any other harbour, provide accommodation for shipping, and invite the masters and owners of ships to occupy that accommodation, and charge them a price for it. The obligation thence arising is not an obligation to insure against accident, but only an obligation to use reasonable diligence to prevent the occurrence of injuries to vessels. It appears to me that in the present case there is no reason whatever for imputing negligence or any other fault either to the Harbour Trustees or to any of their officials or servants. The dredging of this harbour, which was necessary to deepen it to the requisite extent before it could be occupied by vessels of the size which now resort there, were carried on apparently in the most thorough, complete, and perfect manner, and it is impossible for us to read the evidence applicable to the history of the case without being satisfied that the operation was both skilful and complete at the time. After the dredging had been finished, the bottom of the harbour was examined by means of divers, to see whether any stones were still remaining there, or had been brought out of the place by the dredging operation; and that examination having been carefully made, every obstruction was removed that was found still to remain there. How this stone came there nobody can explain. I am satisfied it was not there when the harbour was completed for the reception of vessels. No doubt it is there at the time when the injury is said to have been sustained by the "Albatross," but I do not think that is sufficient to infer liability against the Harbour Trustees. I think, on the contrary, it lies on the pursuer in such an action as this to prove, as matter of substantive fact, that there is negligence upon the part either of the Harbour Trustees or of some one in their employment, and in that I think the pursuers have entirely failed.

With regard to the other ground of defence, which has also been adopted by the Lord Ordinary as a ground of judgment, I think there is much more reason for hesitation; but, upon the whole, I am disposed to agree with the Lord Ordinary upon that point also, and come to the conclusion that the pursuers have failed to prove that the injury to the keel of the "Albatross" was sustained within the harbour of Greenock. I do not sympathise exactly with the view stated by my brother Lord Deas, that supposing that stone to be there, and the vessel to come down and rest upon that stone on her keel, the injury would not be likely to be produced. I rather think, upon the other hand, that nothing would be more likely to produce such an injury. But then I am not at all satisfied that the keel of that vessel and the stone there came in contact at all. I do not think that has been established, and therefore, upon the whole matter, I am inclined to affirm the judgment of the Lord Ordinary as it stands.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the pursuers Alexander Thomson and others, against Lord Craighill's interlocutor, dated 9th April 1875, Adhere to the said interlocutor, and refuse the reclaiming note: Find the defenders entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers—Dean of Faculty (Watson)—Trayner—M'Donald. Agents—Mason & Smith, S.S.C.

Counsel for Defenders—Lord Advocate (Gordon) — J. G. Smith — Wallace. Agent — William Archibald, S.S.C.

Tuesday, December 14.

FIRST DIVISION.

[Bill Chamber.

KELLOCK (PETITIONER AND RECLAIMER) *v.* ANDERSON AND OTHERS, *et e contra.*

Bankruptcy — Sequestration — Petitions — Recall — Process.

On a petition in the Sheriff-court by a creditor for sequestration of a debtor's estate, a first deliverance was pronounced granting warrant to cite the debtor within seven days after citation to show cause why sequestration should not be awarded. Pending the running of the *inducice*, the debtor himself and a concurring creditor, on petition to the Bill Chamber, obtained sequestration. In petitions at the instance of each party for recall of the sequestration obtained by the other—*held* (1) that the date of the first deliverance being the statutory date of the sequestration, the Sheriff-court sequestration must stand; and (2) that in conformity with the course followed in *Jarvie* v. *Robertson*, (25 Nov. 1865, 4 Macph.) 79, the Bill Chamber sequestration fell to be recalled *hoc statu*, and the judgment of recall to be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions, in terms of sec. 31 of the Bankruptcy Act.

Upon the 23d October 1875, Joseph Kellock, cattle-dealer, Thornhill, presented a petition to the Sheriff of Dumfries and Galloway, praying, upon grounds therein set forth, for warrant for citing his debtor John Anderson, draper, Thornhill, to appear and show cause why sequestration of his estates should not be awarded, and thereafter to award sequestration and appoint a meeting of creditors, all in terms of the provisions of the "Bankruptcy (Scotland) Act, 1856." The Sheriff-Substitute pronounced an interlocutor ordaining Anderson to appear within seven days, to show cause why sequestration should not be awarded, and the *inducice* having expired, the Sheriff pronounced an interlocutor awarding sequestration of the estate.

On the 29th October Anderson, without any intimation to Kellock or his agent, applied for and obtained sequestration of his estates by the Court of Session. The concurring creditors in that petition were Messrs M'Laren & Co., Glasgow; and the petition bearing to be at the instance of a petitioner craving sequestration of his own estates, with concurrence of creditors to the statutory amount, sequestration was instantly awarded as a matter of course. The interlocutor awarding sequestration appointed a first meeting of creditors to be held in the Faculty Hall, Glasgow, on Tuesday, the 9th November 1875.

In these circumstances Kellock presented a petition to the Lord Ordinary on the Bills (RUTHERFURD CLARK) for recall of the sequestration obtained on petition by Anderson and M'Laren & Co. from the Court of Session, on the ground that that petition was incompetent and illegal, because (*first*), There was, at the date of presenting it a pending process of sequestration in which the bankrupt and his creditors could have appeared and concurred; and (*second*) Because it was an attempt to alter the true date of sequestration of the bankrupt's estates in such a way as to endanger the rights of creditors, as fixed by the sequestration which followed on the petition at his own instance. The first deliverance on that petition was dated 23d October 1875, and (sequestration having since been awarded) that was the date of sequestration in all questions of preference; whereas, if Anderson's petition and the deliverance thereon were to be sustained, the 29th of October would be the date ruling the disposal of all such questions.

To this petition Anderson and M'Laren & Co. lodged answers, and also presented a petition for recall of the sequestration awarded on Kellock's application by the Sheriff-Substitute at Dumfries, on the ground that Kellock's proceedings and the deliverance following thereon by the Sheriff-Substitute, dated 2d November 1875, were incompetent and illegal, because the deliverance was granted and sequestration awarded notwithstanding of Anderson having appeared and shown cause to the contrary, and of the production of evidence and in the knowledge of sequestration of the estates having already been competently awarded, in terms of the Bankruptcy Statutes, in another Court, and being still undischarged. Even if not recalled *simpliciter*, inasmuch as the general body of creditors were in Glasgow, and considering that the estates could best and advantageously for them be administered at Glasgow, the sequestration awarded at Dumfries ought to be remitted to the Sheriff-court at Lanarkshire, under and in terms of the provisions of section 19 of 'The Bankruptcy (Scotland) Act, 1856.'"

Kellock appeared and lodged answers to this petition.

Both petitioners were heard together by the Lord Ordinary. In Kellock's petition the following interlocutor with note were pronounced:—

"*Edinburgh*, 23*d November* 1875.—The Lord Ordinary having heard counsel and considered the petition, answers, and proceedings, Refuses the petition: Finds no expenses due to or by either party.

"*Note.*—It was not disputed that the petition presented on 23d October to the Sheriff of Dumfriesshire was well-founded, and that but for the petition presented in the Bill Chamber on 29th October, and the proceedings following thereon, the Sheriff would have been bound to award sequestration. The date of the sequestration so awarded would of course be the date of the first deliverance.

"It was maintained, however, that inasmuch as the sequestration had been awarded in the Bill Chamber on 29th October, it was incompetent for the Sheriff to award sequestration in the petition depending before him. The Lord Ordinary cannot take that view, because no evidence was produced to the Sheriff that sequestration had been awarded in another Court. If evidence of the sequestration awarded in the Bill Chamber had been produced, it would probably have been incompetent for the Sheriff to have awarded sequestration. But the Lord Ordinary does not think that this would have ultimately prevented the petitioning creditor from having sequestration awarded on his petition, though it might have necessitated the recal of the sequestration granted in the Bill Chamber, in order to enable the Sheriff to sequestrate. In the view of the Lord Ordinary, a creditor who has presented a petition for sequestration cannot be deprived of the rights under that petition by reason of a petition being subsequently presented in another Court. If this were so, it would be competent for the bankrupt by his own act to delay the sequestration by presenting a petition during the currency of the *inducie*.

"It was urged that it was of no consequence whether the sequestration was awarded on the 23d or 29th October, as the bankrupt was admittedly notour bankrupt on the former date. The Lord Ordinary thinks that he cannot enter into that question. It is impossible for him to determine it, and he cannot, as he thinks, dispose of the present case on the supposition that the date of the sequestration is of no importance.

"But it was maintained that there was no ground for recalling the sequestration awarded in the Bill Chamber, even though the sequestration awarded by the Sheriff was to stand, and that the only lawful course was to remit the latter to the Sheriff of Lanarkshire, to whom the sequestration awarded in the Bill Chamber has been remitted. It is here that the Lord Ordinary has felt most difficulty. The 19th section of the Bankrupt Act deals with the case of sequestration awarded in the Bill Chamber and Sheriff-court, and directs that the Court or Lord Ordinary shall 'remit the sequestration' to such Sheriff-court as shall be deemed most expedient. It was urged that this enactment required the Court to maintain both sequestrations, though of different dates, and that its only province was to remit them to the same Sheriff-court. Without going so far as to hold that it is incompetent to recal the sequestration granted in the Bill Chamber, the Lord Ordinary thinks that it is the safer course to remit the one sequestration to the other. In doing so, he follows the direct injunction of the Act in the case which has occurred; for he is of opinion that it is most expedient that the sequestration should proceed in the Sheriff-court of Lanarkshire. This is the wish of the great body of creditors, and it was stated by Mr Kellock that it was indifferent to him in which Court the sequestration proceeded.

"The Lord Ordinary thinks it right to record that it was admitted that Mr Kellock had no knowledge of the petition in the Bill Chamber till sequestration had been awarded. He has found neither party entitled to expenses, because neither party has been completely successful in the proceedings raised in this Court, taking these proceedings to be substantially one."

In Anderson's petition the Lord Ordinary pronounced an interlocutor remitting the sequestration awarded by the Sheriff at Dumfries to the Sheriff-court of Lanarkshire, and referred to his note in Kellock's case.

Kellock reclaimed in both petitions. In the course of the discussion he stated he had no objection to the sequestration proceeding in Glasgow, as desired by the respondents.

The following authorities were quoted:—*Jarvies* v. *Robertson*, 25 Nov. 1865, 4 Macph. 79; *Love* v. *Anderson*, 4 July 1846, 8 D. 1016.

At advising—

LORD PRESIDENT—There were two petitions before the Lord Ordinary here, one presented by Kellock for the recall of the sequestration awarded in the Bill Chamber, and the other by the bankrupt and M'Laren & Co. as concurring creditors, praying for recall of the sequestration awarded by the Sheriff-Substitute in Dumfries. Upon the latter of these petitions the Lord Ordinary has pronounced this interlocutor (reads *ut supra*) That seems to me a perfectly correct interlocutor. The deliverance of the Lord Ordinary on the Bills upon the petition presented in the Bill Chamber awarded sequestration and remitted the sequestration to the Sheriff-court of Lanarkshire. That was quite right, and the parties are now agreed that this sequestration should now go on before the Sheriff of Lanarkshire.

Consideration of the petition for the recall of the Bill Chamber sequestration raises a different question altogether. Kellock presented a petition before the Sheriff-Substitute of Dumfries on 23d October, and a first deliverance was pronounced on the same day. Pending the running of the *inducice* in that petition, the bankrupt, with these concurring creditors, presented the petition for sequestration in the Bill Chamber. That petition required no service, and the Lord Ordinary sequestrated the estate and remitted the sequestration to the Sheriff of Lanarkshire. Four days after this, the *inducice* having expired on the Sheriff Court petition, the Sheriff-Substitute, in ignorance of the Bill Chamber sequestration, awarded sequestration at Dumfries.

What remains for us to do is to put the matter into shape. The Lord Ordinary has refused the petition for the recall of the Bill Chamber sequestration, and the result is that two petitions of different dates go into the Sheriff-court of Lanarkshire with award of sequestration standing on each. That is very awkward. The estate cannot have been sequestrated at two different dates—the first on 23d October, and the other on 29th October. In that case parties who had an interest might object to the sequestration of 29th October standing. A great many things depend on the date of the first deliverance in such petitions.

It appears to me that we should recal the Lord Ordinary's interlocutor in the petition as to the Bill Chamber sequestration refusing the petition, and follow the course taken in the case of *Jarvies*, recalling the sequestration *hoc statu*. The first petition presented in Dumfries, with the first deliverance of 23d October, is that left standing, and if anything goes wrong with it the second petition in the Bill Chamber can be gone on with.

I may add that I quite concur in the Lord Ordinary's finding as to expenses, and that neither party is entitled to any.

The other Judges concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the petitioner Joseph Kellock, against Lord Rutherfurd Clark's interlocutor of 23d November 1875, Recal the said interlocutor: Recal *in hoc statu* the sequestration awarded by the Lord Ordinary on the Bills on the 29th October 1875, on the petition for sequestration of the estates of John Anderson, presented by the bankrupt with concurrence of M'Laren, Sons, & Company, warehousemen, Glasgow: Appoint this judgment of recal to be entered in the Register of Sequestrations, and on the margin of the Register of Inhibitions, all in terms of the 31st section of the Bankruptcy (Scotland) Act, 1856: Find no expenses due to or by either party."

Counsel for Kellock (Reclaimer) — Gloag. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Anderson and Others (Respondents) —Asher. Agents—Hamilton, Kinnear, & Beatson, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, December 8.

DONALDSON *v.* LINTON.

(Before Lord Justice-General, Lord Justice-Clerk, Lords Ardmillan and Mure.)

Excise—Certificate, breach of—Act 25 *and* 26 *Vict., cap.* 35 *(Schedule A).*

By schedule A, attached to the Public House Acts Amendment Act, 1862, one of the conditions upon which a certificate may be granted is that the person obtaining the certificate "do not supply exciseable liquors to girls or boys apparently under fourteen years of age."—*Held* that it is a breach of this provision to supply a boy apparently under fourteen years of age with exciseable liquor without knowledge that he is the messenger of an adult, or inquiry to discover whether he is so or not.

This was an appeal taken by James Donaldson, who held a public-house certificate for No. 7 Hamilton Place, Stockbridge, Edinburgh, against a conviction obtained against him at the instance of Thomas Linton, P.-F. of the Police Court, and respondent in the appeal, of having sold exciseable liquor on 28th October 1875 to Robert Mathieson, a boy of eight years of age. The charge was laid under the schedule (A) of the Act 25 and 26 Vict., cap. 35, whereby it is provided that the publican "do not sell or supply exciseable liquor to girls or boys apparently under fourteen years of age." Donaldson was also charged with selling to a boy named Mason, but that charge was found not proven.

The facts were as follows: — The boy Robert Mathieson, being between eight and nine years of age, and apparently under fourteen years of age, was sent alone into the appellant's shop about ten o'clock on the forenoon of the day libelled, and at his request was supplied with half a gill of whisky, put into a bottle, and for which he paid twopence half-penny for the whisky and a penny for the bottle. The boy had been sent to the shop by another boy, who supplied him with the money for the whisky and bottle. Mathieson was asked no questions in the shop as to whom the liquor was for; he was not known in the shop, and he left carrying the bottle