ing is a level-crossing, and no doubt this in itself is one cause of accident, for it requires that the attention of persons passing over the line should be called to the coming of a train. The crossing is said by the pursuer to be at the foot of a very steep incline, and it is possible that the line of rail here is not visible at all till one is close upon it. This is of course a dangerous place. In these circumstances I am not disposed to exclude any part of the pursuer's averments from the issue. I think we should recall the Lord Ordinary's interlocutor and appoint the case to be tried on a general issue without specification.

LORD YOUNG—I am entirely of the same opinion, and on the same grounds. If I thought with the Lord Ordinary that the pursuer's case was irrelevant except in so far as he has alleged fault on the part of the company's servants in not having sounded the whistle when approaching the crossing, I would agree with him in his judgment, and put only that ground of fault in issue which I hold to be relevantly stated. But I do not think so. And I do not think it is right to say that to try the case on a special issue is according to the practice of this Court. The pursuer's case is that, on the whole matter, this crossing was not in a safe condition, and that the train was not conducted in such a manner as to be safe for those crossing the line at this point, and that on one or other of these grounds the defenders are responsible for the death of his son.

I think that the pursuer has presented a relevant case, and that it should go to trial on the whole record as it stands. I must say it was not without some surprise that I observed the contention of the railway company here—and I rather think the opinion of the Lord Ordinary—with reference to this crossing, that it is left free to the public to cross as a street in a town might be, as far as the railway company are concerned; because the railway are concerned, and the public are concerned, not only with the safety of those who cross the line, but also with the safety of the trains, which may contain hundreds of passengers. If the crossing be left in the state that men, women, and children who are able to open the gate thus left unprotected may run upon the line at any time night or day, where is the security to people travelling in the trains? A child crossing the line might lead to the wreck of a train and to the death of scores of passengers. We cannot, I think, listen to the contention put forward for the railway company. Their counsel said, in effect, that the gate was for the purpose of letting people in, and not for the purpose of letting them out. I cannot subscribe to the suggestion that the company is entitled so to keep a crossing that anyone may have access to the line day or night. That view I cannot adopt. I think it proper to express this last ground of dissent from the Lord Ordinary's judgment, though it is not necessary to the case. On the whole matter, I think the case should go to trial on the general issue whether the pursuer's son was killed owing to fault of the defenders.

LORD CRAIGHILL—I am of the same opinion, and think a general issue should be adopted. If the pursuer's case rested on separate grounds it might be different, but as the case stands I agree with both your Lordships that it is not possible to read the statement of the pursuer's case without seeing that one ground touches all the rest.

LORD RUTHERFURD CLARK—I am of the same opinion. It being conceded that the pursuer has a relevant case, I think he is entitled to have a general issue. Beyond that I do not go.

The Court varied the issue adjusted by the Lord Ordinary, and fixed this issue for the trial of the cause—"Whether, on or about the 31st December 1881, the pursuer's son James Ireland was killed at a level-crossing at or near Largo by a train belonging to the defenders, through their fault, to the pursuer's loss, injury, and damage?" The pursuer was found entitled to expenses since the date of the interlocutor of the Lord Ordinary, which were modified at £6, 6s.

Counsel for Pursuer—J. C. Smith. Agent—John Macmillan, S.S.C.

Counsel for Defenders—R. Johnstone—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Wednesday, November 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

GILLON, PETITIONER.

Bankruptcy—Recall of Sequestration—Concurring Creditor — Relevancy.

In a petition for recall of sequestration by a creditor of the bankrupt, general averments that the debt set forth in the affidavit of the concurring creditor, and accompanied by vouchers *ex facie* regular, was not a true debt, and that the documents of debt were concocted to enable the bankrupt to procure sequestration, *held* not relevant to go to proof, and petition *dismissed*.

On the 7th of August 1882 the estates of Patrick Murphy, draper, West Calder, were sequestrated by the Sheriff of the Lothians under the Bankruptcy (Scotland) Act 1856, on an application at the instance of the bankrupt with concurrence of James M'Connen. The concurring creditor produced along with his affidavit and claim four promissory-notes granted by the bankrupt in his favour for £10, £10, £24, 2s. 2d., and £12, 17s. 7d. respectively, amounting together to £56, 19s. 9d.

On October 12, 1882, Robert Gillon, a creditor of the said Patrick Murphy, presented a petition to the Lord Ordinary on the Bills for recall of the said sequestration on the ground that the said four documents were granted to M'Connen without any consideration, that they were all written out on the same date, and were concocted for the fraudulent purpose of enabling the bankrupt to procure sequestration of his estates and M'Connen to concur in the application. The petitioner averred that M'Connen was a person in impecunious circumstances, and not in a position to make any advance to the bankrupt.

The estate showed a deficiency of £776, 8s. 4d., the assets being £63, 10s. and the liabilities £839, 18s. 4d.

The trustee in the sequestration, W. J. Cæsar,

C.A., lodged answers to the petition, in which he stated that the promissory-notes in Mr Cameron's favour were all in proper order, were properly and sufficiently stamped, were in the handwriting of the bankrupt, and were subscribed by him; and that at his public examination the bankrupt swore he had borrowed the money from M'Connen. The trustee further stated that he had discovered in the bankrupt's books the following entries in his handwriting of sums owing to M'Connen, viz., 1880, 3d August, £22, 13th January 1881 £12, August 12th 1881 £10, January 2d 1882 £10, amounting together to £54, and explained that the difference between that sum and the sums contained in the bills was composed of interest on the first-mentioned bill to the amount of £2, 2s. 2d., and on the second bill of £12 to the amount of 17s. 7d., amounting together to £2, 19s. 9d., which added to the sum of £54 makes up the sum contained in M'Connen's affidavit. He further stated that the whole other creditors of the bankrupt approved of the sequestration, which it was necessary should be obtained in order to cut down certain preferences which the petitioner was desirous of acquiring, and was attempting to acquire, by certain arrestments which he had used.

The Lord Ordinary (KINNEAR) on 28th September 1882 dismissed the petition.

The petitioner reclaimed, and argued that he should be allowed a proof of the averments in his petition—*Campbell* v. *Myles*, May 27, 1853, 15 D. 685, 25 Scot. Jur. 413.

The respondents argued that there was no relevant case to go to proof, and that the petitioner was bound to condescend on his means of knowledge as to the alleged fraudulent pretence. The merits of the case would be dealt with in the sequestration as a question of ranking.—*Ure* v. *M'Gibbon*, May 28, 1857, 19 D. 758, 29 Scot. Jur. 353; *Joel* v. *Gill*, June 10, 1859, 21 D. 929, 30 Scot. Jur. 511.

At advising—

LORD PRESIDENT—The sequestration of which the petitioner asks recall is the sequestration of the estate of Patrick Murphy, awarded on the 7th of August last by the Sheriff of Midlothian on the application of the bankrupt himself with the concurrence of one of his creditors, or alleged creditors, named James M'Connen. The amount of the alleged debt was £56, 19s. 9d., and the affidavit lodged by the concurring creditor in the application for sequestration was quite in proper form, and was instructed by four vouchers of debt. These were in the form of promissory-notes, two of them being for £10 each, one for £24, 2s. 2d., and one for £12, 17s. 7d. They are all *ex facie* quite regular, and said to be in the handwriting of the bankrupt himself, and are subscribed by him. We are further informed by the trustee that in the bankrupt's books sums corresponding to the amounts in these promissory-notes are entered as due by him to the concurring creditor, with one variation (which certainly does not take from the value of the documents of debt), which is accounted for by the amount of interest charged on the original bill for which this was substituted. The bankrupt himself when examined made a statement to the effect that these sums were undoubtedly owing by him to M'Connen. It is in these circumstances that the petition for recall is presented, the sequestration having been followed up by the appointment of a trustee and the examination of the bankrupt. The ground of the petition is an allegation that the debt is a mere pretence, that it was not really owing by the bankrupt, but was simply concocted in order to enable him to apply for sequestration. It is a question of great practical importance whether that is an allegation which ought to be sent to proof, or whether we have a relevant ground which entitles us to recall the sequestration. I am disposed to think that this allegation is not a relevant ground on which to recall the sequestration. It is too vague and general to justify the Court in interfering with a pending sequestration, and there would require to be something more explicit than a statement like this. The petitioner would require to state what were his means of knowledge of the alleged fact that there was something wrong, and to show in what manner he would establish that the debt was not due. One can hardly see how this is possible, for if he means to prove it by the oath of the two parties, the bankrupt and the concurring creditor, then it must be remembered that they have both given their statement on oath, the one in his affidavit, the other in his public examination. It is not very probable therefore that he could establish his case in that manner, and on that general ground I am disposed to adhere to this interlocutor.

Where the debt of the concurring creditor is sworn to by a regular affidavit, and is accompanied by appropriate vouchers, then unless there is something irregular on the face of the claim or of the vouchers such an averment as this will not afford a relevant ground of recall.

I am fortified in this view by a case not cited to us in argument, probably because it is only reported in Mr Stuart's reports. That is the case of *M'Nab*, Dec. 13, 1851, 1 Stuart 164. There the concurring creditor, who was also appointed trustee in the sequestration, turned out himself to be an undischarged bankrupt, and consequently could not be truly creditor in the debt on which sequestration was awarded. That appears to me to be a much more serious case than the present, yet there the Court did not think there were sufficient grounds to enable them to recall the sequestration. The Lord Ordinary on the Bills, before whom the case first came, remitted to the Sheriff to inquire into the proceedings in the sequestration, and to report. When the case came up again, Lord Fullerton, the new Lord Ordinary, refused the petition for recall, and in a note to his interlocutor says he "cannot hold that there was any such incompetency in the step taken by him (the creditor) in concurring in the application for the sequestration of Hunter, as to demand the recall of the last sequestration after it had been adopted by the general body of the creditors. It was clearly a step taken for the benefit of Hunter's creditors as well as of his own; and accordingly the petitioner does not dispute that his only interest in applying for the recall is to secure a preference in virtue of an arrestment which he has used in the hands of a creditor of the bankrupt." M'Nab, the objector, reclaimed, and as soon as the reclaiming-note had been opened the Lord Justice-Clerk (Hope) asked—"Do you know any case where the debt being vouched, and an affidavit produced along with it, the Court have interposed?" No such case could be found, the

only authorities referred to being precisely of the class cited to us in the discussion here. The end of the case was that the Second Division adhered to the interlocutor of Lord Fullerton, and the Lord Justice-Clerk observed—"The ground of recall pressed is not to be sustained in the abstract. Here the sequestration has gone on, and a trustee has been appointed. Along with the petition there was produced a vouched debt and an affidavit. This claim may be found bad, but this would not be a ground for annulling the sequestration."

Now, undoubtedly, two circumstances referred to there as weighing with the Court occur here also. The sequestration has been adopted by the general body of creditors, and the sole reason for which the petitioner for recall takes action is that he may acquire a preference over the other creditors. This seems a strong and apt illustration of the principle I have already enounced, that it would require something more than a mere allegation to entitle the Court to recall a sequestration. I am therefore for adhering.

Lord Mure—I concur. In this case the promissory-notes are *ex facie* quite right, and all the requisites of the statute have been complied with in the sequestration. Now, in these circumstances no objection could have been taken *ex facie* of the proceedings, but within the statutory period a creditor of the bankrupt has applied for recall on the ground that the concurring creditor was not, strictly speaking, a creditor at all, and that in fact the alleged debt was not really due. That is the ground of his application as stated in the petition. It appears, however, to be one of the facts of the case that at the dates of granting these promissory-notes the concurring creditor stands as creditor for their amount in the books of the bankrupt. These are the facts, together with the important addition that all the other creditors are satisfied that the sequestration should go on. In these circumstances I think the case of *M'Nab* is in point, and has been properly interpreted. I am quite satisfied that we have no ground here set forth to entitle the petitioner to get behind these bills and the affidavit which the concurring creditor produced.

Lord Shand—I am of the same opinion. The petitioner on his own statement is in about as unfavourable a position for making this proposal as can well be conceived. He avers that the bankrupt is absolutely insolvent, and is therefore in those circumstances in which his estate should be divided among all his creditors. His purpose is simply to get a preference in the sequestration and defeat the other creditors. In the next place, looking at this objection to the claim of the concurring creditor, it appears to me that although the petitioner's statement may be true that these documents of debt were all made out at the same time, nevertheless it appears from the bankrupt's books that on several occasions in 1880, 1881, and 1882 there are entered at their appropriate dates sums due by the bankrupt to M'Connen corresponding to the debts set forth in the affidavits. In these circumstances I think we have no alternative but to refuse the petition. The petitioner's averment comes merely to this, that these particular documents of debt were all made out at one date. But suppose that to be the case, if they were granted by the bankrupt for a subsisting debt which he was bound to acknowledge, then there is an end of the objection, for the bankrupt was entitled to grant them.

On the general case I am not prepared to go the length of saying that even if a sequestration has proceeded so far regularly on documents of debt *ex facie* right, it may not be made the subject of inquiry on very special grounds. If sequestration is applied for, and all the statutory requirements have been attended to, the Judge has no alternative but to grant it; but if subsequently allegations are made that the documents founded on were forged, that there has been a fraudulent scheme, and that there is no ground whatever for saying that the debt was due, I think that the Court might allow an inquiry into the facts. But I agree that the petitioner must give a detailed account of his objection, and of his means of the knowledge of the truth of his objection. I concur in thinking that no relevant averment has here been made to entitle us to recall this sequestration, especially with reference to the statements made by the trustee as to his knowledge of the bankrupt's books.

Lord Deas was absent

The Court adhered.

Counsel for Petitioner — Campbell Smith—Nevay. Agent—Robert Broatch, L.A.

Counsel for Respondent — Rhind — Lang. Agents—M'Caskie & Brown, S.S.C.

Wednesday, November 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

RANKIN *v.* CALEDONIAN RAILWAY COY.

Sale—Horse—Retention of Subject by Purchaser after Discovery that it is Disconform to Warranty—Personal Bar.

A horse was sold with an express warranty of soundness. The purchaser discovered him to be unsound, and intimated the fact to the seller, who after some delay came to see the horse in the purchaser's stables. The horse was then suffering from a cold, and it was difficult to examine him for the alleged unsoundness. The seller accordingly requested the purchaser to keep him till he recovered from the cold, by which time it would be more easy to determine the question of his soundness. The purchaser agreed to keep him for a week, but eventually kept him as requested by the seller for more than a month after the seller's visit, after which, and about two months subsequent to the original sale, he was sold by warrant of the Sheriff obtained by the purchaser, and the price consigned. In an action for repetition of the original price, *held* (1), on the facts, that the horse was unsound at the date of sale; and (2) that the purchaser having kept the horse in his