strike against their rights and not against the Beardmores' rights.

The Lord Ordinary on the Bills, who took up the matter, refused permission to the minuters to be sisted, and then there being no defence to the interdict at all, he interdicted, prohibited, and discharged in terms of the prayer of the note, and declared perpetual the interim interdict which had been granted. Against that interlocutor the present reclaiming note is brought by the minuters, and the only question before your Lordships to-day is whether the minuters upon this matter are to be allowed to be heard.

I have been absolutely unable to see any argument upon which it can be contended that they should not be heard, and the whole reason which is given seems to me a reason which is based upon a forgetfulness of this very obvious fact that two different contracts may overlap and deal with the same subject-matter. The Lord Ordinary on the Bills, holding that "the corporation have no right to be made parties to the present action, which is founded entirely upon contract between the company and Messrs Beardmore," really brings his decision to a point in this sentence—"If Messrs Beardmore & Company have disabled themselves from carrying out the contract in the indenture (that is, the original contract between the Alkali Company — now the Power Gas Corporation—and Beardmore), that may give rise to an action of damages against them at the instance of the corporation, but I do not see how, in a question with the company, it can invalidate a condition under which the company granted their licence to Messrs Beardmore & Company."

That sentence might be turned round with equal justice and put exactly the opposite way. I think his Lordship has forgotten that in pronouncing a decree of the Court as he has done he has practically given specific performance of one contract to the one party, and denied specific performance of the other contract to the other, and that without the other party being heard.

As to what is to be the particular extrication out of this troubled position I do not wish at present to say anything, because it would be very improper that I should do so until parties have been fully heard upon the matter. They cannot be heard until we have them before us, and it seems to me out of the question that we should pronounce an order which practically decides the question against one of the parties interested without that party being heard.

I am therefore very clearly of opinion that the judgment before us is wrong, and that the case must go back in order that the Power Gas Corporation may at least be heard upon the matter before an interdict is pronounced.

LORD KINNEAR—I am entirely of the same opinion, and for the same reasons. This is an interdict which strikes directly and by name against the Power Gas Corporation, because it prohibits the respondents, the Messrs Beardmore, from permitting the corporation to do certain things which they allege they have a direct right to do. It appears to me to be out of the question, for the reasons your Lordship has already given, that the Power Gas Corporation, who are to be struck at by this order, are not to be allowed to appear and to be heard upon the merits of the question, whether the order is good or bad. Without going into the merits, which are not before us, I have no doubt whatever that the reclaimers are at least entitled to be heard.

LORD JOHNSTON—I am of the same opinion, and do not desire to add anything.

LORD SALVESEN was sitting in the Second Division.

The Court recalled the interlocutor reclaimed against, of new allowed the minute for the minuters the Gas Power Corporation, Limited, to be received, remitted the cause to the Lord Ordinary to allow the minuters to lodge answers and to proceed as accords, and meantime continued the interim interdict granted on 8th July 1910 and found the minuters entitled to expenses both in the Inner House and in so far as caused by opposition to the receiving of said minute in the Bill Chamber.

Counsel for the Minuters and Reclaimers — Macmillan. Agents — J. & J. Ross, W.S.

Counsel for the Complainers and Respondents — Wilson, K.C. — Moncrieff. Agents—Smith & Watt, W.S.

Counsel for William Beardmore & Co., Limited, Respondents — W. T. Watson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, November 9.

FIRST DIVISION.

[Sheriff Court at Stirling.
[Lord Ordinary Officiating on the Bills.

LOCHRIE *v.* M'GREGOR.

LOCHRIE, PETITIONER.

Bankruptcy — Sequestration — Petition for Sequestration—Citation—Clerical Error in Citation—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 14 *and* 26.

The Bankruptcy (Scotland) Act 1856 enacts — Section 14 — "Petitions for sequestration may be at the instance or with the concurrence of any one creditor whose debt amounts to not less than fifty pounds. . . ." Section 26—"When a petition . . . is presented . . . for the sequestration of the estate of a debtor who is dead without the consent of the successor, the Lord Ordinary or Sheriff to whom it is presented shall grant warrant to cite

. . . his successor to appear within a specified period, if he be within Scotland, by delivering to him personally or by leaving at his dwelling-house or place of business . . . a copy of the petition and warrant. . . ."

A creditor presented a petition for the sequestration of the estates of a deceased debtor. His petition was in respect that he was a creditor for £55 conform to oath and I O U therewith produced. The copy of the petition served upon the debtor's successor stated the amount of the debt as £45.

Held that the clerical error in the service copy of the petition was not a good ground for refusing to award sequestration.

Bankruptcy — Sequestration — Sequestration Improperly Refused—Sequestration Awarded on a Later Petition — Recal of Going Sequestration.

When a trustee has been appointed in a sequestration and has ingathered the estate, the Court, even though it is of opinion that sequestration has been wrongly refused in an earlier petition, will not recal the sequestration granted in the later petition where no specific preferences, which would be cut down under the first petition, but would be left standing under the second, are alleged to exist, and where the trustee avers that there are none.

Robert Lochrie, labourer, Kilsyth, appealed against an interlocutor of the Sheriff-Substitute (MITCHELL) at Stirling dismissing his petition for the sequestration of the estates of Duncan M'Gregor deceased.

Robert Lochrie also reclaimed against an interlocutor of the Lord Ordinary officiating on the Bills (ARDWALL), of 1st September 1910, dismissing a petition at his instance for recal of the sequestration of M'Gregor's estates awarded on the subsequent petition of another creditor.

The appeal and the reclaiming note were heard together.

The *facts* of the two cases are narrated in the opinion (*infra*) of the Lord President.

The opinion of the Lord Ordinary appended to his interlocutor of 1st September 1910 was as follows:—

Opinion. — "This petition is presented, not on the ground of any irregularity in the sequestration sought to be recalled, but on the ground that a petition for sequestration had been presented on 14th July 1910 by the petitioner, and that although the Sheriff-Substitute had dismissed the same an appeal had been taken against dismissal, which, if successful, would have the result of permitting the said sequestration to proceed. The only practical ground for recall or sist suggested is "That the petitioner believes that there are preferences granted by the deceased Duncan M'Gregor, and that the purpose of the second petition was to obtain an award of sequestration dated more than seven months after the death of the said Duncan M'Gregor and thus deprive the general body of creditors of the benefit of section 110 of the Bankruptcy (Scotland) Act 1856, and it is of the utmost importance that the date of the deliverance first granted should be held to rule the proceedings.

"But counsel for the petitioner could not specify any preferences, and the respondent's agent put in a letter from the trustee in which he denies that there are any such preferences. In these circumstances, and on the authority of the decision in *Tennent* v. *Martin & Dunlop*, 6 R. 786, I am of opinion that the petition ought to be dismissed.

"I would strongly impress on the petitioner's advisers the propriety of considering most carefully whether, if there are no preferences, they ought to incur expense by proceeding with the appeal, and if successful therein again petitioning for recal of the present sequestration, a proceeding which, unless they could aver preferences, would probably follow the fate of the petition for recal in the case Iha ve quoted."

Argued for the appellant and the reclaimer—The Sheriff should not have dismissed the original petition. The Court should either conjoin the petitions, though there was some doubt whether that could be competently done—*Love* v. *Anderson*, July 4, 1846, 8 D. 1016; Goudy on Bankruptcy (3rd ed.), p. 141—or remit to the Sheriff to award sequestration and recal the Lord Ordinary's interlocutor—*Blair & Co., Ltd.* v. *Mackenzie*, April 7, 1899, 1 F. 854. 36 S.L.R. 638; *Jarvie* v. *Robertson*, November 25, 1865, 4 Macph. 79; *Kellock* v. *Anderson*, December 14, 1875, 3 R. 239, 13 S.L.R. 161. Reference was also made to sections 14, 26, 32, and 110 of the Bankruptcy (Scotland) Act 1856.

Argued for the respondent—The Sheriff was right in dismissing the original petition, but even assuming he was wrong the Court ought not to recal a going sequestration where no real benefit would accrue to the creditors. Reference was made to *Fleming* v. *Yeaman*, 21 S.L.R. 164; *Simpson* v. *Myles*, November 8, 1881, 9 R. 104, 19 S.L.R. 64, and *Fletcher* v. *Anderson*, March 20, 1883, 10 R. 835, 20 S.L.R. 564; *Tennent* v. *Martin & Dunlop*, March 6, 1879, 6 R. 786, 16 S.L.R. 441.

At advising—

LORD PRESIDENT—Two cases are before your Lordships which are so entwined with each other that it is impossible to deal with them separately.

The appellant in an appeal from the Sheriff Court of Stirling, one Robert Lochrie, presented a petition in that Sheriff Court for the sequestration of the estates of a certain Duncan M'Gregor, grocer in Kilsyth, deceased. His petition was in respect that he was a creditor for £55, conform to oath and I O U therewith produced. As the petition was for the sequestration of the estate of a deceased debtor, and was not presented with the concurrence of the representatives of the deceased debtor, it was necessary, in terms of section 26 of the Bankruptcy Act 1856, to cite the successors of the debtor. Ac-

cordingly citation was made upon, *inter alios*, Miss Jeanie M'Gregor, who was a daughter of the deceased Duncan M'Gregor, and is the respondent in this appeal. In the copy of the petition which accompanied the citation there was a clerical error, £45 being entered as the amount of the debt instead of £55. Accordingly Miss Jeanie M'Gregor appeared before the Sheriff and objected to sequestration being pronounced, on the ground that in her copy of the petition £45 appeared as the amount of the debt on which it proceeded, and that therefore the petition appeared to be presented by one who had no statutory right to do so. The Sheriff sustained that objection and pronounced this interlocutor—"Finds that the compearing defender Miss Jeanie M'Gregor has shown cause why the sequestration cannot be competently awarded; therefore dismisses the action and decerns." That is the interlocutor appealed against.

I think that interlocutor is clearly wrong. It seems to me quite out of the question to say that because there is a clerical error in the service copy of the petition the whole proceedings are thereby invalidated. Of course unless the debt was for more than £50 the petition was incompetent, but the debt itself was for more than £50, and the oath and voucher were all perfectly right, and the matter was one which could be instantly verified on the compearing objector coming into Court. If the compearing objector had said, "Now I see that the petition is competent, but I have been brought here by the petitioner's mistake," she would have stated a good ground for claiming the expenses of that appearance, but I cannot see that there was further cause for complaint. She has shown no prejudice except that of having been brought into Court, and that prejudice can be dealt with in awarding expenses. I think the Sheriff in giving effect to her contention has confused the requirements of the citation with those of the petition. He says — "No petition setting forth a sufficient creditor qualification has reached the defender." The petition has not to reach the defender, it has to remain in Court. What the Sheriff has decided is that a clerical error in the service copy of the petition is enough to vitiate the whole proceedings, and in that I think he is clearly wrong.

If no sequestration had ever been awarded, then the matter would be plain enough; we should remit to the Sheriff to award sequestration. But the matter did not end there, for within two days of the dismissal of that petition the same compearing successor concurred with another creditor in asking for the sequestration which she had formerly opposed. There was no answer to that application; sequestration has been awarded, and the trustee who has been appointed has proceeded to ingather the estate. The gentleman who has been appointed trustee was originally judicial factor on the estate, and has therefore had the administration of the estate for about a year, since Mr M'Gregor's death. Matters being in this position the petitioning creditor in the original petition (the appellant in the case with which I have just dealt) has presented a petition for the recal of the sequestration in order that that sequestration may be got out of the way, and that a deliverance may be pronounced in the appeal in his own petition.

If all your Lordships had to do was to consider the question at issue between the two parties now before us it would no doubt follow that the second sequestration should be recalled, and the appeal in the first case sustained. But it has been laid down and decided again and again by a series of decisions that, although in the first instance in matters of this kind you begin by considering the antagonistic position of the petitioners and respondents, when the question emerges of the actual interests of the general body of creditors this interest is paramount. You must therefore be guided in this matter by the general interest of the creditors. Now in a small estate of this kind—it is said that the assets are only about £180 — it is obviously vital that no more should be spent on litigation than is absolutely necessary, and it would therefore seem *prima facie* to be useless to cut down this sequestration that has gone so far, the trustee who has been appointed having ingathered the estate, and to begin all over again. We should only do that if it were shown to be to the general advantage of the creditors. Now the only advantage to the general creditors is said to be in this, that the first petition was presented within seven months of the death of Mr M'Gregor, the second after that date, and consequently certain preferences which, under section 110 of the Bankruptcy Act, were cut down under the first sequestration would be available under the second. That would be sufficient ground for recalling the second sequestration if it could be shown that there are any such preferences. But we have not been told that there are any such, and there is in process a letter from the trustee in which he says that he has not been able to discover that any such exist. In these circumstances I think that it would be going too far to cut down this sequestration and to alter its date because certain preferences might emerge.

On the whole matter I think we should recal the interlocutor of the Sheriff-Substitute appealed against in so far as it finds the pursuer liable in payment to Miss Jeanie M'Gregor of 30s. of expenses, and instead thereof find the said Jeanie M'Gregor liable to the pursuer in 30s. of expenses; *quoad ultra* adhere to that interlocutor, and find the pursuer entitled to the expenses of the appeal against the said Jeanie M'Gregor.

In the second case we should refuse the reclaiming note and find neither party liable in or entitled to expenses.

LORD KINNEAR—I agree with your Lordship. But for one overruling consideration the proper way to put the case in shape would have been to recal the interlocutor

of the Sheriff-Substitute, which dismissed the original petition, and to allow the reclaiming note against the interlocutor of the Lord Ordinary officiating on the Bills. It is clear, for the reasons your Lordship has given, that the Sheriff was quite wrong in dismissing the original petition, and the logical consequence would have been now to remit to him to grant the sequestration.

But within a few days after the Sheriff had dismissed the petition the daughter of the deceased man whose estates had been sought to be sequestrated, although she had appeared and opposed the original petition, concurred in a new petition for sequestration brought by another creditor, and on that petition sequestration was awarded.

The logical course would have the effect of sweeping away as ill-founded all the proceedings which have followed upon the award of sequestration in the later petition.

But following upon the second petition a trustee was appointed who had already been for some time in the saddle as judicial factor, and he has been in administration and has ingathered the estate. To set aside all that procedure and to start a new sequestration would expose the insolvent estate to unnecessary expense and inconvenience.

There would have been strong grounds for following that course if we had seen reason to suppose that proceedings under the second petition for sequestration instead of under the first would leave the estate open to the preferences of particular creditors which would be cut down under the first but left standing by the second.

There are two different principles running through the cases cited. In the first place, the Court says it cannot assume that the date of sequestration is of no importance, for even in the ordinary case it is of importance that preferences should be cut down from the earliest possible date, while in such cases as the present, where the sequestration is that of a deceased debtor the importance is greater, for it is only within seven months of the deceased's death that preferences can be cut down at all.

The other principle upon which the Court has acted is that where there is no reasonable apprehension of creditors getting preferences to which they are not entitled, the Court ought not to interfere with a going sequestration.

In the present case I think that the balance between the two principles is turned by the statement of the trustee that there are no such preferences, and as he has informed the Lord Ordinary officiating on the Bills that there is no risk of preferences, I think it is right that we should take the most convenient and least expensive course —that is, should recal the Sheriff's interlocutor to the extent indicated by your Lordship and adhere to that of the Lord Ordinary.

LORD JOHNSTON—I agree entirely in the course your Lordship proposes to take.

LORD SALVESEN was sitting in the Second Division.

The Court recalled the interlocutor of the Sheriff-Substitute dated 27th July 1910 in so far as it found the pursuer liable in payment to the defender Jeanie M'Gregor in thirty shillings of expenses, and in lieu thereof found the said defender Jeanie M'Gregor liable to the pursuer in thirty shillings of expenses; *quoad ultra* affirmed said interlocutor, and decerned; found the pursuer entitled to the expenses of the appeal against the said defender.

The Court adhered to the interlocutor of Lord Ardwall dated 1st September 1910, and refused the reclaiming note.

Counsel for Robert Lochrie (Appellant and Reclaimer)—Blackburn, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Jeanie M'Gregor (Respondent)—Lyon Mackenzie. Agent—Norman Macpherson, S.S.C.

Saturday, November 12.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THE ELLERMAN LINES, LIMITED *v.* CLYDE NAVIGATION TRUSTEES AND OTHERS.

GLASGOW AND NEWPORT NEWS STEAMSHIP COMPANY, LIMITED *v.* CLYDE NAVIGATION TRUSTEES AND OTHERS.

(See *ante*, March 4, 1909, 46 S.L.R. 472, and 1909 S.C. 690).

Ship — Collision — Collision Due to Negligence of Two Independent Third Parties — Question whether Negligence of One Directly Contributed to Collision.

Two vessels in the Clyde, the one proceeding up and the other down the river, found themselves, without any fault on their part, in such a position owing to the original misdemeanour in navigation of a tug and flotilla of barges that escape from collision was rendered impossible by the position of a cruiser then in course of construction on the river, and whose stern had been wrongfully projected into the navigable channel.

In an action of damages brought by the owners of the colliding vessels against the owners of the tug and the builders of the cruiser, *held* that as but for the wrongful protrusion of the cruiser into the fairway of the river there would not, or at least might not (notwithstanding the original fault of the tug), have been any collision, she (the cruiser) had directly contributed to the accident, and that the builders were liable jointly and severally with the owners of the tug.