Oct. 1, 1831. The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellants' Authorities.—Stat. 1471; 1540; 1593, c. 19; 1606, c. 2; 1612, c. 14, 15, 16; Peterkin's Rentals of Orkney, p. 66; No. 3, p. 34; App. p. 99; 1669, c. 19; 1707, c. 46; 10 Anne, c. 12, sec. 4; 2 Stair, 8, 35; 1 Ersk. 5, 10.

Authorities for Lord Dundas.—1592, c. 94; Record Edit. p. 1; 1606, c. 2; 1612, c. 15; 1669, c. 19; 1707, c. 9; Act 1742; Cochrane, 21st Jan. 1739 (M. 9,909); Graham, 17th Jan. 1758 (M. 9,927); Act, 1594; 1617, c. 12; Earl of Leven, (M. 10,930); 2 Ersk. 6, 18, 3; 3, 23; 3 Ersk. 7. 3. 4. 31; 1, 5, 16; 2 Stair, 1, 24; 3, 45; 12, sec. 23; 8, sec. 35, 1, 8, 35; 2 Craig, 8, 37; Earl of Argyle, (M. 9,631); Duke of Buccleuch, Nov. 30, 1826 (5 S. & D. No. 44); 1712, c. 10.

Authorities for Magistrates of Kirkwall.—1670, c. 42; 1617, c. 12; 2 Stair, 12, 23; 3 Ersk. 7, 3.

MUNDELL—RICHARDSON and CONNELL,—Solicitors.

No. 56.

DONALD ROBB, Appellant.

JAMES FORREST, Respondent.

Bankruptcy—Sequestration—Stamp.—Held (affirming the judgment of the Court of Session)—1. That it is competent for a creditor to apply for sequestration, whose debt is of the statutory amount, but consists partly of a sum originally due to himself, and partly of a debt purchased by him at an undervalue, subsequent to the bankruptcy: 2. That the assignation of such a debt requires to be written on a deed, and not on an ad valorem stamp: 3. That as no objection was taken to the assignation, in respect of its being written on a wrong stamp, until after sequestration was awarded, and as there was no room to suppose that the Court was aware of the objection, and as the defect was afterwards supplied, the sequestration was valid.

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1ST DIVISION.
Lord Newton.

ROBB presented a petition to the Court of Session, praying for a recal of the sequestration of his estates which had been awarded at the instance of Forrest under the Bankrupt Act. This he did on the following grounds:

1. The debt of Forrest, the sequestrating creditor, was not of the statutory amount to entitle him to present the application. It was stated in his affidavit as amounting to 135*l.*, but of this 55*l.* consisted of an account originally due to Young and Company, and assigned by them, subsequently to Robb's bankruptcy, for 18*l.* This purchase was illegal, as being, after bankruptcy, for

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an inadequate price; and collusive, as enabling a creditor to carry through a sequestration in circumstances which the law did not contemplate; and, if sanctioned, would enable creditors in small sums, by the assignment of their claims, to apply for sequestrations on all occasions, and to evade the provision in the statute by which the amount of the petitioning creditor's debt is determined:

2. The assignation by Young and Company was null and void, as bearing to be an assignation from Young and Company, and the individual partners of the Company, while it was only subscribed by Thomas Young and Company, and not by the individual partners:

3. And the assignation was null, as being extended on an ad valorem instead of a common deed stamp.

The Lord Ordinary on the Bills having refused the petition, Robb reclaimed.

The Court, before answer, remitted to the Solicitor of Stamps and to the Deputy Keepers of the Signet to report as to the practice in Scotland as to using ad valorem stamps or common deed stamps in the preparation of such assignations as the one in question. The report was returned, that "upon a transaction "such as the one in question it is the usual practice of convey-"ancers to write the assignation upon a valorem conveyance "stamp." Thereupon the Court repelled the other objections, but ordered Cases upon the objection in regard to the stamp. Forrest now sent the assignation to London to be stamped, where it was accordingly stamped with a common deed stamp of 35*s.*, over and above the previous stamp of 10*s.* The Court then, "in re-"spect the deed is now produced stamped, recalled the order for "cases; refused the prayer of the reclaiming note; and adhered "to the interlocutor of the Lord Ordinary complained of, in "toto; and remitted to the trustee to consider how far the de-"fender's expenses of process, with one half of the expense "incurred in procuring the report of the Solicitor of Stamps "and Keeper of Signet, ought to be defrayed out of the seques-"trated estate."*

* 8 Shaw and Dunlop, pp. 839 and 1035.

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Robb appealed. No appearance was made for the respondent.

Appellant.—1. There is no lawful evidence that the respondent was a creditor who had a debt owing to him to the extent required by the statute. The deed of assignment, said to have been granted by Thomas Young and Company, in favour of the respondent, was not validly or legally executed, so as to transfer their debt to the respondent; and at the time it was produced and founded on it was written upon a wrong stamp, and could not therefore, even if valid in other respects, bear faith in judgment, or be founded on, and made the ground for awarding sequestration. It was irregular and incompetent to remit to the Solicitor of Stamps and Deputy Keepers of the Signet to report as to this point, and to affirm an interlocutor which (by the very circumstance of the subsequent stamping) is admitted by the Court of Session to have been erroneous at the time it was pronounced.

Lord Chancellor.—My Lords, this is a pauper case, in which the means of the unfortunate appellant have been completely exhausted by the expense of the litigation, and he has been obliged to come here in formâ pauperis. No person appears in support of the judgment, those concerned on the part of the respondent deeming that the grounds of that judgment were so clear as to require no argument in its support; but in fact the better reason (for the former turned out, in the event, to be by no means sufficient) was the extremely small amount of the matter in litigation. The question is, whether, in a bankruptcy, (or, as it is called in Scotch practice, a sequestration,) there had been, or not, a sufficient debt to support the prayer for the sequestration,—what we should call in bankruptcy a sufficient petitioning creditor's debt. Various objections were taken in the Court below and here in last resort, and they ultimately resolved themselves chiefly into one; that a certain instrument of assignation, necessary to make up the debt to the hundred pounds required (the amount without that being only about 80*l.*), was defective. It was objected to on various grounds, with only one of which I will trouble your Lordships, and that was one which induced me to postpone moving judgment, because I conceived that the case had not been sufficiently considered in the Court below. The instrument, it appears, was not upon the proper stamp; it was on an ad valorem stamp,

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whereas it ought to have been on a deed stamp. This point does not appear, I say, to have been sufficiently attended to below. If any proceeding had been instituted, in which the rights of the parties were in question, and it had been necessary to rely upon that instrument, the proceeding must have failed as respected the party producing it, and resting his case upon it, because it had not a sufficient stamp. But then the proceeding in question was of a peculiar kind. A petition was presented. Your Lordships know that the law of Scotland differs materially from ours in this, that we make a man a bankrupt behind his back, without any rule to shew cause, as it were, but in Scotland they proceed against him upon notice, and after the delay of ten days the sequestration is awarded. They state in the record the ground of the debt, and, among others, this assignment. This unstamped instrument was a necessary part of the record, but no objection was taken; and after a lapse of the proper time the sequestration was awarded; and then, within sixty days, there still being no objection taken, or, if taken, got over by the after stamping of the instrument—it is perfectly immaterial to the case which—the instrument, before it was required to be used in the process, and before it was objected to, and came to be considered in foro contentionis, was stamped; the defect was cured in the proper quarter, and the instrument was validly produced. My Lords, upon these grounds I am of opinion, an opinion I have come to after considerable delay and much consideration of the case, that as there was no objection taken in the first instance, and as the Court allowed the instrument to be given in evidence, and proceeded upon it without taking the objection to the stamp, one of two things must have happened, either that the Court was not apprised of the fact that the stamp was insufficient, or that, if the Court was apprised of it, the party consented against whom it was produced. If the Court was apprised of the objection, and if, that objection being taken, the instrument was received, (and I mention this to show on what a very narrow edge, as it were, the validity of the judgment turns,) then the judgment ought clearly to be reversed; and I make this observation; but I have looked, and with much anxiety, into the case, and I see no sufficient reason to believe that the Court was apprised of the objection. We therefore come to this alternative, either that the Court (and this proceeding being in the absence of the respondent, we cannot precisely ascertain the fact,) was not aware of its being on a wrong stamp, or that no objection was taken, and that, by consent, this instrument was admitted in evidence. In either case, I am of opinion that it is too late now to take the objection, or rather, that it was taken too late in the Court below; for when the objection was at length taken the defect of the stamp was remedied. Then the question is, whether the Court does

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its duty, with reference to the revenue law, if it allows the parties to cure such a defect by consent; and my opinion is, clearly, that it does not do its duty. But still, though the Court may have been wrong in not refusing the evidence in spite of the consent to its being received, that may not be a ground for depriving a party of his judgment. The English judges hold, that consent does not cure the defect of stamp, and that they are bound to protect the revenue; and your Lordships will plainly perceive that the revenue law would become a dead letter if the parties to an instrument might beforehand preclude themselves from taking advantage of the objection, allowing an unstamped instrument to be executed, and afterwards given in evidence, without objection; but the Court, to prevent this collusion of parties, say, we will protect the duties, and not allow the parties to waive. But I am of opinion that in this appeal, for setting aside the judgment below, given in consequence of the Court not attending to the want of stamp, it is too late to complain. So it would be at Nisi Prius here, which furnishes an analogy to the proceedings in this case. If a judge at Nisi Prius, contrary to what is understood to be his duty, and not protecting the revenue law, chose to receive an unstamped instrument in evidence—if he did it against the consent of the other party, that would be a ground for a new trial;—if he did it with the consent of the other party, it would be only a ground for saying that he did not do what he ought to do, but it would be no ground for a new trial. But, my Lords, I see no reason in this case to believe that the Court did act with the consent of the parties. We have no right to impute that error to the Court. For any thing that appears, the Court was not apprised of this defect in the instrument; and there is therefore not only no ground for reversing the judgment, but no ground for imputing neglect to the Court. I am bound, to believe that fact, which I have taken the best means in my power to ascertain, in the absence of counsel for the respondent.

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

EVANS, STEVENS, and FLOWER,—Solicitors.