foreigner might always bring an action in the Inferior Court against a defender subject to its jurisdiction, and now it is provided that a foreigner may be sued there if arrestments have been used to found jurisdiction. Laying that provision and the old law together, the result is that where two London merchants have a dispute arising out of a contract made there, one of them, by arresting a ship belonging to the other which is lying in the Clyde, may found jurisdiction in the Sheriff Court of Lanarkshire, and the Sheriff would be bound to entertain the action. That is one extensive exception to the rule that a foreigner can only be made answerable to Scotch jurisdiction in the Supreme Court.

I think, with your Lordship, that we have another exception here where the furniture was stopped *in transitu* by an arrestment. It might equally well have been done by interdict. It is a case in which it is alleged that there has been a fraudulent removal of a debtor's furniture for the purpose of cheating his creditors. It would be the same case if the goods were alleged to be stolen goods. Such goods might be stopped in the hands of the railway company to have the question of their ownership tried here though they were consigned to someone out of Scotland. There is thus no objection in the circumstances to the stoppage of the goods, and to the question of the right to them being raised in a multiplepoinding in the Sheriff Court. I agree with your Lordship also in holding that a foreigner who comes into a Sheriff Court, as Roberts does in this case, shall be in no other position than if the allegation of fraud has been the subject of reduction in a competent process in which he was defender. I also agree that the appellant ought to be allowed to urge his claim without sisting a mandatory.

Lord Craighill concurred.

The Court pronounced this interlocutor:—

"Find the action of multiplepoinding competent: Sustain the appeal to the effect of recalling so much of the interlocutor of the 1st July last as requires the said David R. Roberts as a claimant to sist a mandatory, and so much of the interlocutor of the 7th October last as disallows the claim of the said claimant Roberts: *Quoad ultra* dismiss the appeal, and affirm the judgment appealed from, and remit to the Sheriff to proceed with the cause."

Counsel for Roberts (Appellant) — Nevay. Agent—R. Broatch, L.A.

Counsel for Other Claimants—Mackintosh—Shaw. Agent—P. Morison, S.S.C.

Saturday, November 5.

SECOND DIVISION.

[Lord Lee, Ordinary.

M'AVOY *v.* YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY.

Process—Jury Trial—Causes Appropriated to Act 29 and 30 Vict. cap. 112 (Evidence Act 1866)—"Special Cause Shewn"—Act 43 and 44 Vict. cap. 42 (Employers Liability Act 1880).

It is not sufficient "special cause" to induce the Court to refuse a jury trial and allow a proof in an action on account of injury to the person, that the case is alleged to present features of difficulty in point of law as to the defenders' liability which are not special to the case itself, but belong to all cases of its class; and an action removed to the Court of Session under the provisions of the Employers Liability Act, being one of the causes appropriated by statute to jury trial, sent for trial by jury though said to raise questions of legal difficulty under the statute, and therefore to be more suited for proof than jury trial.

Question (*per* Lord Young), Whether if an action were brought in the Court of Session by a workman against his employer, and it appeared as a result of the evidence that the only ground of liability was under the Act, the action must therefore be dismissed?

This was an action of damages at the instance of the widow and children of a man named M'Avoy, in respect of his death while engaged in the employment of the defenders, through the fault, as the pursuers alleged, of the defenders or those for whom they were responsible. It appeared from the averments on record that M'Avoy was at the time of his death engaged at a working-face situated at the top of a bank or slope in the shale workings belonging to the defenders, on which there was a double line of rails, by means of one of which lines the trucks loaded with shale descended, dragging up by their weight as they did so the light waggons which required to be sent to the top. The death of M'Avoy occurred through his being struck by a piece of wood which was being sent up the working-face in one of these light waggons. The chain by which these sets of waggons were connected was passed round a horizontal wheel situated on the working-face at the top of the bank. The pursuers alleged that this wheel, and the prop by which it was supported, and also the roads on which the rails rested, were in a defective and unsafe condition, and that the death of M'Avoy was caused either through such defective condition or through the negligence of the defenders, or those in their employment who were in charge of the workings and machinery. They therefore raised this action claiming £1000 in name of damages. Alternatively, in the event of its being found that they had no claim at common law, but only under the Employers Liability Act 1880, which (sec. 3) provides that the amount of compensation recoverable thereunder "shall not exceed such sum as may be found equivalent to the estimated earnings during the three years

preceding the injury of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury." They claimed £300 as damages estimated in the manner required by that Act.

The Employers Liability Act 1880 provides, by sub-sec. 1 of sec. 6, that every action for compensation under this Act shall be brought in a county court, but may upon the application of either plaintiff or defendant be removed into a Superior Court, in like manner and upon the same conditions as an action commenced in a county court may by law be removed. . . . County court with respect to Scotland shall mean the "Sheriff's Court." The same section provides that in Scotland the power of removal shall be exercised in the manner provided by the Sheriff Court Act 1877, sec. 9, which allows such removal to be made either before or within six days of the interlocutor closing the record, by a note in process in the form therein provided.

The process was accordingly instituted in the Sheriff Court, and was thereafter removed in the statutory form for trial in the Court of Session, and was marked to Lord Lee by authority of the Lord President. The pursuer thereafter moved the Lord Ordinary to adjust issues for the trial of the cause by jury. The defenders resisted the motion and asked a proof before the Lord Ordinary. The Act 6 Geo. IV. cap. 120, sec. 28 (1819), provides that "the following cases are appropriated to jury trial:" "All actions on account of injury to the person." . . . The Evidence Act 1866 (29 and 30 Vict. cap. 112) provides—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof . . . in any cause which may be in dependence before him."

The Lord Ordinary refused the pursuer's motion and "allowed the pursuers a proof of their averments, and to the defenders a conjunct probation."

He added this note to his interlocutor:—"Although actions raised in the Court of Session on account of injury to the person have since 1819 been among the causes appropriate to jury trial, there is nothing in the common law of Scotland at all repugnant to the ascertainment of the facts in such causes by proof in common form. Accordingly, in the Sheriff Courts, where there is no trial by jury in civil causes, the facts are always ascertained in that manner; and it seems to me to have at least this advantage, that on review of the judgment which may be pronounced, the law can be applied to the facts as ascertained by the evidence without exposing the parties to the risk of any miscarriage or of a second trial. At the same time, I hold it well settled, and for sufficient reasons, that in the Court of Session proof in such causes is not to be taken in the manner authorised by the Statute 29 and 30 Vict. cap. 112, 'unless special cause be shewn' (section 4).

"In the present case, however, there are certain specialties which appear to me to deserve attention. By the form of her action the pursuer admits that her claim, in some aspects of it, is dependent on the 'Employers Liability Act, 1880'—a statute which introduces very important changes in the common law liability of employers, but introduces them only in the cases specified in section 1, and subject to the exception mentioned in section 2. Now, in that statute it is contemplated and provided that all actions brought under its provisions shall be brought in the Sheriff Court; and although this is subject to a power of removal to the Court of Session by either party, I cannot find anything in the terms in which that power is conferred to suggest that the Legislature intended to limit the mode of ascertaining the facts in such causes, after removal, to the form of jury trial.

"I am of opinion, therefore, that it is within the discretion of the Court in this case to ascertain the facts by a proof in the usual manner, instead of by the verdict of a jury, if such shall appear to be the expedient course of procedure.

"Now, upon this point, I think it is only necessary to look at the record to see that the questions of fact and of law are in this case such as make it eminently desirable that the facts should be ascertained in such a manner as may enable the parties to get the law applied to each and all of the different cases presented without the necessity, in any case, of a new trial.

"It is no doubt possible that this might be done by adjusting issues for the trial of the cause by jury, and by obtaining a special verdict. But it appears to me that in this case the advantages of allowing a proof are sufficient to outweigh any of the advantages of a jury trial. This course will enable either party to obtain a review, both in fact and in law, of any judgment which may be pronounced; and in a case presenting so many features of novelty, and involving the application of a recent and very important statute, I think it desirable, in the interest of both parties, that it should be adopted.

"The case of *Macfie* v. *Shaw Stewart*, decided in the Second Division, January 24, 1872, 10 M. 408, appears to me to afford an important illustration of the grounds upon which a cause, though among the number appropriated to jury trial, may be tried and decided by way of proof, and ought to be so tried. And the case of *Cadzow* v. *Lockhart*, decided in the First Division, July 10, 1875, 2 R. 928, affords another illustration to the same effect. I think that the considerations referred to in these cases apply very forcibly to the present action."

The pursuer reclaimed, and argued — There being no consent, "special" cause must be shown. The reasons assigned by the Lord Ordinary were not "special" to this case, but applied to all cases of the kind. Not only was this one of the cases appropriated to trial by jury, but the practice was entirely against trying them by means of a proof. The Employers Liability Act 1880 extended the liability of employers, but did not take away the workman's right of jury trial in a fit case. No doubt it provided that such cases should be brought in the Inferior Courts, where there is no jury trial in civil causes, but the power of removal it provided must mean that it contemplated that such a case when removed should be tried in the customary and appropriate way.

Argued for defenders — The pursuer's averments raised questions of nicety and difficulty under a new and important statute. The matter was one for the discretion of the Lord Ordinary, and he had rightly held (if his discretion was to be reviewed) that such questions would be more

suitably tried as the result of a proof, which would bring the law and facts before the Inner House if need be, than by a jury, with, it was probable, a bill of exceptions to the charge of the Judge, and, it might be, a new trial thereby rendered necessary. The case was far more complex than many that had been sent to proof, especially those mentioned by the Lord Ordinary.

At advising—

Lord Justice-Clerk—I must own I do not think a jury trial a handy machine for trying questions of this kind. I never have thought so, and of late years such trials have run to an amount of expense and an expenditure of the time of the Court that is sometimes distressing. If we could try our jury causes more shortly, and cause less expense, it would be a very important matter. But no more can I say much for the other mode of trying cases, for the proofs that come before us are frequently examples of an abuse of that mode of trial, so great is the mass of evidence led.

Now, in regard to the present case, it is one of the cases that are enumerated by the statute to be sent to a jury, unless cause is clearly shown why they should not be sent to a jury. The action is one against an employer for injury received in a work by reason of insufficient protection—a very ordinary kind of action. It has been brought after the passing of the Employers Liability Act of 1880; but that Act was only intended to clear up the law in regard to the general category of liability of a master for the acts of his servant. It provides that in some cases that liability shall exist, and that in others it shall not—that such-and-such things shall be a defence in one case, and shall not be in another. That is the mere regulation of the category of liability—relating, not specially to this case, or any case like the case of M'Avoy, but applying to the whole circle of cases arising out of the relation of master and servant in large works. It is impossible for me to say there is any ground here why a case of this kind should not be sent to a jury, any more than before the passing of the Employers Liability Act, for the questions of law instead of being more numerous, are supposed and presumed to be likely to become less and less, seeing that the Employers Liability Act was intended to clear up the law.

Therefore, with deference to the Lord Ordinary, I am of opinion that there is no ground in this case for taking it out of the ordinary rule. It is a case which the Act of Parliament certainly intended should be tried by jury.

Lord Young—I am of the same opinion.

Wisely or not, it is according to our system—it is the policy of our law and of all Acts of Parliament on the subject—that actions of damages for personal injury of this character shall be tried by jury. The Lord Ordinary refers to the provision of the latest statute upon the subject, giving discretion to the Court to try the case by a proof in exceptional cases. The rule is quite distinct, but by the statute referred to the Court is authorised—which was not the case previously even under exceptional circumstances — to allow a departure from the general rule, and appoint the case to be tried on a proof before the Lord Ordinary. The words are, that if both parties consent, or if special cause be shown, it shall be competent to take the case on proof. Now, here the parties do not consent, and no cause is shown which is not applicable to every case of the kind. The Lord Ordinary, quoting the language quite correctly, "unless special cause be shown," seems to think that there is special cause enough in the nature of the action, and in the consideration that questions of law may arise to be determined by the Judge. But special cause, as I understand it, means exceptional grounds; and a cause which exists in all cases of a certain class is not special at all. Now, all the observations which were made are applicable, and equally applicable, to all cases of this class; all the remarks made show that there is nothing special in the sense of exceptional in the case before us.

Now, I should not be disposed under any circumstances, at least without very strong reasons indeed, to interfere with the discretion exercised by the Lord Ordinary in a matter committed to the discretion of that Judge by statute. On consideration of the matter I should have been disposed to exercise my own discretion otherwise; yet, as I have said, I should be slow indeed to interfere with the discretion exercised by the Lord Ordinary, with the result of encouraging resort to the Inner House on a matter of that kind. But the Lord Ordinary has not been exercising discretion but pronouncing an opinion, and acting on that opinion he says that no case of this class ought to be tried by jury hereafter, as they have hitherto been.

Now, I cannot assent to that. It was conceded—and I think we know it to be the fact—that all cases of this kind have hitherto been tried by a jury. I do not myself see at this moment how the provisions of the Employers Liability Act of 1880 would make that mode of trial more inconvenient hereafter than it has hitherto been. At all events, before departing from the ancient practice because of that statute, we had better see whether it causes any inconvenience. I do not anticipate that it will, but if it does, without any previous anticipation on my part, then we may hereafter act accordingly. I can see that questions may arise *prima facie*. But the operation of the Act of 1880 is just to exclude a defence which theretofore would have been competent to the employer in the event of its appearing to the satisfaction of the jury that the defect or neglect which led to the accident was attributable to the carelessness or negligence of fellow-workmen. In cases of the class specified in the statute that which theretofore was a defence is not thereafter; and if it appear in the course of trial that the case would have been excluded—that is to say, if there is a good defence stated, showing that there was no good cause of action established but for the Employers Liability Act, the question might arise then, Whether the action if brought originally in this Court upon no good ground of action, except that which the Employers Liability Act gave, could be sustained? Probably that would be avoided by bringing the action in the Sheriff Court, and then bringing it here. It is an awkward provision, and has not been—at least with reference to our practice here—sufficiently considered. Again, another question may arise, but I should think it not difficult to deal with, —If it appeared that the accident was attributable to the negligence of fellow-workmen, and that

therefore it was under the Employers Liability Act, which gives the action and the remedy. Under a case of that sort the Judge would have to tell the jury upon the case as established—"If it be your opinion, in point of fact, that the case is so-and-so, then the action is only under the Liability of Employers Act, and if so, your damage must not exceed so-and-so." There is no difficulty about that. The greater difficulty—the greater practical difficulty—is one that does not arise, namely, Whether an action in this Court would be shut out—all actions requiring to be in the Sheriff Court—if it should appear in the result that the only cause of action was good under that statute only, and would not have been good without it? The true operation of the Employers Liability Act is that which I have stated—to render ineffectual a defence in a certain state of the fact which prior thereto would have been effectual and good.

Upon these grounds I concur with your Lordship.

LORD CRAIGHILL—I am of the same opinion, but I have formed that opinion with some regret, because the interlocutor regards procedure only, and it is a pity to interfere in the discretion of the Lord Ordinary with regard to a matter that simply affects procedure. So far as I can discover, it might have been well tried before the Lord Ordinary on a proof, and equally well before a Judge and jury. I am at a loss, indeed, to understand what the interest of the pursuer in seeking a jury trial in preference to a proof, or, on the other hand, what the interest of the defender in preferring a proof. The expenses incurred in either case are pretty much the same, with this difference that the proof would possibly be longer in the case of a proof than if the evidence were taken before a Judge and jury. At the same time, the question to consider is, Whether cause has been shown why the inquiry here should proceed before the Lord Ordinary without a jury? This is one of the enumerated cases, and *prima facie* therefore to be tried by a Judge and jury, although by consent of parties the case might proceed before the Lord Ordinary as a proof. Has special cause been shown here why the cause should go on before the Lord Ordinary? It is admitted there has been no consent, and I am of opinion with your Lordships that nothing has been said to show there is cause for taking the case out of the ordinary rule. Nothing has been said which might not be said in any case of the same kind. I am therefore of opinion that the Lord Ordinary has misapprehended the provisions of the Act in question.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to adjust issues for the trial of the cause.

Counsel for Pursuer—Macdonald, Q.C.—G. Burnet. Agent—J. Macpherson, W.S.

Counsel for Defenders—Lord Advocate (Balfour, Q.C.)—Strachan. Agent—T. F. Weir, S.S.C.

Tuesday, November 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SIMPSON *v.* MYLES (SCOTT'S TRUSTEE).

*Bankruptcy—Recall of Sequestration — Within what Time Competent—Competency of Conjoining an Earlier and a Later Petition for Sequestration—*19 *and* 20 *Vict., cap.* 79, *secs.* 31 *and* 32.

It is incompetent to recall a sequestration after the lapse of forty days from the date of the deliverance awarding the sequestration, except with consent of nine-tenths in number and value of the creditors; but *question* whether where a petition for sequestration is refused as incompetent, and thereafter a second petition is presented by different creditors, it may not in certain circumstances be competent to conjoin the two petitions so as to obtain the benefit of the first deliverance in the earlier?

Bankruptcy—Sequestration—Voucher.

In a petition for sequestration, where the only voucher produced was a cash account, which brought out a balance in the petitioning creditor's favour, and there was no voucher produced to establish any one of the items in the claim, petition *dismissed* (*per* Lord Fraser, Ordinary) on the ground that the creditor had not produced with his oath the vouchers necessary to prove the debt.

William Scott, solicitor, Dundee, died on January 30, 1881, and thereafter a judicial factor was appointed on his estates under the 164th section of Bankruptcy Act 1856 (19 and 20 Vict., cap. 79). On 18th May the Lord Ordinary on the Bills (FRASER) pronounced a first deliverance in a petition at the instance of Simpson, a creditor of Scott's, for the sequestration of Scott's estates. The judicial factor, Myles, appeared and opposed this petition, which was on 8th August refused, the Lord Ordinary (FRASER) adding the following note to his interlocutor:—"The estates of the deceased debtor Scott are now administered by the judicial factor David Myles, accountant, Dundee, who was appointed to that office under the 164th section of the Bankrupt Statute. No averment is made against the mode in which the factor has hitherto managed the estate, and if the Court had any discretion in granting or withholding sequestration this would be a circumstance of essential importance. In the case of *Campbell* v. *M'Farlane*, 24 D. 1097, Lord President M'Neill gave it as his opinion that 'the Court has an equitable jurisdiction, and it does not always follow that sequestration should be awarded where it is competent if it appears that that course involves a defeating of the ends of justice.' But there are other authorities in a contrary sense that seem to sanction the doctrine that the Court have no discretion where a competent application for sequestration is presented to it—See *Newal's Trustees*, June 13, 1840, 2 D. 1108. The petition therefore is not dismissed upon the ground that the estate is well managed under a factor appointed by the Court, who is subject to the control of the Accountant