[11*th August* 1832.]

No. 15. ARCHIBALD SCOT, Appellant. — *Lushington.*

KER and JOHNSTON, Respondents. — *Lord Advocate (Jeffrey).*

Appeal — Process — (competent and omitted.) — Held incompetent to have an appeal, previously disposed of, reheard, on the ground that an interlocutor in the cause had been omitted to be appealed from, and had not been allowed to be considered at the previous hearing.

Sequestration.—Can a sequestration issue at the instance of some of the partners of a bank against one of their partners, on a debt due by him individually to the company?

THE facts of this case will be found in 5 Wilson and Shaw, 9th December 1830.

House of Lords. The appellant afterwards petitioned the House of Lords, setting forth, inter alia, That the petitioner, in March 1829, presented his petition of appeal to their Lordships against the interlocutor of the Lord Ordinary on the Bills of the 20th July 1827, in which his Lordship, having considered the petition, with the writs produced, granted warrant for citing the petitioner to appear, within ten days after citation, to show cause why sequestration should not be awarded against him; and the interlocutor of the First Division of the Court of Session, of the 11th December 1828, whereby their Lordships, before further procedure, appointed the petitioners (Ker and Johnston) to give in a minute, stating the grounds upon which they aver that the

respondent (the present petitioner) was a bankrupt at the period of the petition for sequestration being presented to the Court; and the interlocutor of the same division, of the 20th February 1829, whereby the Lords, having advised the petition for sequestration, with the revised cases, &c., repelled the objections stated to the application, sustained the title of the petitioners, and therefore sequestrated the whole estate and effects of the said Archibald Scot, in terms of the statute, appointed the creditors to hold two meetings within the Crown Inn, Langholm, &c. to choose a trustee, &c.: That the sequestration so awarded against this petitioner was at the instance of the Leith Banking Company, of which the respondents (Ker and Johnston) design themselves managers, and of which the present petitioner himself was, at the time in question, (as is expressly charged and admitted by the respondents in their pleadings,) one of the partners; and such sequestration was founded upon a debt of 1,011*l.* 15*s.* 7*d.*, alleged to be due by this petitioner individually to the banking company, that is to say, by a partner of the company to himself and the other partners of whom that company consisted: That this petitioner is advised, that in point of law no sequestration could be awarded against this petitioner, or can legally subsist, founded upon a debt under such circumstances, which debt, if due at all, being due from this petitioner individually to himself and the eleven other persons constituting the partnership in question, the sequestration is, in fact, a sequestration by this petitioner against himself: That the appeal came on for hearing on the 6th December last, but upon such hearing this petitioner was shut out from the benefit of the above-mentioned objection, because it then appeared

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that a certain other interlocutor in the said case had not been included in the petition of appeal, which was pronounced by the Court of Session upon the 2d December 1828: That the interlocutor so omitted was in the following words; "The Lords, having resumed consider-" ation of the cases given in by the parties, repel the " objection proponed to the title of the petitioners, and " appoint the cause to be put to the roll for advising:" That the agent in Scotland of this petitioner, by whom the said petition of appeal was prepared, being since dead, this petitioner is unable to ascertain whether such an omission to the said interlocutor in his petition of appeal arose out of inadvertence, or proceeded from an impression in the mind of the agent that it was not necessary to notice such interlocutor, inasmuch as the subsequent interlocutor above mentioned, which embraced the matter of the respondent's title, was included in the petition of appeal: That it further manifestly appears, upon reference to the interlocutor so omitted, and to the other proceedings in the cause, that the objection to the petitioner's title, repelled by the interlocutor so omitted, related only to the circumstance of the said banking company not having complied with certain requisites of the statutes 7 Geo. 4, cap. 46 and 67, and that the objection so repelled had no connection whatever with the particular objection herein-before stated: That this petitioner is only desirous of obtaining substantial justice and an equitable consideration of his case: That, on a fair accounting, it will be found he owes nothing to the banking company: That Scotch banks never discharge, whereby, after all this petitioner's property shall be taken from him, he will be left for the remainder of his life in the power

of the respondents: That by the sequestration (disclaimed by the other creditors) the estate will be involved in great expense: That all the petitioner's property is already secured, and he is willing to execute any further deeds in security, to his creditors: That under such circumstances the petitioner humbly submitted, that it would be an act of great hardship upon him if he should be subjected to the process of sequestration and all its injurious consequences; whilst it is clear that the respondents are not legally entitled to issue such process against the petitioner. The petitioner therefore prayed their Lordships, that, under the peculiar circumstances of this case, their Lordships would be pleased to recal the judgment pronounced, and to permit the petitioner to amend his petition of appeal, by inserting therein the said interlocutor of the 2d December 1828, and to order that the said appeal may thereafter be re-heard generally, or that their Lordships will be pleased to order the said appeal to be re-heard upon the particular objection above stated, and any others connected therewith, and to make such alteration in the said judgment as to their Lordships upon such re-hearing shall seem just; and that the petitioner may be heard by counsel upon the matter of this petition at their Lordships' bar, or before their Lordships' committee of appeals; and that further proceedings in the said process of sequestration in the Court of Session may in the meantime be stayed, or that their Lordships will be pleased to make such further or other order, &c. &c.

The petition was referred to the appeal committee, and thereafter the competency of the application was directed to be argued, and was argued at the bar. The

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leading arguments are stated by the Lord Chancellor in moving judgment.

LORD CHANCELLOR:—My Lords, in this case I apprehend there is so little doubt, that I should be disposed to advise your Lordships immediately to decide upon the present application, but that I think it may be desirable to look into the practice of the Court below, under the 6th George IV., cap. 120, and ascertain to what degree there has been a strict observance of the rules laid down there; and on that ground chiefly it is that I shall propose to your Lordships to postpone the consideration of this application. It appears to me, on the best consideration I have been able to give to the case, that if this House had heard it over again, and the appeal had included the interlocutor which is referred to in the petition, I should have felt it impossible to do otherwise than advise your Lordships to affirm the judgment of the Court below. The question, however, which is raised by this petition, is an extremely important one: it may be so in its result. I do not think it is likely that I shall alter my opinion; but to put it beyond even the possibility of the party being shut out from any remedy to which on the most mature consideration he may be considered to be entitled, I shall postpone finally craving your Lordships to proceed to judgment until I shall have considered the merits of this case, independently of the question now raised, which was never raised in the Court below, never brought under the notice of the judges who disposed of that case in the Court below, but for the first time presented at your Lordships' bar. I have already said what my opinion is; but for the purpose of

giving any chance, if chance there may be, of my altering that opinion, I shall now advise your Lordships to postpone dismissing this petition until I have looked further into the case.

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Lord Chancellor:—My Lords, an application was made to this House to re-hear this case, which had been already disposed of, and in consequence of this application your Lordships heard at the bar one counsel on each side. During that argument, a point was made at the bar, which had not been taken in the Court below, and which, upon the hearing of the cause, it was contended the party was not allowed to raise, in consequence of a certain interlocutor in the Court below not having been appealed from. That interlocutor was pronounced upon an objection taken to the title to pursue, and it over-ruled the objection so taken to the pursuer's title. That interlocutor was unappealed from. When the case was heard upon the petition for a re-hearing, it was argued upon the ground of the party being shut out from obtaining justice. Upon that occasion several matters suggested themselves. One was stated, namely, an objection arising upon the 11th section of the Scotch Judicature Act, in respect to the points to which the argument should be confined; and it appeared that an inquiry should be made, whether, in the practice that had prevailed since that act was passed in the courts in Scotland, there was such a deviation from the provisions of that act as enabled the parties to be let into fresh matters, after the record had been closed? I have made that inquiry, and obtained that information, and

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I am satisfied with the result. I am satisfied that no deviation from that act has been sanctioned by the practice, and that no laxity has been introduced in the practice of the Courts upon that subject, where the party has not in due time taken an objection. My Lords, this would have been fatal to this application, to be let in upon the present occasion, had that provision of the statute applied to a case like the present, which arises out of a sequestration issued by some of the partners of a banking house against another partner of the same house; but it is perfectly clear that this objection upon the 11th section of the statute does not apply to that proceeding. The other ground of objection is one taken by myself when the question first came on, and which was afterwards insisted on when it was in the second instance before your Lordships, and most ably argued at the bar. I have the more confidence in it, because, upon consulting most learned persons in the Court below upon the matter, in order to prevent anxiety in my mind, in advising your Lordships upon the decision of the question, I found that the objection then taken, upon its being mentioned to those learned persons (without any communication of the objection having been taken on the part of any of your Lordships), had struck themselves originally as being fatal to the present application; and that is the old established ground, which there is no getting over in this House,—either that the Court below dealt with that objection to the pursuer's title, in which case they repelled it; or if it is alleged that it was not an objection dealt with by the interlocutor, then it is not repelled; but still it was a competent objection, and omitted by the party. It was competent to the party to take the objection — it

was omitted; and upon that ground, if upon no other, emphatically in this place the objection ought not to be allowed to be taken; and when it was taken here, it was fit it should be met by that answer. I have the satisfaction of knowing that the same learned persons whom I consulted upon the practice of the Court, and whose opinion I have quoted upon the question of the competence of the objection in this stage, are of opinion that the objection founded on the circumstance of the sequestration issuing at the instance of some of the partners of a bank against one of their partners would not, according to the Scotch law, have availed the party, even if taken in time in that Court. That is a very satisfactory circumstance; but if it had been otherwise, and it had been an available objection, still, upon the grounds I have mentioned, there is sufficient to preclude the party being considered entitled to the relief sought. I therefore move your Lordships that the prayer of the petition be not complied with.

The House of Lords ordered and adjudged, "That the "prayer of the petition be, and hereby is refused."

GORDON — MONCRIEFF and WEBSTER, — Solicitors.