No. 44.

JOHN JOPP, Petitioner.—*Rutherfurd—Hector.*
SIR ANDREW LEITH HAY, Respondent.—*Maitland—Handyside.*

Bankruptcy—Sequestration.—1. Held that a person was liable to sequestration for a personal debt, unconnected with trade, contracted while he was a trader, though he had ceased to be so, without owing any trading debts prior to the date of the bill which he granted for the debt, upon which the application for sequestration was founded. 2. Circumstances in which held that a creditor was not barred from applying for sequestration of his debtor's estate, though he had agreed in acceding to a trust to suspend all diligence till the final conclusion of an action, which it was the object of the trust to have tried for behoof of the creditors, and that action, though finally decided in the Court of Session, was still open to be appealed.

Dec. 22, 1845.*

1ST DIVISION.
Ld. Robertson.
N.

PETITION, under the Bankrupt Act, by a creditor for sequestration of the estates of his debtor, opposed under the following circumstances:—

Sir Andrew Leith Hay became a partner, in 1825, of an insurance company, and also of a banking company, in Aberdeen He sold out, and ceased to be a partner of the former in 1827, and of the latter in 1833. It did not appear that he had ever in any other way been connected with trade. On 22d March 1836, he granted a promissory-note for £3177:10:1, payable on 20th June 1837, to Alexander Jopp, Aberdeen, "on account of his late father's representatives." It appeared that the father died in 1829. This note was indorsed by Alexander to his brother, John Jopp, W.S., who in 1841, along with certain other creditors of Sir Andrew Leith Hay, subscribed a deed of accession to a

* Decided 14th.

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trust-deed executed by him, whereby he conveyed his whole estates to trustees, for the purpose of enabling them, for behoof of the creditors, to try the validity of the entail under which he held them, the creditors acceding binding themselves to supply the necessary funds for that purpose—to use their endeavour to obtain the accession of all the creditors, and, finally, consenting and agreeing for themselves, "respectively and individually, to suspend all diligence, real or personal, against Sir Andrew Leith Hay, and the said lands and others, until the final conclusion of the said action, or whilst the same is *bona fide* defended and insisted in by an heir of entail contained in the destination expressed by the said deed of entail." Those creditors who acceded formed a very small minority of the whole.

An action was accordingly instituted, which resulted in the entail being sustained by a unanimous judgment of the Court on 20th December 1842. At a subsequent meeting of the acceding creditors, they refused to supply the funds for an appeal, and resolved that no further proceedings should be had under the trust and deed of accession. On 29th November 1844, Sir Andrew Leith Hay, having failed to induce the creditors to prosecute an appeal, caused his agent to intimate to his opponents that he meant to do so himself.

In December 1840, Sir Andrew Leith Hay granted his concurrence, and became a party to a deed granted by the North of Scotland Assurance Company, whereby they assigned debts which they held against him to the extent of £13,000 to Duncan Davidson, and conveyed Sir Andrew's estates to him in security. Upon this deed, Davidson raised a process of maills and duties, in which he obtained decree in July 1844.

In November following, John Jopp, as creditor in the promissory-note which he held, presented a petition, under the Bankrupt Act, for sequestration of Sir Andrew's estates, upon the allegation that he "is, or has been, a banker, and an underwriter or an insurance broker in Aberdeen," and is "notour bankrupt."

Answers were given in for Sir Andrew Leith Hay, objecting, 1st, to the vagueness of the description in the petition, "is, or has been, a banker," &c.;[1] 2d, That the debt of the petitioner was neither a trading debt, nor contracted while the debtor was a trader, and that, therefore, sequestration could not be awarded upon it;[2] 3d, That the petitioner was barred from applying for sequestration by the obligation he came under in acceding to the trust, to suspend all diligence until the final conclusion of the action respecting the entail;—it being intended to ap-

[1] Ireland v. Whyte, Nov. 24, 1842, (ante, Vol. V. p. 173.)
[2] Ogilvie v. Simpson, March 4, 1837, (15 S. 746.)

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peal the judgment in that action, it could not be held as finally concluded.

In support of his application, the petitioner contended,—1st, That the very words of the Bankrupt Act had been used in the description in the petition; 2d, That his debt, though not a trading debt, was contracted while the debtor was a trader, the bill having been granted for a debt due to the petitioner's father, who died in 1829;[1] 3d, That the trust and accession were at an end, by the judgment of the Court of Session in the action, and the creditors refusing to carry it further; and, at all events, a material change of circumstances had occurred by the truster's own act, enabling a non-acceding creditor to do diligence against the estate.

The Lord Ordinary reported the case to the Court.

After hearing counsel, the following opinions were delivered:—

Lord President.—I think there is nothing in the critical objection to the form and shape of the application, which appears to me completely within the Act of Parliament. Then, as to the origin of the debt, it is impossible to look at the decisions without seeing that there is nothing in the objection founded upon that. It is sufficient that the debt is coeval with trading. The last objection is of more importance—that this application is barred by the trust-deed, to which the applicant was an acceding party. It has been long settled that a trust-deed in favour of creditors is no bar to sequestration, and the question here therefore is, whether there are clauses in this particular deed which bar Jopp, an acceding creditor, from making the application. Out of one hundred and thirteen creditors whose names appear in the deed, only thirteen accede to it, Jopp no doubt being one of them. I think it would be a serious matter to hold that no change of circumstances can take place which will warrant the withdrawal of accession when there is such a number of non-acceding creditors. If so, the whole estate for which the trust was granted might be swallowed up in the mean time, the creditors who acceded being barred, whatever they might see going on, from taking any step for the protection of their interests. The non-acceding creditors might get into possession in any of the various ways allowed by the diligence of the law, while those who acceded could not move to help themselves. That is a proposition which I cannot sanction. The object of the trust was to try the validity of the entails at the instance of trustees for creditors, they agreeing "to suspend all diligence, real or personal, against Sir Andrew Leith Hay, and the said lands and others, until the final conclusion of the said action, or whilst the same is *bona fide* defended and insisted in by an heir of entail contained in the destination expressed by the said deeds of entail." It may be a question whether an application for sequestration is diligence, in the sense of this clause. But to pass by that, what I am moved by is the change of circumstances which has taken place by the act of Sir Andrew Leith Hay himself—the deed granted with his concurrence—

[1] 2 Bell's Com. 316; Dick v. Lyell, Jan. 28, 1815, (F. C.;) Grant v. Baillie, May 20, 1830, (8 S. 778.)

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which put Davidson in a situation, with reference to accumulated debts to the extent of £13,000, to do diligence against the estate, and enable him to carry it off if it should be found to be held in fee-simple. I hold that to be such a breach of the *bona fide* object of the trust, which certainly implied that the debtor was to do nothing to affect the rights of the acceding creditors, as to bar him from founding upon any clause in it against them. I think that of itself affords an answer to the defence on the trust deed. On the whole, I cannot say that Sir Andrew Leith Hay is not liable to sequestration.

Lord Mackenzie.—I concur. In regard to the right contemplated to be granted to a particular creditor, no doubt it is more favourable than if the debtor had spent the money, but still it is objectionable. I have no doubt that it was never contemplated that sequestration should only be granted for trading debts. Being a trader, renders a party liable to sequestration, and then his own private debts are looked to just as much as any others. A party may be a trader, and have no trading debts; he may be a partner of a large banking concern that has no debts, but being a partner renders him liable to sequestration for his own debts.

Lord Fullerton.—I am of the same opinion. There is nothing in this particular trust or deed of accession to exclude the rule, that a trust for creditors does not prevent sequestration. That principle must apply to the last clause of the deed of accession, as well as any others. That clause might have prevented them beginning diligence against the estate, while none of the other creditors were touching it; but that is not the case here, and there is, therefore, nothing in the clause to prevent the application of the rule.

In regard to the other points of the case, I agree with your Lordships. It cannot be maintained that the debts must be trading debts. A person who is only a partner may be sequestrated, though the company is quite solvent. That is quite conclusive on the point. In the case of Ogilvie, the Court took a very fair view, holding, that if a party can show that he has extinguished all the debts for which he might have been sequestrated when a trader, he may start a new course. But that is clearly not the case here.

Lord Jeffrey.—I concur. I see no difficulty in the point last spoken to. The import of the decisions is, that a party is liable to sequestration for debts prior to, or coeval with, trading, though quite unconnected with trade. The party being by personal description a trader, is liable to be sequestrated for all debts. If debts are connected with the period of trading, they are equally the subject of sequestration with trading debts. The only difficulty is upon the form and object of the trust deed. I view it as a mere agreement among certain creditors to contribute the funds for trying a law question. I think there ought to be a concurrence of all the creditors, or at least a tacit concurrence, *non agendo*, to bar sequestration. Without going into that, the trust here is solely a contract to pay the expenses of a law suit by certain creditors, and to do all they can to prevent the attachment of the estate by other creditors during its dependence. When they on very good grounds—a unanimous judgment of this Court—refuse to appeal, I think they put an end to the arrangement. They say then,—we give up this chance of obtaining payment, and take the other. Then there was a violation of the compact by the truster himself. He takes the creditors bound to do nothing to attach the estate during the dependence of the lawsuit, and he himself enables

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a non-acceding creditor to obtain a preference over it. I think the objections to sequestration ought to be repelled.

THE COURT accordingly remitted to the Lord Ordinary to award sequestration, and proceed further in common form.

JOFF and JOHNSTON, W.S.—J. H. BURNETT, W.S.—Agents.