Thomas Biggart, has a right of servitude over the road libelled for its whole extent from the parish road from Dalry to Blair westward to the point A on the plan referred to in the summons, for the use of his property lying to the southward of the said servitude road: Find and declare that the said defender was not and is not entitled to perform any operations on the said servitude road to the effect of substantially altering the nature or level of the said road or otherwise to the prejudice or injury of the pursuers, but that he is entitled to perform such operations thereon as may from time to time be necessary for keeping the same in an efficient state of repair, and find no sufficient ground for ordaining him to take up and remove the slag or other materials already laid by him on the said road: Find and declare that the said defender was not and is not entitled at his own hand to open up or cut trenches in the said servitude road or the said parish road for the purpose of laying pipes, but find in the circumstances no sufficient ground on which to ordain him at the instance of the present pursuers to take up and remove any gaspipe already laid by him: Find and declare that the said defender was and is entitled to make openings in the wall running along the south side of the said servitude road for the purpose of giving access to his said property with or without gates, and that he was and is entitled to take down the said wall to such an extent as to enable him to erect offices or other buildings on his own property on the line of the said wall, but in regard to the continuation of the said wall westward from the point A to the point B on the said plan, and which does not run along the said road, Find and declare that the defender is not entitled at his own hand to make openings therein so as to give access from his own ground to the ground on the north side of said wall, sold by him to the heritors for the purpose of being added to the manse grounds: Find and declare that the defender is entitled to require and insist that the hedge and trees on the north side of said servitude road shall not be allowed to protrude on or over the said road so as to interfere with the full use thereof, but that the defender was not entitled, at his own hand, to cut the said trees and hedge in the manner in which he is proved to have done: Find and declare, that the pursuers are not entitled, without consent of the defender, to erect a gate on the said servitude road at or near to its junction with the parish road: Reserve to all parties concerned their right to apply to the Judge Ordinary of the bounds to obtain authority for performing any operations on the said road or hedge as to which they may not be agreed, and to any other or further effect than may be comprehended in the before written findings, dismiss the action, and decern: Of new, find the defender entitled to expenses in the Outer House, subject to modification: Further, find the defender entitled to expenses since the date of the Lord Ordinary's interlocutor: Allow an account to be given in, and remit to the auditor to tax the same when lodged, and remit to the Lord Ordinary to modify the expenses incurred in the Outer House, and to decern for the expenses of both Courts. "DUN. M'NEILL, *I.P.D.*"

Agent for Pursuers—John Henry, S.S.C.
Agents for Defender—Duncan & Dewar, W.S.

Tuesday, Jan. 29.

SECOND DIVISION.

DIXON *v.* JACKSON.

Trade Mark—Interim Interdict. Circumstances in which, in a question of infringement of a trade mark, interim interdict granted.

This is a note of suspension and interdict presented by William Dixon of Govan Colliery, against Thomas Jackson, iron-master, Coats Iron Works, Coatbridge. The object of the action is to have the respondent interdicted from the manufacture at his works of bar iron stamped or branded "Coats" with a star immediately following—thus, Coats*—on the ground that the trade of the complainer in "star iron" is injured by the respondent assuming the said mark. The Lord Ordinary passed the note to try the question between the parties; "but having regard to the terms of the complainer's price-list, in which complainer's iron is entered as stamped—not simply with a star, but as 'Govan *'—the Lord Ordinary did not think that the use on the part of the respondent of the mark 'Coats *' was *ex facie* so clear an adoption of a trade mark belonging to the complainer as to entitle him to an interim interdict."

The complainer reclaimed.

YOUNG and THOMSON appeared for him.

CLARK and GLOAG for the respondent.

At advising,

LORD JUSTICE-CLERK said that the question to be tried under the note was whether the mark of a star used by Dixon was such a trade mark as could obtain the protection of law. That was a question of some delicacy, on which he gave no opinion at present. But, then, the complainer asked interim interdict, and that involved other considerations than those necessary to determine the main question. In disposing of such a question, it was necessary to look at both sides. Now, Dixon said that he had been in use to put the star mark on his iron for many years; that the mark was well known in the foreign trade; and that it was of importance to him that the mark should not be used by others so as to cause confusion in the market. This was not admitted by the respondent, but it was evidently true to some extent; for, if the star was not significant of something, it was not easy to see why it should be used by the respondent. It might therefore be assumed that it had some signification. Then the complainer averred that no other master had ever used this mark, and that there was no other star iron in the trade. This was not admitted either, but the respondent did not specify any other bar iron similarly marked, as he should have done if it were the case. All he said was that for some time he had contemplated the use of some mark, and that it was common in the trade to use a crown, a star, a horse-shoe, or some such mark. It was clear, therefore (1), that Dixon had used the mark for some time; (2), that it had some signification in the market; (3), that no one else had used it; and (4), that the use of it by the respondent was recent, sudden, and unexplained. The reason he gave for using it was that he recently got an order from an iron merchant for a small quantity of bar iron, with a request that the iron should be marked with a star in addition to his usual trade mark. Now, this was obviously the first time when he used the star mark at the request of the iron merchant, and no explanation was given by either party of the object of using it. In these circumstances the respondent was in an unfavourable position in the present question. This was very like a device of an unfair kind to make use of a trade mark used by a rival, to the injury of that rival; and as no injury could arise to the respondent by granting interim inter-

dict, but very considerable injury might result to the complainer by refusal of it, the true equity of the case demanded that protection should be given in the meantime.

Lord COWAN had some hesitation, but did not dissent.

Lord BENHOLME concurred, observing that the main use of interdicts was to stop changes, and not to allow alterations in the state of possession while the question between the parties was being tried.

Lord NEAVES—I cordially concur. Without anticipating the merits there are some considerations in the case very favourable to the complainer and suspicious in the conduct of the respondent. If the respondent had used the word "Govan" alone, that would have been a clear fraud, which we would very soon have put down, but the star may be such an integral and substantial part of the complainer's mark as to entitle him to the same redress. He alleges that it has been used by him for many years, which I think we may assume, and that his iron is known abroad as star iron. Now, if that is so, one can easily see how the Coats bad iron marked with a star might be passed off as the Govan good iron. The want of the word Govan might easily be explained away. Then the respondent never used the star until the other day, and what fair or legitimate object could he have in adopting that mark? His iron is very inferior to the complainer's star iron, and one suspects something wrong at once when he begins to use the star. Then the respondent tells us that a Mr Hertz first ordered the iron to be stamped with a star. Now, assuming this gentleman to be an honest man, his ordering iron to be marked in this way is, to say the least of it, very suspicious. He wants inferior iron stamped with the mark of a well-known superior iron. We have no explanation of Mr Hertz's reason for wishing this done, and it looks like a device for injuring in the market the complainer's star iron. Now, pending the trial of the question it is quite plain that the complainers may suffer much injury by the interim interdict being withheld, but that the respondent cannot possibly suffer any injury by its being granted. It cannot be assumed that Mr Hertz is such a very unreasonable man as to withdraw his custom from the respondent unless he agrees to commit a breach of interdict.

The note was accordingly passed and interim interdict granted.

Agents for Complainer—Melville & Lindsay W.S.

Agents for Respondent—A. G. & W. Ellis, W.S.

BALLANTYNE *v.* JEFFREY AND BARR.

Bankruptcy — Recal of Sequestration — Voucher of Debt—Competency. A sequestration granted on the petition of the bankrupt with a concurring creditor recalled as incompetently awarded, in respect the creditor's account was not sufficiently vouched according to the requirements of the Bankrupt Act.

On 27th September 1866, John Jeffrey, with concurrence of Patrick Flannigan, pawnbroker, Falkirk, representing himself as his creditor to the requisite amount, presented a petition to the Sheriff of Linlithgowshire for sequestration of his estates. The account, upon which a sum of £57, 10s. was said to be due by Jeffrey, was produced, and also Flannigan's oath to that effect; but two of the items in the account—viz., "Cash lent you, £10," and "Amount of goods, £17"—were not vouched as is required by the statute. Sequestration was awarded by the Sheriff of Linlithgowshire, and Mr Barr was appointed trustee. A petition for recal of the sequestration was presented within forty days by Ballantyne, as a creditor of Jeffrey to the extent of £200, 2s. 6d.

The Lord Ordinary (Mure) refused the petition, on the ground that the petitioner must be held to have acquiesced in the sequestration. His Lordship added the following note explaining the grounds of judgment:—

"The question for consideration is whether, when the concurring creditor is truly a creditor to the extent required by law, it is necessary to recal a sequestration granted on an affidavit *ex facie* regular, and which is not said to have operated injuriously as regards the interest of the petitioner, or any others of the creditors on the estate, because vouchers for certain of the items in the account to which the affidavit relates, were not produced before the Sheriff when sequestration was awarded.

"The Lord Ordinary has felt this question to be attended with considerable difficulty, as the provisions of the Bankrupt Act are very precise as to the necessity of producing vouchers to instruct accounts. But on examining the authorities, he has come to be of opinion that the present case may be held to fall within the operation of the rules applied in the cases of M'Nab, December 13, 1851, and Ure, May 28, 1857, rather than in that of Campbell, 27th May 1853, relied on by the petitioner. For the decision in the case of Campbell appears to have proceeded on the ground that the concurring creditor was not in any sense a creditor of the bankrupt, and that there could therefore be no concurrence. The objection, however, now under consideration arises on the assumption that there was a debt of the requisite amount due to the concurring creditor, and it rested on the fact that when the Sheriff awarded sequestration, certain items of the account were not properly vouched. This is an objection, however, which, in the opinion of the Lord Ordinary, is not necessarily fatal to the sequestration, but one which may be waived or acquiesced in by a creditor so as to preclude him from on that ground applying to have the sequestration recalled.

"Now, it appears from the proceedings in the sequestration, that this is what occurred in the present case. For the petitioner granted a mandate to Mr Thomson, an accountant, who appeared and acted for him at the meeting for the election of trustee. At that meeting Mr Thomson proposed himself as trustee in opposition to the respondent; and the concurring creditor also appeared, and having produced the bill for £27 granted by the bankrupt, was allowed to vote without objection. Mr Thomson was not elected, but no protest or appeal was taken against the vote of the concurring creditor, or the resolution of the creditors to elect the respondent, whose appointment was duly confirmed on the 13th of October 1866. Upon this being done, the creditors proceeded, at meetings called in terms of the statute, to entertain and dispose of an offer of composition made by the bankrupt, and that without intimation of any objection on the part of the petitioner until the date of the present application. In these circumstances it appears to the Lord Ordinary that the petitioner must be held to have acquiesced in the sequestration, and is now foreclosed from seeking to have it recalled."

The petitioner reclaimed.

SCOTT, for him, argued—There being no proper