tion that it is not evidence against a party of having committed a delict to show that he has committed delicts of the like description against other persons on other occasions.

The late Lord President Robertson had, I may be allowed to say, an instinctive discernment of relevancy in cases coming before us, and I think an opinion by him on such matters is of very great weight.

Apart from authority, and on the general principles of the law of evidence, I am unable to see how the fact of Mr Sloan having defrauded others by similar transactions could be evidence that we should be entitled to consider in this case.

I therefore propose that we should affirm the Lord Ordinary's interlocutor, but exclude proof of the averments contained in article 10.

LORD PEARSON and LORD DUNDAS concurred.

The Court adhered, with the variation that they excepted from the proof the whole of the averments in Condescendence 10.

Counsel for Pursuer (Respondent)—M. P. Fraser. Agent—Allan M'Neil, Solicitor.

Counsel for Defenders (Reclaimers)—Hon. Wm. Watson. Agents—Mackenzie, Innes, & Logan, W.S.

Saturday, May 29.

SECOND DIVISION.

[Bill Chamber.

DRUMMOND *v.* CLUNAS TILES AND MOSAICS, LIMITED.

Bankruptcy—Sequestration—Notour Bankruptcy — Evidence — Expired Charge Destroyed by Bankrupt—Copy Produced.

A petition having been presented for the sequestration of the estates of B, the Lord Ordinary on the Bills on 11th March 1909 pronounced a deliverance granting warrant to cite B, and diligence to recover evidence of his notour bankruptcy. B having been cited to appear before the Lord Ordinary to produce (1) extract registered protest of a bill granted by him, which protest had been recorded in the Books of Council and Session on 15th December 1908, (2) execution of charge endorsed upon said extract registered protest, made on the 24th December 1908, and (3) the bill itself, deponed that he had destroyed these documents on 20th March 1909. A messenger-at-arms deponed that he had charged B upon the said extract registered protest and had returned an execution of that charge, and he produced a copy of the charge. Sequestration having been awarded, B presented a petition for recal on the ground that the necessary productions were not before the Lord Ordinary, and no evidence of notour bankruptcy produced. *Held* that in the circumstances notour bankrupty had been proved, and that sequestration had been competently awarded.

On 14th April 1909 Alan Drummond, accountant, Edinburgh, presented in the Bill Chamber a petition for the recal of the sequestration of his estates awarded on 1st April on the petition of the Clunas Tiles and Mosaics, Limited, and James Shiels Alexander, C.A., the official liquidators thereof.

The sequestration had been awarded under the following circumstances:—On 11th March 1909 the Lord Ordinary on the Bills (SKERRINGTON) pronounced a deliverance granting warrant to cite Drummond, and diligence to recover evidence of notour bankruptcy. On 26th March 1909 Drummond, having failed to produce the documents to the Commissioner, was cited to appear before the Lord Ordinary on the Bills to produce "(1) extract registered protest of a bill for £40, dated 30th June 1908, granted by him in favour of Herbert Lawton Warden, S.S.C., Edinburgh, which protest was recorded in the Books of Council and Session on 15th December 1908; (2) execution of charge endorsed upon the said extract registered protest made on the twenty-fourth day of December 1908; and (3) the said bill itself." On 31st March 1909 he deponed that he had destroyed the said documents on 20th March 1909. On the same occasion Robert Gardiner, messenger-at-arms deponed—"On 24th December 1908 I charged Alan Drummond, accountant, 15 Queen Street, Edinburgh, upon an extract registered protest of a bill for £40, dated 30th June 1908, granted by him in favour of Herbert Lawton Warden, S.S.C., Edinburgh, which protest was recorded in the Books of Council and Session on 15th December 1908. I returned an execution of that charge. I have not got a duplicate. I have a copy of the charge given, but not of the execution. I produce the copy. I have an entry in my books relative to giving this charge. It is merely 'executing protest, Herbert Lawton Warden, 3s. 6d.' I will produce an excerpt from my books. I have nothing more in writing which can instruct that I had given the charge to Alan Drummond. It is the fact that I did give Alan Drummond a charge on that extract registered protest." On 1st April 1909 the Lord Ordinary on the Bills (MACKENZIE), finding that the notour bankruptcy of Drummond and the other facts necessary to be established had been proved, granted sequestration of Drummond's estates.

Drummond in his petition for recal averred, *inter alia*—"In point of fact the necessary productions were not in process or before the Lord Ordinary at the time. No evidence of notour bankruptcy was produced, and the said Alan Drummond was not notour bankrupt as at the date of the presentation of the petition."

Answers were lodged for the Clunas Tiles and Mosaics, Limited, in which the said

petition for sequestration, the procedure thereon, and the productions lodged therein, were referred to.

On 29th April the Lord Ordinary on the Bills (GUTHRIE) refused the petition.

The petitioner reclaimed, and argued—It was necessary that there should be notour bankruptcy at the date of sequestration, and in this case there was no proper evidence of it. Written evidence of notour bankruptcy was required—Goudy on Bankruptcy (3rd ed.) 147—and here there was merely oral testimony, which was incompetent to prove it. The expired charge must be produced, and was the only competent proof of the proceedings of the messenger-at-arms—Dickson on Evidence, section 1262; *Haswell* v. *Magistrates of Jedburgh*, 1714, M. 12,270; *M'Kean*, 1694, M. 3784. The evidence, therefore, being insufficient, the sequestration must be recalled—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sections 13, 26, and 31. If there was an *ex facie* defect dating from prior to the award of sequestration, sequestration must be recalled—*Ballantyne* v. *Barr*, January 29, 1867, 5 Macph. 330, 3 S.L.R. 189.

Argued for the respondent—Here there was a purely technical default. All the statutory requisites for sequestration were present—Bankruptcy (Scotland) Act 1856 (*sup. cit.*), sections 9 and 13; Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), section 6. Notour bankruptcy was clearly proved. A man once notour bankrupt remained so—Bankruptcy (Scotland) Act 1856, section 9. This section of the statute was founded on the common law as laid down by Lord Corehouse in the case of *M'Hardy* v. *Adam*, June 18, 1833, 11 S. 735. There was no authority for the statement that the Court was held to the production of written evidence to prove notour bankruptcy. A copy of the charge had been produced. It was the best evidence that was available, because the bankrupt himself had destroyed the charge. The cases in Morrison's Dictionary cited by the petitioner dealt with what was a competent citation. The distinction between *Ballantyne* v. *Barr* (*sup. cit.*) and the present case was that the former dealt with the title of the creditor, who under the provisions of the statute must produce voucher of debt.

LORD JUSTICE-CLERK—The case stands in this position. We are not asked to review the interlocutor by which sequestration was awarded, but the interlocutor of the Lord Ordinary by which the petition for recal of the sequestration is refused. The ground upon which this is asked is that there was no documentary evidence to justify the award of sequestration. The circumstances are very peculiar. On 11th March 1909 the Lord Ordinary granted a diligence for the recovery of evidence of notour bankruptcy and appointed a commission for that purpose. At that date the documents which would have proved notour bankruptcy were in existence, but on 20th March they were destroyed by the person of whose estates sequestration was sought. Whether he had in law a right to destroy these documents is not in question, but their destruction put aside the best evidence of the facts which the Lord Ordinary desired to investigate. In these circumstances the messenger-at-arms employed to execute the charge was adduced and a copy of the charge produced. It seems to me that the best available evidence was brought forward. If the original cannot be got, and is known to be destroyed, a copy may generally be used, and that was done here. The petitioner suggests that an action should be brought to prove the tenor of the missing documents, but I think that in such proceedings as these that would be unnecessary. In the whole circumstances of the case I see no reason for interfering with the judgment of the Lord Ordinary.

LORD LOW concurred.

LORD ARDWALL — I am of the same opinion. We are not concerned here with an appeal against the interlocutor awarding sequestration of Alan Drummond's estates, because that is final. We are dealing with a petition for recal of that sequestration which Lord Guthrie has refused by the interlocutor now reclaimed against. The only ground on which we are asked to interfere is that Lord Mackenzie, who awarded sequestration, was not, it is argued, justified in finding the facts proved which constitute notour bankruptcy. Now I think these facts were proved by what was in the circumstances the best evidence available. Lord Mackenzie had to be satisfied with secondary evidence in consequence of the bankrupt's own act, which amounted to something very like contempt of Court.

After the Lord Ordinary on the Bills had pronounced the first deliverance on the petition for sequestration, and had granted diligence for the recovery of evidence of notour bankruptcy, the bankrupt destroyed the extract registered protest and execution of charge which formed the best evidence of his having been rendered notour bankrupt. After the bankrupt had deponed on oath to having destroyed these writs Lord Mackenzie held the notour bankruptcy proved by a copy of the charge, an excerpt from the messenger's books, and the depositions of the bankrupt, the messenger, and other oral testimony. In the circumstances I think the Lord Ordinary was right. But in any view I am of opinion that his having so held and thereupon awarded sequestration is not a sufficient ground for the Court now recalling that sequestration. I therefore agree with your Lordships that the interlocutor of Lord Guthrie refusing the petition for recal ought to be adhered to. Nothing now decided affects the law applicable to the proof of notour bankruptcy in the ordinary case.

The Court adhered.

Counsel for the Petitioner—Craigie, K.C. —A. Crawford. Agent—George Meston Leys, Solicitor.

Counsel for the Respondents — Pringle. Agents—Cowan & Stewart, W.S.