

Oct. 15, 1831.

question being as to the homologation of the trustees, and not as to so acting, it is sufficient to say that the very circumstance of the bankrupt being dead at the time takes away from the conduct of the trustees, in not so applying for the recall of the supersedeas, any thing amounting to confirmation or homologation of what had been done in Mr. Mackenzie's absence, *ultra vires*. As to the other part of the case, it amounts to little or nothing. The only point upon which I entertain any doubt is upon the subject of the cross appeal; and without looking into the case a little farther, I am not prepared to advise your Lordships to affirm that judgment. As to the original appeal, I humbly move your Lordships that the judgment of the Court below be affirmed; but in a case of this kind I shall not advise your Lordships to affirm it with costs.

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

JOHN MACQUEEN—SPOTTISWOODE and ROBERTSON,—Solicitors.

JAMES M'GAVIN, (Trustee for the Creditors of John Stewart and Co.) Appellant. No. 62.

JAMES STEWART, Respondent.

*Appeal.*—An order for the examination of three parties before a jury discharged, in respect of two of them being dead.

IN July 1830, (Vol. II. p. 536,) the House of Lords remitted this case (which related to an accounting between partners) to the Court of Session, with a direction to submit it to a special jury, and a recommendation that the three partners should be examined on oath before the jury.\*

The agents for the parties now attended by order of the House, and being called to the bar, and questioned by their Lordships, stated, that two of the partners on one side, directed to be examined upon oath, were dead.

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\* See 9 S. D. B. 17, ante procedure on a motion to apply the judgment in the Court of Session.

Oct. 18, 1831.

LORD CHANCELLOR.—My Lords, there can be no doubt whatever as to the proper mode of proceeding in this case. When your Lordships made the order directing that the parties should be examined upon oath, your Lordships meant that they should both be examined, or neither. It would be unjust to examine one of them, without both being examined. But two of the parties intended to be examined are dead. This was a fact unknown at the time of your Lordships' order. I have conversed with my noble and learned friend who attended the hearing of the cause upon the subject, and know his opinion; and I will now move your Lordships that the clerk of the House do strike out the direction to examine the parties.

Ordered accordingly.

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