

July 24. 1822.

‘ derived from the Livingstone family in right of their barony of
 ‘ Callendar, in commonty with himself, as deriving title from the
 ‘ Abbey of Holyroodhouse, in undivided shares: But find that
 ‘ the undivided part or share in the said muir, which did belong
 ‘ to the said Abbey of Holyroodhouse, was kirk land within the
 ‘ intent and meaning of the act 1663, and that therefore part of
 ‘ the said 110 acres ought to have been allotted to the said Wil-
 ‘ liam Forbes in respect of the right which he derived from the
 ‘ said Abbey of Holyroodhouse, and another part ought to have
 ‘ been allotted to him in respect of his rights in the barony of
 ‘ Callendar; and in as much as the presbytery found that the
 ‘ entirety of the muir of Falkirk, on the south side of the town,
 ‘ was kirk land, and thereupon proceeded to set out 20 acres of
 ‘ ground, part of the said 110 acres, as kirk land for the accom-
 ‘ modation of the minister, for grazing a horse and two cows, as
 ‘ a grass glebe, whereas only a part undivided of the said 110
 ‘ acres was kirk land, and consequently only an undivided part of
 ‘ the 20 acres, part of the said 110 acres so set out by the pres-
 ‘ bytery, was kirk land; so that the proceeding of the said pres-
 ‘ bytery, in setting out the said 20 acres, as if the entirety of the
 ‘ said 110 acres had been kirk land, was erroneous; and it is
 ‘ therefore ordered and adjudged that the several interlocutors
 ‘ complained of be reversed.’

Appellants' Authorities.—2. Ersk. 10. 62; 4. Ersk. 1. 54. 56. 58; Quon. Attach. c. 53. § 7; M. of Avondale, Jan. 10. 1733; 4. Stair, 32. 9; 2. Ersk. 10. 62; Grierson, June 26. 1778, (5162); Min. of Dollar, July 9. 1807, (F. C.); Forbes, Nov. 26. 1755, (5127); 2. Ersk. 10. 62; Min. of Dunfermline, March 25. 1812, (F. C.); Massie, July 12. 1785, (8377.)

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 36.*)

No. 47.

WILLIAM TAYLOR, Appellant.—*Brougham.*SAMUEL LITTLE, Respondent.—*Moncreiff—More.*

Stat. 54. Geo. III. c. 137.—Bankrupt—Sequestration.—Held, (affirming the judgment of the Court of Session,)—1.—That a coal-lessee dealing in coal, although not buying it, is liable to sequestration; and,—2.—That it is no objection that the affidavit of the creditor applying for sequestration has been made before a Justice of the Peace in Ireland.

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1ST DIVISION.

THE appellant, Mr. Taylor, held leases of several very extensive coal-works in the county of Ayr, the produce of which he disposed of chiefly by exporting it to the Irish market. His affairs

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having become embarrassed, he executed a deed of trust, conveying his whole effects to trustees for behoof of his creditors; and among others, Mr. Murdoch, writer in Ayr, acceded to this arrangement. After the management had been for some time in the hands of these trustees, the respondent, Mr. Little, a merchant in Stewartstown in the county of Tyrone in Ireland, a creditor of Mr. Taylor, (but who had not acceded to the trust,) presented a petition to the Court of Session for sequestration of Mr. Taylor's estates. In support of this application Mr. Little produced an affidavit which he had made at Dungannon, on the 20th of August 1818, in presence of William Murray, Esq. one of his Majesty's Justices of the Peace for the county of Tyrone, and in which he deponed that a debt of upwards of £ 200 was owing to him, and that he believed that Mr. Taylor carried on business as a coal-master, coal-merchant, and grain-dealer, or otherwise fell within the description, and not within the exceptions of persons liable to sequestration. In evidence of the bankruptcy, he founded upon a caption which had been obtained by Mr. Murdoch subsequent to the date of the trust, 'for not making payment to the complainer of the principal sum of £120, and the legal interest thereof since due, and till payment, deducting all partial payments made to account thereof which can be legally instructed, contained in the promissory note of M'Harg and Wallace, merchants in Ayr, and the said William Taylor, dated the 15th day of February 1818,' and on which caption an execution of search, dated 2d October 1818, was returned. Mr. Taylor made appearance, and objected to sequestration being awarded, on the ground,

1. That although he was a coal-owner or coal-lessee, and as such worked the coals let to him, and sold them; yet he did not purchase coals in order to sell again, and therefore he was not within the description of persons who make their living by buying and selling, and so liable to sequestration; and that neither could he be characterized as a grain-merchant, because the only purchases which he had made were for the purpose of paying the wages of his coaliers in grain instead of money; and that although, from peculiar circumstances, he had been obliged to dispose of part of that grain in the market, yet this could not constitute him a grain-merchant in the sense of the statute.

2. That the petition for sequestration was not supported by the documents required by the statute; and, in particular, first, That the affidavit was objectionable, because it was made before an Irish Justice of the Peace, without having any authority from the Courts in Scotland; and, second, That it was made prior to the act of bankruptcy, which did not take place till the 2d of October

July 26. 1822. 1818, whereas the affidavit was dated on the 20th of August preceding.

3. That the caption was illegal ; first, Because Mr. Murdoch, being an acceding creditor to the trust, was barred from doing diligence on his debt ; and, second, Because it was uncertain in its terms, as it was issued for a debt, ‘ deducting all partial payments made to account thereof which can be legally instructed ;’ and therefore, as the diligence was illegal, there had been no act of bankruptcy in terms of law.

To these pleas it was answered,—

1. That Mr. Taylor was an extensive dealer in coals, and that it was not necessary, according to the Scottish statute, that he should both buy and sell, it being sufficient that he manufactured and prepared coals for the market, and made a material part of his living by the disposal of them :—that, besides, he was a partner of several companies trading in Dublin, and usually designed himself ‘ merchant’ there ; and that it was proved by documents recovered from the consignees, that he had bought and sold grain to a considerable amount.

2. That it was quite sufficient that the affidavit was emitted before a Justice of the Peace within Great Britain or Ireland, and that no commission from the Scottish Courts was necessary ; nor was it required by the statute that the execution of the caption, or other diligence creating the bankruptcy, should be prior to the affidavit :—that, besides, the execution had been postponed by a bill of suspension, which had been ultimately dismissed : And,

3. That Mr. Murdoch was not barred from doing diligence, nor was it any objection to sequestration being awarded that he had acceded to the trust, and the debt on which the diligence was done had been subsequently acquired by him :—that it was res judicata, by the refusal of the bill of suspension, that he was entitled to execute that diligence ;—and that the terms of the caption were such as were usual in similar cases.

The Court, on the 11th of February 1819, awarded sequestration ; and thereafter an interim factor and trustee were successively appointed, and Mr. Taylor applied for a personal protection in terms of the statute. He, however, afterwards presented a petition for recal of the sequestration, on the same grounds on which he had maintained that it should not be awarded ; but the Court, on the 22d of May 1819, refused the petition, and found him liable in expenses.*

He then entered an appeal ; but the House of Lords ‘ ordered ‘ and adjudged that the interlocutors complained of be affirmed.’

* Not reported.

Appellant's Authorities.—(1.)—Stewart, Feb. 15. 1812, (F. C.); Jeffrey v. Russel, July 26. 1822. 1816, (not rep.)—(3.)—Rex v. Hall, 1. Cowper, 60.

Respondent's Authorities.—(1.)—1. Bell, 368.—(3.)—1. Ross, 290.

J. RICHARDSON,—C. BERRY,—Solicitors.

(*Ap. Ca. No. 38.*)

JAMES CARRICK, Appellant.—*Gifford—Forsyth.*

No. 48.

JAMES MARTIN and COMPANY, and THOMAS MARTIN and COMPANY, Respondents.—*Clerk—Skene—Rutherford.*

Meditatio Fugæ Warrant.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that it is not a sufficient ground of suspension of a *meditatio fugæ* warrant, that the oath of the petitioner and the declaration of the defender have been taken by the clerk and assessor of a royal burgh acting in virtue of a commission by the Magistrates,—the warrant bearing to have been issued by a Magistrate, on considering the oath and declaration.

JAMES CARRICK, a merchant and mercantile agent in the island of Martinique, was employed in the latter capacity by Thomas Martin and Company of the island of Guadaloupe, (a branch of Thomas Martin and Company, merchants in Glasgow,) to dispose of goods which they consigned to him. In the year 1816 he came to Glasgow, at which time it was alleged he had a large balance in his hands belonging to Martin and Company. The affairs of that company having become embarrassed, a conveyance of their effects was made to Alexander Wighton and others, as trustees for their creditors; and in the month of June 1817, these trustees, having reason to suspect that Carrick was about to leave the country without settling the balance, presented a petition to the Magistrates of Glasgow, stating that James Martin and Company had, through their partners Thomas Martin and Company, made large consignments to Carrick, who had hitherto rendered no regular account-sales:—that ‘ he is justly ‘ due to the petitioners, as trustees for James Martin and Company’s creditors, a sum exceeding £4000 sterling:—that they ‘ are about to commence an action of count and reckoning and for ‘ payment against him, but that they had received information, ‘ and verily believed, that the said James Carrick was in *meditatio fugæ*, and about to leave the country, with a view of ‘ eluding the petitioners’ just demands.’ They therefore prayed the Magistrates ‘ to grant warrant for apprehending the said ‘ James Carrick and bringing him for examination, and there-

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2^D DIVISION.
Lord Cringletie.