain condition, which is, that diligence be done within a period of three years; and in construing that Act of Parliament it has been decided, that by diligence, complete diligence is meant, and therefore, unless the creditor completes his diligence within the period of three years, he loses this preference. The words of the Act are:—(His Lordship then quoted the Act).

Now, my Lords, this is the general state of the law, as between the creditors of the ancestor and the creditors of the heir.

The question in this case arises out of the 54. Geo. III. cap. 137., respecting the sequestration of bankrupt estates in Scotland. Under that Act there is a general adjudication directed against the whole property of the bankrupt; and the question is, whether that general adjudication embraces within it the property of the ancestor, so as to render it unnecessary for the creditor of the ancestor to go on and complete

June 15. 1829. diligence within the time limited by the Act 1661? Now, my Lords, it certainly is extremely convenient that that construction should be put upon the Act 54. Geo. III.; because, in the first place, it tends much to diminish the expense of the proceedings: the creditors of the heir would have the benefit only of the surplus of the ancestor's estate after the debts of the ancestor are discharged; and therefore it seems very much for the benefit of the general creditors of the heir, that as little expense should be incurred in settling the ancestor's estate as possible. If each creditor, therefore, of the ancestor is to do separate diligence, the consequence will be, that very considerable expense will be incurred; and that expense so incurred will so far tend to the diminution of that surplus, the benefit of which will ultimately belong to the general creditors of the heir. In the next place, that conclusion would also tend materially in many instances to delay, because, instead of enabling a trustee almost immediately to distribute the estate, it would be necessary to wait until the period of three years had expired, for the purpose of ascertaining what the surplus was; and so far that would be also productive of inconvenience: and, on the other hand, it does not strike my mind, that there is any corresponding convenience to that which I have referred.

But still, after all, this case must be governed by the construction of the 54th of Geo. III. By the 15th section of that Act it is declared, that the great object of the Act is, as speedily and expeditiously as possible, to distribute the effects of the bankrupt, without abiding (I think is the expression) the ordinary forms of law; and accordingly, by summary petition to the Court of Session, sequestration is immediately awarded. When we come to the 29th section we find, that, by the provisions in that section, all the property of every description belonging to the bankrupt is to be assigned and transferred to the trustee; and if the bankrupt himself will not assign and transfer it, property of every description becomes then vested in the trustee, for behoof of creditors, by the operation of law. And by the section immediately following, (30th), it is provided, 'that the property shall vest in the trustee, for behoof of all the creditors;' so that the whole of the property of the bankrupt is transferred to the trustee; and it is declared, that the whole of the property so transferred shall be for the behoof of the whole of the creditors. But the property which comes to the heir from his ancestor is a part of the property of the bankrupt: when, therefore, the Act of Parliament provides, that all the property shall vest in the trustee for the benefit and behoof of all the creditors, it seems that it comprehended the estate which had belonged to the ancestor, as well as that particular property which did not belong to the ancestor, but belonged to the heir exclusively.

My Lords, in a subsequent section your Lordships will find, that the property which the heir takes as 'apparent heir,' is distinctly ad-

verted to, so that the attention of the Legislature appears to have been directed to that particular. June 15. 1829.

The Act provides, that in case the bankrupt's own titles to any part of the estate, real or personal, which belonged to him at that period, or to which he had then succeeded as apparent heir, nearest of kin, or otherwise, to any predecessor, have not been so completed as to vest the right properly in him, the factor and trustee shall take the most safe and eligible method of completing the bankrupt's title, in such way and manner as the law requires; declaring always, that the rules of preference or ranking between the creditors of the ancestor and those of the heir, by the law of Scotland, are not meant to be altered by any thing contained in this Act. It does not say, that the course of proceeding with respect to this preference is not to be altered, but merely that the rules of preference or ranking between the creditors of the ancestor and those of the heir are not meant to be altered by the operation of the Act; so that the whole property is conveyed for the behoof of all the creditors: and then, to prevent any inference which might be drawn, tending to the conclusion that the creditors of the ancestor were meant to be affected by the Act,—for the purpose of avoiding that conclusion,—the clause to which I have adverted is inserted, stating, that the rules with respect to the preference between the creditors of the ancestor and those of the heir are not meant to be altered.

In the 42d section it is distinctly provided, that no other adjudication, led or made effectual after the date of the first deliverance aforesaid, shall have any effect in competition with the right of the creditors under the sequestration; so that it is clear, that, in the general adjudication, the first adjudication is the adjudication that is to affect the whole property, and that no other adjudication, led or made effectual after the date of the first deliverance aforesaid, shall have any effect in competition with the rights of the creditors under the sequestration; thereby in effect enacting, that no proceedings whatever are to be carried on for the purpose of obtaining an adjudication by those persons who are creditors of the ancestor.

My Lords, taking all these clauses together, I cannot bring my mind to entertain any degree of reasonable doubt as to the intention of the Legislature. I have adverted to the other sections of the Act, which were alluded to during the argument at your Lordships' Bar; but it appears to me that there is not one of them that is not reconcilable with the view of the subject which I have taken. I do not mean to say that some degree of doubt and some degree of uncertainty might not have rested on those other sections, if taken separately; but the whole must be construed together; and the sections to which I have adverted appear to me to speak in a clear and distinct language, and I think may be reconciled with those other sections, which, if they stood by themselves, might possibly have thrown some degree of doubt upon the case.

My Lords, it was stated at the Bar, and correctly stated, that there

June 15. 1829.

had been a contradictory decision from that against which this appeal has been lodged; but that case is open to this observation, (I mean the case of the Blair bond), that this question was not there raised before the Court. It was considered by the parties on both sides, (although the point was open), I suppose for their mutual interest, that it should be waived. But certainly the point was never argued; and therefore that decision, although in its terms at variance with the decision to which the Court of Session has since come, can hardly be considered as possessing much weight with respect to the present question.

My Lords, there were other subordinate points in the case, to which it does not appear to me to be necsssary to advert. The main question that was argued at your Lordships' Bar was the question to which I have called your attention. I think, on reference to the sections of the Act of Parliament of the 54. Geo. III., upon which the case must ultimately rest, your Lordships will be of opinion, that the judgment of the Court of Session is correct, and that it ought therefore to be affirmed.

Appellant's Authorities.—3. Ersk. 8. 101.; 1. Bell's Commentaries, p. 729.; M'Kenzie's Observations, p. 394.; 2. Stair, 12. 29. and 4. 35. 16.; 3. Bank. 5. 67.; Bellenden, March 1685, (3127.); Taylor, Dec. 9. 1747; Arniston, March 1686, (2. Sup. 92.)

Respondent's Authorities.—1. Bell's Commentaries, 729.; Grahame, Nov. 27. 1751, (12,160.); Bellenden, March 1685, (3127.)

MONCREIFF, WEBSTER, and THOMPSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 32.

WILLIAM COLHOUN STIRLING, and his Commissioners, Appellants.—*Keay—Dunlop.*

WILLIAM DUN, Respondent.—*Lushington—A. M'Neill.*

Entail—Lease—Acquiescence.—1. Held, (reversing the judgment of the Court of Session), that the word 'dispone' in an entail strikes at leases of extraordinary endurance. 2. That the lease of a loch for 300 years is in no more favourable situation—in a question whether such lease falls under the prohibition to dispone—than any other part of the entailed estate. 3. That (affirming the judgment) a pro indiviso share of a loch, forming part of an entailed estate, is subject to the fetters of the entail. 4. Circumstances held not to constitute an acquiescence barring the heir of entail from challenging the lease in a question with an onerous assignee.

June 22. 1829.

2D DIVISION.
Lord Newton.

BY the entail, executed in 1691, of the estates of Law and Edinbarnet, with the pertinents thereof, it is declared, 'That it 'shall not be leisome or lawful to any of the heirs of tailzie above 'mentioned (except the heirs-male of my own body), to sell, dis'pone, wadset, or impignorate the said lands and others fore-