[25th *June* 1832.]

No. 3. ALEXANDER BAILLIE, Appellant. — *Sir Charles Wetherell — Wilson.*

MARGARET GRANT, Respondent. — *Lord Advocate (Jeffrey) — Dr. Lushington.*

Sequestration. — The Court of Session having held that a party who had been for a short while a trader, but had totally wound up business, and, as he alleged, paid all the debts and obligations incurred while a trader, was liable to be sequestrated at the instance of a creditor, whose debt was a private debt, incurred many years before the debtor had commenced trade, but which had continued unpaid during and after his trading; on appeal, the House of Lords directed the following question to be put to the Twelve Judges: "A., not a trader, becomes indebted to "B. to the amount of 100*l.* A. afterwards becomes a "trader, and ceases to be a trader, never having paid "his debt to B. After ceasing to be a trader, he com- "mits an act of bankruptcy. Can B. support a com- "mission against him upon his debt and that act of "bankruptcy?" The judges declared their unanimous opinion in the affirmative.

Bankrupt. — Held, (affirming the judgment of the Court of Session,) that a party who had been charged with letters of horning, and who retired to Holyrood-house before caption could be executed against him, but who was apprehended in the sanctuary, and there and then pleaded his protection, was a notour bankrupt, within the meaning of the statute.

Bill Chamber. MARGARET GRANT presented a petition, founded on the bankrupt statute 54 Geo. 3, c. 137, continued and renewed by subsequent statutes, to the Lord Ordinary on the bills, setting forth, that she is a creditor of Alexander Baillie, (designed in the petition, creditor

of Alexander Baillie, grocer and spirit-dealer in Canongate of Edinburgh, lately residing in Cross-causeway, Edinburgh, presently residing within the sanctuary, Holyrood-house,) to the extent of 1,197*l.* 15*s.* 3*d.* sterling, with unpaid interest from 1st June 1812, contained in a decree-arbitral, dated 20th October 1812, and registered in the books of Session the day following, proceeding upon a submission entered into between the petitioner and David Littlejohn, as her trustee, on the one part, and the said Alexander Baillie on the other, dated 8th and 14th January 1812, and registered along with the said decree-arbitral: That a discharge and retrocession were executed by the said David Littlejohn in her favour: That she had made and now produces an affidavit to the verity of the debt, in which she depones, that she "believes that the said "Alexander Baillie, although for some years retired "from business, did, subsequently to the contraction "of the debt above deponed to, carry on business as "a grocer and spirit-dealer in the Canongate, and is "therefore a trader within the description of persons "whose estates are liable to sequestration under the "said statute, and not within the exceptions therein "specified:" That the said business is not yet finally wound up, and Baillie was, upon the 3d September last, charged to make payment of the debt above specified to the petitioner, in virtue of letters of horning at her instance, (raised upon the said submission and decree-arbitral,) dated and signeted the said 3d September last; and Baillie having been thereupon denounced on the 20th January last, and letters of caption, dated and signeted the 22d January last, raised at the pur-

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suer's instance, he, in order to avoid being apprehended, had retired to the sanctuary upon the 19th January last, as the messenger's certificate, dated 5th March current, indorsed upon the said caption, bears; and praying for warrant for citing the said Alexander Baillie to appear in court to show cause why sequestration should not be awarded against him; and if he should not appear, or so appearing should not instantly pay or satisfy the debt due to the petitioner, or to any creditor or creditors who may appear and concur in this application, or show other reasonable cause why the sequestration should not proceed further, then to sequestrate the whole estates and effects, heritable and moveable, real and personal, of the said Alexander Baillie, for the benefit of his whole just and lawful creditors: with the other usual conclusions in like cases.

Baillie answered, that in the year 1829, the petitioner brought an action against him, before the Court of Session, for payment of the same debt upon which her present petition is founded, and which was constituted by a decree-arbitral as far back as the year 1812. The sum in that decree-arbitral, however, was not due by him to the petitioner, for he had counter claims against the petitioner to a much larger amount. Accordingly, nothing more was heard of it till after the lapse of seventeen years. When the case came into court, defences were given in; and the petitioner was appointed to condescend. Insetad, however, of lodging the condescendence, she gave a charge of horning upon the recorded submission and decree-arbitral, and that without abandoning her cause in the Court of Session. She also, in the course of last year, founding upon the

decree-arbitral, after having previously arrested the rents, adjudged a house in Queen Street, belonging to him, worth about 900*l.*, and not encumbered with any debt. And then, after having pursued him with messengers, and obliged him to retire to the abbey to escape imprisonment, she has presented the present petition for a mercantile sequestration of his whole means and effects under the statute quoted.

It is plain, therefore, that the petitioner does not possess the proper character of creditor, to be entitled to pray for sequestration against the defender. His action, and the counter claims on which his defence is founded, must first be disposed of; and it is not a sufficient answer to this objection, that the petitioner's claim on the decree-arbitral is liquid, and his counter claims illiquid; for the whole effect of the decree-arbitral, and of his counter claims, and consequently the question, whether the petitioner is his creditor or not, has been rendered litigious by the petitioner herself, and is now sub judice in the Court of Session.

But there remain other insuperable objections to the prayer of the petitioner.

The debt, forming the basis of the decree-arbitral, arose in an accounting between the defender's wife and her sisters (one of whom is the petitioner), relative to a property in which they were co-heiresses. It was entirely a private debt, and had no relation to business at all. He was then engaged in no trade, nor did he stand in any situation on account of which his estate could be sequestrated. He continued to live as a private individual, engaged in no business of any kind, till about the year 1819, seven years after the date of the

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decree-arbitral, when he commenced, and continued for one year, but for one year only, the business of a spirit-dealer. This took place ten years ago, and except then, and since then, he has been engaged in no business whatever. Before he shut his shop he paid every shilling of debt which he had contracted in the business; indeed the whole was finally wound up ten years ago. He is not, therefore, included in the description in the statute of a "merchant or trader who seeks his living "by buying and selling."

It is not enough to say, that a person was once in trade. No doubt, where insolvency is occasioned by former transactions as a trader, or if the debt of the petitioning creditors arose in the course of these transactions, the character of trader continues to the effect of supporting the sequestration. This is expressly laid down by all our best authorities. But here the defender is not insolvent; the debt of the petitioner had no relation to trade; and no debts exist contracted during the short time he was a trader. Indeed, this is admitted by the petitioner herself in her affidavit, and proved by the decree-arbitral.

But while the petitioner is not a creditor entitled to sequestrate, and the defender not a party subject to be sequestrated, neither has he been rendered bankrupt within the meaning of the bankrupt statute. The letters of horning were dated 3d September 1829, and the defender was denounced on the 20th of the following January. Letters of caption did not issue till the 22d of that month. But before that date, namely, on the 19th of January, the defender had retired to the sanctuary; so that the caption neither was nor could be

executed against him. No doubt the messenger tried to go through the ceremony of apprehension within the sanctuary, but that was quite idle and futile.*

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A record having been prepared and closed, the cause came before the First Division, when "The Lords re-
"pelled the objections, sequestrate the whole estate
"and effects of the said Alexander Baillie, in terms of
"the statute; appoint the creditors to hold two meet-
"ings at the place and the times specified in the note,
"and for the purposes mentioned in the petition, as
"directed by the statute; grant commission as prayed
"for; ordain the petitioner to advertize the sequestra-
"tion, and times and place of the meetings, in the
"Edinburgh and London Gazettes, in the usual
"form." †

May 20, 1830.

Baillie appealed.

Feb. 3, 1832.
Feb. 13, 1832.

Appellant.—The appellant is not now, and has not been for many years, engaged in trade, or in any other mode of life falling within the description of the bankrupt statutes, as making him liable to sequestration; and it is no relevant ground of sequestration that the appellant was engaged in trade as a spirit-dealer from 1819 to 1820, seeing, not only that the respondent's debt did not arise out of that trade, or out of any transaction connected with it, but that the concern was many years since finally and absolutely wound up, and that no debt arising out of it now exists, or presses against the appellant.

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* Baillie also maintained that, assuming that the caption had not been validly executed against him, the sequestrating act could not found on any arrestment or adjudication, to eke out the bankruptcy, as those were not alleged in her petition, which formed the basis of the whole proceeding.

† Shaw and Dunlop, 778.

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When, as in the present case, the debtor himself does not concur in the petition for sequestration, it is necessary that the debtor should have been rendered bankrupt in precise terms of the statute; but the appellant has not been rendered bankrupt in terms of the statute, in respect he was not under diligence by "horning and "caption" (an essential ingredient towards creating notour bankruptcy) when he retired to the sanctuary, and that he was not made bankrupt by any other mode of diligence provided as an equivalent in that case.

Sequestration, being a proceeding strictly statutory, cannot be awarded in respect of any supposed or alleged grounds of equity, or as a means of compelling payment of debt, where the statutory requisites have not been complied with, in the description of the debtor, the nature of the petitioning creditor's debt, and the diligence founded on as constituting bankruptcy. — White, 25th November 1800, (Mor. Ap. *v.* Bankrupt, No. 12); and cases relied on by the respondent.

Respondent. — The respondent was, at the date of her petition, and still is, a creditor entitled to apply for and claim in the sequestration, without concurrence of the appellant.

The act 54 Geo. 3, c. 137, § 15, requires that a single petitioning creditor shall have an actual claim, whether liquid or not, amounting to 100*l.* Now the claim of the respondent exceeds the requisite amount, and was liquidated by decreet-arbitral, with clause of execution, so far back as 1812. On the other hand, the appellant did, on the 12th of March 1830, when the petition for sequestration was presented, and

still does, bear the character which makes him liable to sequestration under the bankrupt statutes.

It is admitted by the appellant, that he acquired in 1819 the character of a mercantile trader, by beginning business in the Canongate of Edinburgh as a spirit-dealer. It is plain, that during that time he fell under the description of persons subject to sequestration. The respondent does not say that he now does, or did on the 12th of March 1830, the date of presenting the petition, carry on business; but she maintains, that debts directly contracted by him during the time when he was a trader were, on the 12th of March 1830, and still are, unpaid by and pressing upon him*; that principal sums owing by him before his entry into business were resting owing by him throughout his trading, and are still owing by him; and that the interests of these principal sums, which became payable at their respective terms during the period he was a trader, are still owing by him, and must be regarded in the same light as a new contraction while a trader, and consequently forming a good petitioning debt.

The appellant was, at the date of the respondent's petition, liable to sequestration under the bankrupt act as a notour bankrupt. He had been charged on letters of horning, denunciation had followed, and he had been apprehended within the sanctuary by a messenger on the caption, and having pleaded the protection which he had obtained from the officer of the sanctuary, he thereby "fled for his personal security," and became notour bankrupt, and such has been the invariable course of

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* This was denied by the appellant; but the question of law which was raised did not require that the fact should be ascertained.

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establishing bankruptcy in all similar cases.—2 Bell, 316; Dick, 28 Jan. 1815, (F.C.); Cramond, 21 Feb. 1815, (F.C.); Low, 8 July 1815; Fraser, (7 S. & D. 217); Cook, 21 Feb. 1829, (7 S. & D. 452).

LORD CHANCELLOR.—My Lords, very considerable doubt having been entertained in one stage of this argument, respecting certain points of practice, which were decided by the Court below, and that doubt having pressed upon the minds of some members of your Lordships' House until the last day of hearing, I am happy in being able to state, that a communication with the north has been the means of procuring information which has tended very greatly to relieve us from the pressure of those doubts; upon this matter of practice, therefore, respecting the petition of sequestration, horning, and caption, upon which, apparently, the learned judges felt so little doubt, that they unanimously repelled the objections without hearing the other party, your Lordships will naturally feel the greatest possible desire to defer to the authority of the learned judges. But there is another point which requires your Lordships' attention, and upon which I should wish for an opportunity of making further inquiry, before I move your Lordships to proceed to judgment. On the other part of the case I feel no doubt at all.

LORD CHANCELLOR.—My Lords, when this case was before your Lordships, various questions were discussed respecting the payment of debts contracted during the trading, and remaining unpaid after the trading had ceased,—upon these your Lordships entertained no doubt, but one remained, of

which I am now about shortly to remind your Lordships. It was felt, that even if those points were well decided in the Court below, there still remained an important question, Whether, known or not known, a debt having been contracted before the trading commenced, and continuing unpaid after the trading ceased, and consequently the trading continuing through the whole period, that debt was sufficient to support the sequestration, upon an act amounting to ground of sequestration, committed after the trading ceased? In order to decide that question, it was necessary that some attention should be paid to the cases which it was said bore upon the point. On looking into those cases both then and since, it appears that that point never has been expressly decided in this House, nor in the Court from which this case was brought by appeal; but it being felt that there is no difference between the principles which ought to apply in Scotland and in England, as governing the decision of this question, it became desirable to know what had been decided on this point in the English Courts. I for one am ready to admit, that at all events it would have been impossible for us to follow the decision of the English Courts, unless we saw most clearly that we were called upon to adopt, in a case arising in Scotland, the same principles that had been applied in a similar case which had arisen in England, and which had governed the decision of the English Court. This being a point of very considerable importance, I have felt it to be my duty, though it is a Scotch case, to propose to your Lordships to require the attendance of the learned judges, for the purpose of hearing the point argued as applied to an English case, and of putting questions to

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them, which I am now about humbly to move;—I do therefore move your Lordships that the learned judges be desired to give your Lordships their opinion on this question,—" A., not a trader, becomes indebted to B. to
" the amount of £100. A. afterwards becomes a trader,
" and ceases to be a trader, never having paid his debt
" to B. After ceasing to be a trader he commits an
" act of bankruptcy. Can B. support a commission
" against him upon his debt, and that act of bank-
" ruptcy?"

The question proposed having been argued by Mr. Wilson for the appellant and the Lord Advocate for the respondent, before the Lord Chief Justice of the Common Pleas and the other Judges, the learned judges requested time to consider the same.

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Thereafter, the judges having attended, the Lord Chief Justice Tindall delivered the unanimous opinion of the judges.

LORD C. J. TINDALL.—The question proposed by your Lordships to his Majesty's Judges is this:—A., not a trader, becomes indebted to B. to the amount of 100*l*. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader he commits an act of bankruptcy. Can B. support a commission against him upon his debt, and that act of bankruptcy? Upon this question, the judges who have heard the argument at your Lordships' bar are of opinion that a commission may be supported against B. upon the debt and act of bankruptcy above supposed. It has been decided, and has long been considered as law, that a debt contracted before a man enters into trade, but continuing unpaid at and after the time he is in trade,

is a sufficient debt to support a commission taken out against him upon an act of bankruptcy committed whilst he is a trader. (See the case of Butcher *v.* Easte; Dougl. Reports, 295.) It has also been established beyond dispute, that a petitioning creditor's debt, contracted during the trading of the debtor, will support a commission taken out against him, on an act of bankruptcy committed after the trading has ceased. This point has been settled to be law by various decisions, commencing with that of Heyler *v.* Hall; Palmer's Reports, 325, and ending with that of ex parte Bamford, 15 Ves. jun. 458. But it is contended, that although each of these propositions be true separately, yet that no inference can be drawn from them, that the debt contracted before the trading, but subsisting during its continuance, and the act of bankruptcy committed after the trading, will support a commission. We think, however, that no valid or substantial distinction, in this respect, can be drawn between the debt contracted before, and that contracted during the trading. The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade. It is the same with respect to the trader's ability to carry on his trade. The money lent to the person who afterwards commences trade may be, and often is, the very capital upon which the trade itself is carried on. At all events, the credit given to the trader, by the forbearing to demand repayment, is one of the sources from which such capital is derived, and is the same in effect as a new loan. Again, the debt is attended in both

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cases with the same consequences as to the trader's ability to repay it, for in each the power of repayment is equally affected by the success or failure of the trader. No one would contend that a debt contracted during the period of trading, though not a trade debt, but contracted for private purposes, and applied to private occasions perfectly distinct from the trade, is to be considered as differing in any respect from a debt contracted in the course of the trade itself. It seems rather an artificial distinction than a substantial difference, to hold that the debt contracted after the trading has commenced shall support the commission taken out on an act of bankruptcy, committed after the trading has ceased, but that the debt contracted before the trading, but continuing afterwards, shall not be attended with the same consequence. If a commission cannot be supported under these circumstances, a trader, by giving up his trade, which is a voluntary act on his part, would have the power of depriving his former creditors of the benefit of enforcing an equal distribution of his effects amongst all his creditors, and would be enabled to pay his subsequent creditors out of the very funds furnished or increased by those who were his creditors before he began trade. And upon referring to the bankrupt acts, there does not appear to be any distinction created between these two classes of creditors as to the right to petition for a commission. The first statute which mentions a commission is the 13th Eliz. cap. 7. sec. 2. which states in the most general terms, "that the "Lord Chancellor for the time being, upon every "complaint made in writing, against such person or "persons being bankrupt, as is before defined, shall

"have full power by commission under the Great Seal "to name, assign, and appoint the persons therein "described." And all the subsequent statutes contain an enactment similar in effect to that in the 6 Geo. 4. the present Bankrupt Act; viz. that the Lord Chancellor shall have power, upon petition made to him in writing, against any trader having committed an act of bankruptcy, by any creditor or creditors of such trader, to issue his commission — words which comprehend equally all creditors for debts existing during the trading, whether contracted before or after the commencement of the trading. The principal stress of the argument at your Lordships' bar was placed, first upon the precise language used by the judges in the cases above referred to, wherein they assign the reason for their opinion, that the debt grew during the trading. But in those cases the judges speak with reference to the particular facts of the cases immediately before them; and such expression affords no necessary inference, that if the cases then under discussion had, like the present, been cases of a debt remaining and continuing during the trading, their conclusion, drawn from the other facts, would not have been precisely the same. Again, it has been argued, that the statutes only authorise the suing out a commission against a person using the trade of merchandise, by buying and selling, &c. And that the ground upon which a commission is allowed to be sued out on an act of bankruptcy, committed by the debtor, after he has ceased to trade, is, that he cannot be considered as having left off trade whilst any of the debts contracted during trade are still unpaid. But if the

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debts contracted before, but continuing after, are virtually and substantially the debts of the trader, whilst a trader, as we think they are, the words of the statute which are allowed to extend to the one, ought, in reason, to be held to include the other also. Upon the whole, we think, that both upon the reasonableness of the thing, and also upon the proper construction of the bankrupt acts, a commission may be well supported under the circumstances supposed in the case submitted to us by this House.

LORD CHANCELLOR.—My Lords, the rest of the case having been disposed of after the first argument, the only point remained, upon which the learned judges have now delivered their unanimous opinion. It appeared to me that the case should be argued before the learned judges, inasmuch as it was necessary to see whether the same principles would be equally applicable to English bankruptcy and Scotch sequestration. This was a point on which the decision of your Lordships must be entirely founded; and his Majesty's judges having now delivered that opinion, which removes the only doubt remaining in the case, enables me at once to move your Lordships that the interlocutor be affirmed. But on the consideration of this being a case of first impression in Scotland as well as in England, the question never having been decided in either country before, I shall move your Lordships to affirm it, without costs.

"The unanimous opinion of the judges having been
"delivered this day upon a question of law to them
"propounded, and due consideration had of what was

" offered on either side in this cause," the House of Lords ordered and adjudged, " That the petition and appeal be " and is hereby dismissed, and the interlocutor therein " complained of be, and the same is hereby affirmed."

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CRAWFURD and MEGGET — SPOTTISWOODE and ROBERTSON, — Solicitors.