[17*th July* 1837.]

JAMES CUNINGHAM, Appellant.—*Attorney General (Campbell)—Dr. Lushington.*

WILLIAM DUNCAN, Trustee on the Sequestrated Estate of JAMES DODS, Respondent.—*Sir Wm. Follett—Anderson.*

Bankrupt—Proof—Process.—A party lodged a claim and affidavit with the trustee on a sequestrated estate, and the bankrupt presented two petitions for approval of composition, which he founded on the concurrence of the claimant for the amount claimed, but they were refused—Held, 1. (affirming the judgment of the Court of Session) that the bankrupt was not, at the distance of twenty years, entitled to throw on the claimant the onus of proving the items of the claim to be correct, but that the presumption of law was, that it was correct; and, 2., that the claimant was entitled to maintain an action against the bankrupt notwithstanding the sequestration was still in dependence.

Process—Advocation.—Held, on an objection taken at the Bar, confirming Murdoch v. Wyllie, 10th March 1832, that advocation brings the whole process from the inferior Court to the Court of Session; and therefore, that where certain findings in a judgment had been pronounced in an inferior Court adverse to a defender, but he was assoilzied and the pursuer brought an advocation, the defender was entitled to argue the case as if adverse findings had not been pronounced.

2D DIVISION. Lord Medwyn. THE appellant prior to September 1811, carried on business as a nurseryman near Edinburgh, and in that

month his estates were sequestrated in terms of the bankrupt act. The late James Dods lodged a claim and affidavit in the sequestration for a debt which was thus specified :—

" Mr. James Cuningham, gardener, Comely Bank,

" 1810. To James Dods.

	£	s.	d.
" November.—To an account rendered for			
" wright work, &c. - - -	111	10	1
" 1811.—To fitting on sashes on the green			
" house done by the Portobello men,—			
" four days of a man, 17*s.* ; counter			
" checks furnished for ditto, 9*s.* 9*d.* -	1	6	9
" February 24.—To a second green house			
" and back shed, finished according to			
" letter given, and settled at - -	60	0	0
" To extra work on ditto, the same as above	1	6	9
	£174	3	7
" Received in three different payments,			
" 20*l.*, 15*l.*, and 5*l.* - -	40	0	0
	£134	3	7
" Expense on stamps and discount of bills	1	11	3
" Balance due - -	£135	14	10

The entry of this account in Dods's ledger corresponded with it in general terms, but at the date of the action which gave rise to this appeal his day-book had gone amissing. The claim was ranked by Mr. Knox the trustee.

On the 6th of December 1811, the appellant presented a petition to the Court, with consent of the trustee, for approval of an offer of composition of 2*s.* 6*d.* in the pound, and for a discharge. Appended to this

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petition was a report by the trustee, "that the following "creditors have lodged claims and oaths of verity, and "been ranked on the sequestrated estate:—James Dods, "wright in Edinburgh, 135*l.* 14*s.* 10*d.*," &c.; and the appellant in his petition stated,—"The petitioner "has obtained the concurrence of more than four fifths "of the creditors who have lodged their claims and "grounds of debt, both in number and value, as "appears from the report of the trustee hereto "annexed."

In consequence of Mr. James Dickson, one of the creditors, opposing the petition on the ground of the ability of the appellant to pay his debts, and for reasons affecting the trustee, the Court refused to sanction the offer, and dismissed the trustee. After a lapse of nine years the appellant presented a second petition to the Court, with consent of a new trustee, for a discharge, and to this petition there was appended a report in which Dods was again stated to be a creditor ranked for the above sum on the estate. This application was also opposed; and the Court refused it.

The appellant thereafter, in 1822, made an offer to pay his creditors 5*s.* in the pound upon their granting a discharge within three months from the date of the offer. It was agreed to by several of the creditors; and the estate of Dods having been in the meantime sequestrated, and the respondent Duncan appointed trustee, the appellant applied to him to concur, but he did not. Ultimately the composition was not paid, and the appellant has since remained undischarged.

In February 1831 the respondent, as trustee on Dods's estate, raised a summons before the sheriff of the shire of Edinburgh against the appellant, setting forth that

the appellant "is justly addebted, resting and owing to "the pursuer as trustee foresaid the sum of 134*l.* 3*s.* 7*d.* "sterling, being the balance of an account incurred by "the defender to the said James Dods for fitting up "green houses, per agreement, conform to copy of said "account herewith produced, and here held as repeated "brevitatis causâ;" and he therefore concluded for a decree against him.

In defence the appellant denied the debt, and pleaded, first, the triennial prescription; second, that he was entitled to a specification of the general charge of 111*l.* 10*s.* 1*d.*; and third, that if the respondent was a creditor he could only be entitled, in common with the other creditors, to such sum, in name of composition or otherwise, as the appellant's estate was adequate to afford.

The sheriff, on the 31st July 1833, after having allowed a proof, which was taken, pronounced this interlocutor:—"Finds it instructed, that the late James Dods "lodged a claim and affidavit for the debt libelled in "the defender's sequestration, and was ranked by the "trustee on the defender's sequestrated estate for the "sum of 135*l.* 14*s.* 10*d.*: Finds, therefore, that the "debt libelled is not prescribed, and repels the plea of "prescription: Finds that it was, however, competent "to the defender to call in question the said claim, and "that he is not precluded from doing so either by the "alleged agreement with the creditors, 24th January "1821, to accept a composition, or by the petition for "his discharge, the said petition having been refused "17th November 1821: Finds, that in calling in "question the claim libelled, the defender was and "is still entitled to demand a full specification of the

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" first item of the account libelled, such specification " not having been produced or recovered, though it " appears from Dods's affidavit to have been once ren- " dered the defender; therefore, before farther proce- " dure, ordains the pursuer within six weeks to lodge a " full specification of said first item."

Thereafter the sheriff, in respect the pursuer has declined to produce the specification ordered on 31st July last, " assoilzied the appellant, and found him " entitled to expenses, subject to modification."

The respondent then brought the case under the review of the Court of Session by advocation[1], and Lord Medwyn as Ordinary pronounced, on the 28th February 1834, the following interlocutor :—" The Lord Ordi- " nary, having resumed consideration of the debate and " advised the process, advocates the cause, and finds, " that the defender having been sequestrated in " September 1811, the late James Dods gave in a claim " and affidavit, dated 6th November 1811, claiming to " be ranked as a creditor for the sum of 135*l.* 14*s.* 10*d.*: " Finds, that on 6th December 1811 the defender, with " concurrence of his trustee, presented a petition to the " Court for approval of composition and discharge, " referring to a report by the trustee, in which report " the claim of James Dods for the above sum is stated, " and he is reckoned as a creditor both in number and " value, agreeing to the discharge: Finds, that this " petition having been opposed, the Court refused the " application on 12th May 1812, and removed the " trustee on account of his reprehensible conduct

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1 There was no counter advocation by the appellant as to the findings by the sheriff adverse to him.

" relative to said composition: Finds, that the defender " in the year 1821 again presented a petition, with " concurrence of his new trustee, for approval of a com- " position and discharge; and in the report of the " trustee James Dods is stated as one of the creditors " who have lodged grounds of debt with oaths of verity, " and been ranked on the sequestrated estate; and his " debt is stated at 135*l.* 14*s.* 10*d.*, and he is counted in " the number of creditors giving the statutory con- " currence to this application; but this application was " also refused by the Court, and the defender is still an " undischarged bankrupt: Finds, that the present " action was raised at the instance of the pursuer in " February 1831, when, for the first time, the defender " objected to the amount of the claim, not denying the " employment, nor pointing out any specific objec- " tionable articles in the account, but solely because " the claim commences with this article:—' 1810, Nov. " To an account rendered for wright work, &c., " 111*l.* 10*s.* 1*d.*,' and calling upon the pursuer to pro- " duce the items of said account: Finds, that there is no " book in existence kept by the late James Dods which " contains any account from the year 1806 to November " 1810; but it appears that they have probably been " destroyed without any blame imputable either to the " pursuer or the late Mr. Dods: Finds, that the pre- " sumption of law is, that an account was duly ren- " dered at the time, and this presumption is fortified " by the statement in the claim that it was so; and " further, the presumption is that this claim was only " admitted by the trustee, and founded on by the " defender after being examined, compared with the " account rendered, and found correct: Finds, that the

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" account having been so long unchallenged, and so often judicially founded on as correct, it cannot be supposed that the account books for so many years were destroyed for the purpose of excluding the means of verifying this item in the claim, and that it is now too late, under all the circumstances, to insist that the claim must be rejected because not supported by a full specification of the particulars taken from the tradesman's books, as it seems just that the onus of showing that the account is incorrect should fall upon the defender, to whom the account was rendered, and who has so long and so solemnly acquiesced in its accuracy, and founded upon it, but who points out no mistake or inaccuracy in it: Therefore alters the interlocutors of the sheriff in so far as they are submitted to review, and decerns in terms of conclusion of the libel: Finds expenses due, &c."

To this judgment the Court, on the 3d June 1834, adhered.[1]

Cuningham appealed; but, before proceeding to the merits, the respondent objected that as the sheriff had found that the claim had been duly ranked on the estate of the appellant, and had repelled the plea of prescription, and as the appellant had not brought any advocation, he was precluded from maintaining any plea inconsistent with these findings.[2]

In reply to this objection, the appellant maintained, that the advocation brought up the whole case to the Court of Session, and he was therefore entitled to plead the case in the same way as if the sheriff had pronounced no finding adverse to him at all.[3]

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[1] 12 S. D. & B., p. 678.

[2] Pollock v. Harvie, 3d June 1828, 6 S. & D. p. 913.

[3] Murdoch v. Wyllie, 8th March 1832, 10 S, D., & B., p. 445.

On the merits, in addition to the pleas in the Court of Session, the appellant insisted that it was incompetent for the respondent to raise and maintain the present personal action against the appellant pending the sequestration, and under the circumstances in which the action was brought.

To this it was answered, that the plea was founded on a very erroneous idea of the nature and effect of a sequestration. The purpose of the sequestration is to vest the debtor's estate in a trustee for the purpose of its being recovered, managed, sold, and divided by him among the creditors, and thereby to prevent the expense of separate measures for attaching that estate by individual creditors; but the act of vesting the estate in the trustee does not free the bankrupt of liability, any more than separate measures by individual creditors would free him. His person is still exposed to the diligence of creditors, and any estate which he might acquire subsequently to the date of sequestration may be effectually attached for his previous debts.

LORD BROUGHAM.—My Lords, this case stood over to give time for considering a point of practice in the Court below, raised at the bar on the part of the respondent.

The point arose in these circumstances. The case was brought by the respondent by advocation from the sheriff before the Court of Session; and one point having been decided against the appellant before the sheriff, the question was, whether they could deal with it all, or whether the Court of Session were not shut out from the consideration of that point in consequence of its not having been brought before them by advocation. This

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point of practice was brought under your Lordships consideration by an objection taken on behalf of the respondent previous to entering on the merits of the case. It appeared to be of sufficient importance to require that your Lordships should look into it further, and satisfy yourselves upon it, lest you should lay down a rule which might be inconsistent with a very important branch of practice, that of advocation, the process by which matters are brought from inferior jurisdictions to the Court of Session.

The case of Pollock v. Harvie, decided in 1828, was relied upon by the respondent in support of his position. Undoubtedly there is that case; and it would appear, from the decision in 1828, that the Court had proceeded upon some such view of the question; but it is not now law, as appears clearly in a subsequent case, that of Murdoch v. Wyllie, in the year 1832. The point was then brought under the consideration of all the judges of the Court of Session; the whole matter was discussed by the Court, and they unanimously came to the opinion, that Pollock v. Harvie was not law, and that the rule is, that the advocation brings the whole matter from the inferior to the superior Court, and that in the superior Court the whole matter may be adjudicated upon.

True it is that both those cases of Pollock v. Harvie and Murdoch v. Wyllie were upon questions of costs; but that makes no difference whatever; the principle is precisely the same; and I have satisfied myself since the case was last before your Lordships that the practice of the Court has been, as I state it, undoubted, subsequently to the fully considered case of Murdoch v. Wyllie.

My Lords, this was only an objection taken preliminarily, as it were, and before entering into the merits. Upon the merits we had little or no doubt, I may say, at the time, in favour of the respondent, but we postponed giving judgment till the point of practice had been more fully inquired into. Upon the grounds to which reference was made at the time of the argument I conceive it is fitting that your Lordships should be advised to affirm the judgment of the Court below upon the merits; and I am authorized to state that in this respect also there is no doubt on the mind of my noble and learned friend, the late Chief Justice of the Common Pleas, who is not present to-day. I have therefore humbly to move your Lordships that the interlocutor of February 1834, and the subsequent interlocutor, should be affirmed.

LORD CHANCELLOR.—My Lords, I entirely concur with my noble and learned friend; the only doubt that arose has been removed by further inquiries. I think the interlocutor should be affirmed, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

RICHARDSON & CONNEL—DUNN & DOBIE, Solicitors.