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

in Bankruptcy, and who is to 'exercise the like powers and discharge the same duties with regard to him (the factor) as he is empowered and required to exercise and discharge with regard to a trustee under a sequestration, but subject always to the control of the Lord Ordinary or the Court' (section 164). The ground upon which the petition has been dismissed is that the creditor has not produced with his oath the 'vouchers necessary to prove the debt.' The only voucher produced is a cash account, which brings out a balance in the claimant's favour; but there is no voucher of any sort produced to establish any one of the items in the claim. The whole of the entries in this account were cash transactions, with the exception of two, which are for fees claimed by the creditor for valuing properties. But these two items are counterbalanced by a heavy business account admitted to be due to the deceased's estate. Now, it is no doubt true that by the 14th section of the Bankrupt Statute a creditor may petition for sequestration of his debtor's estates, whether the debt due to him be liquid or illiquid, provided it be not contingent. But this provision does not dispense with the production of those documents which are necessary and appropriate to establish the items of the account founded on. An open account does not require to be supported by vouchers, because no such vouchers in the usual case exist, and such an account extracted from the books of the petitioning creditor was held sufficient in the case of *Knowles*, 3 Macph. 457. But the case is totally different with cash transactions, in reference to which parties (unless in very exceptional circumstances) ought to have vouchers for their disbursements. In the absence of these the Court have held the account and the oath not to be the 'necessary proof of the debt,' so as to warrant sequestration.—See *Ballantyne* v. *Barr*, January 29, 1867, 5 Macph. 330; *Scott* v. *Scott*, June 23, 1847, 9 D. 1347."

Simpson reclaimed, but on August 17, before his reclaiming note came on for hearing, the Bank of Scotland, also a creditor of Scott's, presented another petition for sequestration of Scott's estates, which was granted by the Lord Ordinary on the Bills (SHAND) on September 12, and was followed by the ordinary steps of bankruptcy procedure.

At the hearing on the reclaiming note in the first petition for sequestration, the reclaimer argued on the merits that the Lord Ordinary's interlocutor refusing the petition was wrong.

The respondent objected to the competency of the reclaiming note, founding on the 31st section of the Bankruptcy Act 1856, which provided that "the deliverance awarding sequestration shall not be subject to review; but any debtor whose estate has been sequestrated without his consent, or the successors of any deceased creditor whose estate has been sequestrated without their consent, unless on the application of a mandatory authorised by the deceased debtor, or any creditor, where the sequestration has been awarded by the Lord Ordinary, may within forty days of such deliverance present a petition to the Lord Ordinary setting forth the grounds for recall, and praying for recall;" and on the 32d section, which provided that "no petition for recall of the sequestration, excepting as hereinafter provided, shall be competent after the expiration of the said forty days, or after the advertisement for payment of the first dividend, provided that nine-tenths in number and value of the creditors ranked on the estate as herein directed may at any time apply for recall by petition to the Lord Ordinary." It appeared that Simpson had not applied for recall within the forty days above provided.

The reclaimer argued that it was a case of great hardship that the same parties (the Bank of Scotland) who, as the chief creditors of the deceased, had been the real opponents of the first petition for sequestration, should themselves present a petition with the same object within ten days. Further, if the second sequestration were to override the first, preferences might in certain cases (though not in the present) be acquired which the first deliverance in the first petition would have cut down.

At advising—

LORD PRESIDENT—Whether under particular circumstances it might not be competent to conjoin two petitions for sequestration, and to award sequestration in the conjoined petitions for the purpose of obtaining the benefit of the first deliverance, I do not wish to give any opinion. There is a great variety of circumstances in which such a course may be very expedient, and when such circumstances occur it will be time enough to consider whether the proceeding is competent under the statute. But the present case seems to me to be clear. In the first place, it is not alleged that in the period between the first and the second petitions for sequestration any preference has been obtained. The first petition in point of date was a petition at the instance of the present reclaimer, and instead of going on immediately after the expiry of the *inducice* to obtain an award of sequestration, he allowed the matter to stand over till the 8th of August, and the Lord Ordinary then refused the petition. Immediately afterwards another petition was presented at the instance of another creditor. That petition having been proceeded with in ordinary form, sequestration was awarded in the month of September, on the expiry of the *inducice*, and sequestration having been awarded the proceedings in the sequestration began, first, for the election of a trustee; then the trustee having been confirmed, and the estate vested in his person, another meeting was held, at which the bankrupt was examined in terms of the statute. Now, all that having been done under the second petition, this reclaiming note comes before us with a demand that everything that has been done should be undone—that the sequestration which has been granted under the second petition should be recalled and sequestration granted under the original petition. The proceedings under the second sequestration seem to me to be a bar to this which is insuperable. The 31st section of the Bankruptcy Act provides that "the deliverance awarding sequestration shall not be subject to review." But there is a remedy provided by the statute, and that is, a petition for recall presented within forty days of the date of the deliverance awarding sequestration, and if this petitioner wished to take advantage of it the statutory remedy was open to him of presenting a petition for recall. But he did not do so, and the time has now elapsed, because

the 32d section of the statute provides that "no petition for recall of the sequestration, excepting as hereinafter provided" (that is, with the consent of nine-tenths in number and value of the creditors), "shall be competent after the expiry of the said forty days." That seems to me to be conclusive. We have no alternative but to adhere to the Lord Ordinary's interlocutor—not on the grounds stated by his Lordship, but on grounds which could not have been before his Lordship, as the circumstances on which they are based had not emerged at the date of his interlocutor.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Petitioner and Reclaimer—Campbell Smith—Strachan. Agent—R. H. Miller, L.A.
Counsel for Respondent—Mackay—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, November 10.

SECOND DIVISION.

SPECIAL CASE—ARRES & OTHERS AND MATHER & OTHERS.

Succession — Will — Legacy — Double Legacies to same Legatee.

When a testator by one or several instruments gives two or more legacies to the same legatee, it is presumed that he intended the legatee to take both in the absence of competent evidence that the second legacy was intended to be substitutional for the first.

A testator by a deed of settlement left £4000 to be held in trust for his natural son until he should reach twenty-five years, and then to be paid to him. If he died before attaining twenty-five, the sum was to go to certain cousins of the testator. By another deed dated six months after the first, on the narrative that he thought it his duty to dispose of his whole worldly affairs, he made a bequest of £6000 for behoof of the natural son, to be payable to him when he reached twenty-four years of age, and until that time to be held for him by a different trust from that created by the previous writing. This was the only provision in the deed other than a legacy to the trustees appointed under it. If the son died before reaching twenty-four, the same persons who were conditionally instituted under the previous writing, with one addition, were to take the sum. *Held* that the provisions of the second writing must have been intended to be substitutional for that in the first, and that the natural son was not entitled to take both provisions.

James Mather Arres, farmer, died unmarried on February 13, 1881, possessed of one-half share of certain landed property in Ireland of the annual value of £670, also of certain farm leases in Scotland held by him jointly with a brother, and of moveable property of the value of £12,000, consisting to the extent of £10,000 of his share of a farming stock.

There was found in his repositories after his death the following holograph deed of settlement, dated November 25, 1872:—"I, James Mather Arres, presently residing at the Mains of Ardersier, in the parish of Ardersier and county of Inverness, consider it my duty while in health to settle my worldly affairs. I hereby leave and bequeath and dispose off to my natural son James Mather the sum of four thousand pounds stg., to be free of legacy duty; and I hereby appoint Charles Clunas, accountant, National Bank of Scotland, Inverness, to be trustee in the event of my death before my son is twenty-five years of age; and the above sum of four thousand pounds is to be paid over to my trustee in equal instalments, the one at six months and the other at twelve months after my death, and to be invested in trust-funds or good railway debentures, and the interest thereoff payable by my trustee to my before-mentioned son in half-yearly instalments till he is twenty-five years of age, and then to receive the above sum of four thousand pounds stg.; and I hereby leave to Charles Clunas, for acting as trustee, the sum of one hundred pounds stg., but in the event of my son's death before reaching the age of twenty-five years, the above sum of four thousand pounds to be divided equally among my unmarried female cousins at the date of his death (my son). Written in my own handwriting, and one word deleated before singning, dated and signed thus the twenty-fifth day of November one thousand eight hundred and seventy-two, at Ardersier, as witness my signature thus

"JAMES M. ARRES."

He also left another document, dated April 26, 1873. This was to the following effect:—"I, James Mather Arres, presently residing at the Mains of Ardersier, in the parish of Ardersier and county of Inverness, think it my duty while in health to settle my worldly affairs. I hereby leave and beaquath and dispose of my whole worldly affairs in the following manner, viz., 1st, To my natural son James Mather, presently living with Robert Scott, 44 Pitt Street, Bonnington, near Edinburgh, the sum of six thousand pounds stg. (£6000), to be paid to my trustees for his behoof, the one-half at Whitsunday after my death, the other at the following Martinmas, to be paid to the affordsaid son of my body when he reaches twenty-four years of age, free of legacy-duty. I hereby appoint Chas. Clunas, accountant, National Bank, Inverness, and Roderick Scott, solicitor, Inverness, and Alick Mather, Druid Temple, by Inverness; and I leave to each of my trustees, if they act, the sum of one hundred pounds stg.—in the event of my son's death before reaching the age of twenty-four years, to be divided equally among my unmarried femal cousins, with the following exception, to my cousin Mary Mather, presently the wife of Robert Smith, banker, Lossiemouth, the sum of one thousand pounds stg. Written in my own hand writting, this the twenty-sixth day of April 1873, as witness my hand this.

"JAMES M. ARRES."

A question having arisen as to whether this second writing was intended to supersede the first, or whether the legacy of £6000 provided by it to James Mather Arres, and failing him to the deceased's female cousins as therein mentioned, and the legacy also left by it to Charles Clunas,