factor *loco tutoris* for the heir of entail in possession: Find no expenses due to either party, and decern."

Counsel for First Party—Kinnear—Lorimer. Agents—H. & H. Tod, W.S.

Counsel for Second Parties—Gloag—Rutherfurd. Agent—James Mason, S.S.C.

Wednesday, January 23.

SECOND DIVISION.

[Bill Chamber, Lord Adam.

COOPER *v.* BAILLIE AND OTHERS.

Bankruptcy—Recal of Sequestration under the Act 23 *and* 24 *Vict. cap.* 33, *sec.* 2—*Circumstances where Scotch Sequestration recalled.*

A party obtained sequestration of his estates in Scotland. A petition for recal was presented by a creditor under the 2d section of the Act 23 and 24 Vict. cap. 33, which provides for such a recal "if it shall appear to the Court of Session . . . that a majority of the creditors in number and value reside in England or in Ireland, and from the situation of the property of the bankrupt or other causes his estate and effects ought to be distributed . . . under the bankruptcy or insolvent laws of England or Ireland." The bankrupt had been a partner of a Bristol firm till two years before his sequestration. When he applied for that he resided in Scotland, and it was proved he had not come there for the purposes of sequestration. His debts were almost entirely English, and what assets he might have were situated there.—*Held*, in the circumstances of the case (*rev.* the Lord Ordinary, Adam), that the sequestration must be recalled, notwithstanding the fact that the majority of the creditors both in number and value, and who were English creditors, resisted the prayer of the petition.

On 20th June 1877 William Montague Baillie, described as "now or lately residing in Oban," obtained sequestration of his estates in the Bill Chamber in common form under the Bankruptcy (Scotland) Acts. His application was made with concurrence of Anderson & Macdonald, solicitors in Inverness, as creditors to the required amount.

The sequestration proceedings were remitted to the Sheriff of the county of Edinburgh, and on 2d July 1877 Mr Jackson, accountant in Glasgow, was elected trustee.

The sequestration was being duly proceeded with when this petition was presented under the Act 23 and 24 Vict. cap. 33, at the instance of John Robert Cooper, a creditor of W. M. Baillie, for the purpose of having the sequestration recalled in order that it might proceed in England.

Section 2 of the above statute was as follows:—"If in any case where sequestration has been or shall be awarded in Scotland, it shall appear to the Court of Session or to the Lord Ordinary, by a summary petition by the Accountant in Bankruptcy, or any creditor or other party having interest, presented to either Division of the said Court or to the Lord Ordinary within three months after the date of the sequestration, that a majority of the creditors in number and value reside in England or in Ireland, and from the situation of the property of the bankrupt or other causes his estates and effects ought to be distributed among his creditors under the bankruptcy or insolvent laws of England or Ireland, the said Court, in either Division thereof, or the Lord Ordinary, after such inquiry as to them may seem fit, may recal the sequestration."

The facts alleged by the petitioner as the grounds for his application (to what extent they were held to be proved will be seen from the opinions of their Lordships) were as follows:—W. M. Baillie had come to live at Oban, in Scotland, with his family, in March 1877. He was the son of Mr Baillie of Dochfour, in Inverness-shire, who was partner of a bank in Bristol, which traded under the names successively of Baillie, Cave, Baillie & Company, and Cave & Company. About the year 1851 Mr W. M. Baillie entered his father's bank as a clerk, and some years subsequently he was made a partner. Until 1874 Mr Baillie resided with his wife and family in or near Bristol, and took an active part in the management of the bank. During this time he also acted as his father's commissioner on the estate of Dochfour, but there was also a resident factor under him. In consequence of various speculations, which turned out unfortunately, the bankrupt, about June 1874, was obliged to leave the bank. From 1874 to 1876 the bankrupt resided abroad. He returned to England in 1876, and settled for some time in the neighbourhood of St Neots, Hants. The bill on which the concurring creditors Messrs Anderson & Macdonald founded their claim was dated St Neots, 29th July 1876, and addressed to the bankrupt at Leamington, Hants, and the bankrupt was also drawer of four bills for large sums dated from Bristol in October and December 1876. The bankrupt had shortly after this proceeded to Scotland, and at the time of these proceedings resided in Oban, as above stated.

It was further averred that all the bankrupt's debts had had their origin in England (with the exception of a small claim for house-rent in Oban), and that with two or three exceptions the creditors resided there. The debts amounted to £81,333, 12s. 5d., and the largest creditors were the Credit Foncier Company of England and the bankrupt's father.

The fifth article of the petitioner's condescendence (a record had been made up and closed) contained, *inter alia*, the following allegations:—"The bankrupt's liabilities consist entirely of borrowed money or money received in trust, with the exception of a few accounts due to solicitors and accountants. . . . . The bankrupt's object in trying to obtain sequestration in Scotland is to escape the provisions of the bankruptcy laws in England, to which he is subject. According to the Bankruptcy Act of England (32 and 33 Vict. cap. 71, sec. 48), the bankrupt cannot obtain a discharge without paying 10s. per pound, unless the creditors certify that his inability to pay that composition arose from causes for which he is not responsible. The English Court has no power to grant a discharge on any other terms. He has in view also to escape the 49th section of the same Act, which provides that the discharge of a bankrupt

'shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud;' and the provisions of the other Bankruptcy Act of the same year (cap. 62), which provides, *inter alia*, that a person shall 'be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour, if in incurring any debt or liability he has obtained credit under false pretences or by means of any other fraud.' It is admitted that all the shares and property of the bankrupt are in the hands of creditors, and that their value is much less than the amount of the debts for which they are pledged. It is denied that the sequestration was taken out at the suggestion of the Credit Company, and as to their present appearance in support of the sequestration the petitioner explains it as follows:—The Credit Company wished the sequestration recalled, and accordingly they lodged a minute in this process, in which they set forth 'that the Credit Company, London, being satisfied that it is proper and expedient that the estate and effects of the bankrupt, the said William Montague Baillie, should be distributed among his creditors under the bankruptcy or insolvent laws of England, they consent to the recal of the sequestration which has been awarded.' The bankrupt or his friends have induced the company to lodge another minute, in which they withdraw this without giving a reason. The reason in fact is, that the bankrupt and his friends have offered to pay the company 3s. 6d. in the pound on their whole debt without deducting the value of their securities, while the other creditors shall be offered in the sequestration a composition of 3s. 6d. per pound, according to the provisions of the Scotch Bankruptcy Act—that is, 3s. 6d. a-pound upon their debts after deducting the value of their securities."

Most of the bankrupt's creditors were anxious that the sequestration should proceed in Scotland, and lodged answers to that effect in the petition. The claims of the respondents in the petition who desired that the sequestration should proceed in Scotland amounted to £67,442, 9s. 10d., while the claim of the petitioner only amounted to £5492. It was stated at the discussion by the respondents' counsel that Mr Baillie senior, the bankrupt's father, had promised to pay to all the creditors a composition of 3s. 6d. in the pound if the sequestration were allowed to proceed in Scotland.

The bankrupt denied an averment by the petitioner to the effect that there were no assets of any description in Scotland, and explained that he had an asset in Scotland, consisting of a claim against his father for arrears of interest upon a provision of £10,000 under his marriage-contract. The facts in regard to that asset seemed to be that the bankrupt's father in the said deed provided a bond of £10,000, in favour of certain trustees in trust to pay the bankrupt the interest for his support and maintenance "during his life, or until he shall become bankrupt, or take the benefit of any Act for relief of insolvent debtors, or assign the said fund for the benefit of his creditors, or attempt to do so, or shall compound with his creditors, or do or suffer any act or thing whereby he will be deprived of the absolute enjoyment of the said income or any part thereof." The deed then provided "that in any of these events the trustees shall hold the interest for behoof of the bankrupt, his wife, and children, in any proportions they please." This claim was not in the bankrupt's first state of affairs. In the second it was mentioned, but no amount was stated, and at the same time he represented himself as debtor to his father for £28,000.

After various procedure the Lord Ordinary (ADAM), on 18th December 1877, pronounced an interlocutor refusing the petition. His Lordship appended the following note:—

"*Note.*—The Lord Ordinary is of opinion that this petition must be refused.

"It is not proved that the bankrupt came to Scotland for the purpose of obtaining a Scotch sequestration, and it is not proved that he went to reside in Oban for the purpose of concealing himself from his creditors, or that when there he endeavoured to do so.

"It is true that the majority of creditors in number and value reside in England, but they are, for obvious reasons, desirous that the sequestration should proceed in Scotland.

"It is not proved that the consent and approval of the creditors to this course has been obtained by any undue preference being either granted or promised to them.

"In these circumstances, it has not been made out to the satisfaction of the Lord Ordinary that the bankrupt's estate and effects ought to be distributed among his creditors according to the bankruptcy or insolvency laws of England.

"As regards expenses, the Lord Ordinary does not think that there was any necessity that the respondents should have been represented by separate agents and counsel. His intention is that the respondents should get expenses on the same footing as if they had combined in a joint defence, and in that case the expense of two counsel would have been incurred."

The petitioner reclaimed.

Argued for him—Under the statute there are two requisites necessary in order that a sequestration should be recalled. Both these existed in this case.

Authorities—Act 32 and 33 Vict. cap. 71, secs. 48 and 49; *Haines, &c.* v. *Shaw*, Jan. 31, 1862, 24 D. 383; *Moses, &c.* v. *Gifford*, July 12, 1866, 4 Macph. 1056; *Smith, &c.* v. *Rischmann*, Nov. 6, 1869, 8 Macph. 100; *Joel* v. *Gill*, June 10, 1859, 21 D. 929.

Argued for the bankrupt—The matter was in the discretion of the Court. The bankrupt's father offered 3s. 6d. in the pound of composition if the sequestration was permitted to proceed in Scotland. The expediency therefore was to allow it to proceed instead of going to England, when the creditors would get nothing.

Argued for Credit Company (respondents)—The sequestration being here, it lay upon any creditor who wished to remove it to show cause. This was not a case where the bankrupt merely came to Scotland for the purpose of getting sequestration, and in this respect it was different from the cases quoted. Besides, all the creditors except the petitioner wished it to stay here, knowing it to be their only chance of a dividend. The title of the Credit Company could not be ob-

jected to, because it is not possible to get behind an *ex facie* good title.

Authorities—*British Linen Company* v. *Gourlay*, March 13, 1877, 14 Scot. Law Rep. 416; *Royal Bank* v. *Purdom*, Oct. 26, 1877, *ante*, p. 13.

At advising—

Lord Justice-Clerk—There are circumstances in this case which cause me to view with regret the decision I have come to, that the Lord Ordinary's interlocutor must be recalled. I say I have come to this decision with reluctance, because (1) the great majority of the creditors desire that the sequestration should proceed in Scotland, and (2) because one chance, if not the only one, for the creditors getting any dividend is, that the sequestration should go on here. Besides, I am not prepared to say that Mr Baillie came to Scotland for the purpose of having his sequestration carried through here, and in this particular the case is not in the same position as those of *Joel* and *Moses*, referred to; and if the case had turned upon that point, I do not think these precedents would have ruled it.

But looking to the facts of the case, what do we find? This gentleman was an English trader—a banker in Bristol—and has been so since 1851, when he entered the Old Bristol Bank as a clerk; he became a partner in 1863, and continued so until he got involved in his present difficulties. The fact that he was commissioner on his father's estates in Scotland is of no account; he only paid a yearly visit to Scotland, and had resident factors under him. The fact is, he was an English trader, and nothing else. While in Bristol he incurred debts to the amount of £81,000, and he has now no assets to meet them. There are a number of securities of various kinds, but it is said, and I have no doubt correctly, that they are of no value. The result is, that, as the case comes here, we have an English debtor, whose debts were incurred in English trade, and who, as far as we can see, has no funds to distribute anywhere. There is a sum of £10,000, to which I shall afterwards refer. The petition for sequestration was duly presented in this Court; sequestration was granted, and was proceeding when this petition was presented under the Act 23 and 24 Vict. cap. 33, sec. 2. This Act requires the concurrence of two general elements. Manifestly it is not in the ordinary case a desirable thing to recal a sequestration, but power is given to the Court to do so if (1) a majority of the creditors in number and value reside in England or Ireland; and (2) if it shall appear to the Court, from the situation of the property of the bankrupt or other causes, that the estate should be distributed under the insolvent laws of England.

In regard to the first point, it is quite clear that the majority of the creditors both in number and value are resident in England. In regard to the second point, the question is, whether it appears now to us desirable to remove the sequestration? Now, as to the effects or property belonging to the estate, it appears to me that there are none such, tangible at all events. There is an alleged claim of £10,000 against the bankrupt's father under his marriage-contract, but as to this there is a question, and it is doubtful whether it is a claim that can be sustained. There are securities, and if they are of any value it is desirable that they should be distributed in England.

But it is said that there is, first, a claim against the bankrupt's father, Mr Baillie of Dochfour; and, second, that Mr Baillie (the father) is willing to pay a dividend of 3s. 6d. in the pound by way of composition if his son's sequestration is allowed to continue in Scotland. Now, in regard to the first, although it is not our province to decide whether there is a claim or not, my strong impression is that it has not been clearly made out that there is such a claim. I rather think, as far as we have seen, that there is no claim; but even if there was, I do not see that it makes any difference. The real question in this case is in regard to the second point. The only object in proceeding with the sequestration is to enable the bankrupt to obtain a discharge here, and we are told so plainly. The meaning of that is, that by the law of England, under which the money was lent, Mr Baillie could not obtain a discharge without paying 10s. in the pound, unless the creditors would all agree in saying that his inability to pay arose from causes for which he is not responsible, and the meaning therefore of the anxiety to have the sequestration carried out in this country is to enable Mr Baillie to get a discharge under the law of Scotland. I say nothing as to the comparative merits of the two systems. The law of England, as it stands, was doubtless enacted for good reasons, and we are not to hold out the practice of this Court as affording an opportunity of evading the laws of England. My opinion is that the interlocutor of the Lord Ordinary must be recalled.

Lord Ormidale—I am of the same opinion, and very much on the same grounds; and I must say that I have arrived at it without much difficulty.

If we are to recal a sequestration at all, I think this is such a one as should be recalled. The remarks of the Lord Justice-Clerk (now the Lord President) as reported in *Brandon* v. *Stephens* (9th Jan. 1862, 24 D. 263) are completely applicable to the circumstances of the present case.

On the showing of the bankrupt himself every word of what the Lord Justice-Clerk there says applies here. It was acknowledged during the argument that the purpose of the bankrupt was to avoid the more stringent provisions of the English law, and no favour should in my opinion be shown in such a case.

I think Mr Baillie was an English bankrupt, and nothing else. The whole of his business life was in England from 1853 till lately, and the whole of the transactions that are now brought under the consideration of the Court occurred in England. Besides, substantially all his creditors are in England, for those who are Scotch obtained their claims in England—all except Cumstie, the person who let the house in Oban—and his claim is only for £50. So the case is that of a man incurring debts in England to English creditors, and these fall, in my view, to be judged by the law of England. So that we find the specified conditions of the statute entirely fulfilled.

Bnt there is another very serious reason for recalling this sequestration. According to English law the bankrupt couid not get his discharge without conditions much more stringent than

those in force here. Now, as to whether the English system is preferable to the Scotch system I will not say a word; but I think the Scotch Courts would play a very strange part if they assisted the bankrupt to evade the English law. But it was further said that an undertaking would be entered into before the Court here that 3s. 6d. in the pound would be paid as composition if the sequestration remained here. That, in consequence of some observations which fell from the Court, was departed from, and I think wisely, because it was not for the bankrupt to transact with the Court on such a subject as that; it would be unbecoming on the part of the Court to attach any weight to such an offer. But then it has been said—and that had some influence with me at the time—that this proposal would be made by the bankrupt at a meeting of creditors. But the conclusion I have come to is, that this is in the future, and it is impossible for us to proceed upon a prospective contingency which may or may not occur. Therefore I disregard this altogether, and I may say that I do not like the complexion of this proposed transaction at all. I do not like the idea of the Court not sending the proceedings to England in order to entertain such a proposal from the bankrupt. I have therefore no hesitation in saying that the sequestration should be recalled.

Lord Gifford—I am of the same opinion as your Lordships, but not without hesitation.

I have arrived at this decision with regret, for it is against the wishes of the great majority of creditors. Still, I must go upon principle, and this case raises a very important one. It is different from all the cases quoted, for it cannot be said that the bankrupt came to Scotland for the express purpose of obtaining sequestration.

The first requisite under the statute is present here undoubtedly, as there is a majority of creditors resident in England; and not only is that the case, judging from their residence, but if we look deeper we find that all the debts, except Cumstie's, are English debts. In short, it is an English bankruptcy, and all the obligations of the debtor have been contracted in England. Next, as to the situation of the property of the bankrupt. It is said that the only asset is situated in Scotland, viz., the claim against Mr Baillie of Dochfour. But this, even supposing it to be the case, is not of much importance when we find that all the bankrupt's assets as a trader (and I do not think these assets ceased to be his property although they were impledged) are in England.

The statute, besides specifying these two requisites to which I have alluded, goes on to say "or other causes," and this allows a wide latitude to the Court. What are the "other causes?" I rather think this case comes under that category of sequestrations the leading purpose of which is not to distribute the bankrupt's funds, but to obtain his discharge, and in regard to this I think we are entitled to look at the provisions of the law of England, and we find that it is different from that of Scotland, as has already been explained by your Lordships. Now, we must hold that the provisions of the law of England in this matter are wise, and we cannot encourage people to come to Scotland to get rid of them. We further find, from a consideration of the law of England, that if a man has incurred debt by means of any fraud or breach of trust, he cannot obtain his discharge by paying the 10s. in the pound, without which composition he cannot in any case get his discharge. I do not say this applies to the present case, but we are bound to take such circumstances into consideration. I think they fairly fall under the "other causes" referred to. Especially are we bound to consider such circumstances when we find that the only reason why the sequestration should go on here is that a composition of 3s. 6d. in the pound has been offered by the bankrupt's father on condition of his getting his discharge. It seems to me that an English sequestration should go on in England and a Scotch in Scotland. It would never do for the Courts of this country or of England to hold out inducements to debtors of the other country to come and get sequestration. I think this is an English bankruptcy, and should be carried out in England, and though we are going a little further than any of the other cases, I think we are only carrying out the principle of the statute.

The Court accordingly recalled Lord Adam's interlocutor, granted the prayer of the petition, recalled the sequestration, and prohibited any further procedure therein and appointed the judgment of recal to be entered in the Register of Sequestrations and marked upon the margin of the Record of Inhibitions, &c.

Counsel for Petitioner (Appellant)—Dean of Faculty (Fraser)—Rhind. Agent—William Officer, S.S.C.

Counsel for majority of creditors—Asher. Agents—Lindsay, Paterson & Co., W.S.

Counsel for W. M. Baillie—Mackintosh. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Credit Company—Maclean. Agents—W. & J. Burness, W.S.

Friday, January 25.

FIRST DIVISION.

COWAN, OFFICIAL LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY, PETITIONER (GOWANS' COMPENSATION CASE).

(*Vide ante*, December 13, 1877, p. 195.)

Public Company—Liquidation—Compensation where Calls on Shares sued for.

A creditor who is also a shareholder of a company that is in liquidation cannot set off the debt due to him as a creditor against the debt due by him as a shareholder.

In a petition by the official liquidator of a limited company to settle a list of contributories, *held* that a shareholder who was also a creditor of the company for work done was not entitled to plead the debt due to him in compensation of the calls on shares due by him, even where these calls had all been made previously to the winding-up, and the plea of compensation had been stated, though