self and never informed her that by signing them she would raise a presumption that prior arrears were discharged.

"If these averments are true the pursuer will certainly suffer much injustice if she is denied an opportunity of proving them in the ordinary way and without restrictions which would probably make a proof impossible, and I do not think her demand to be allowed a proof can be refused unless there be some well-settled principle or practice opposed to it. I am of opinion that there is no such settled principle or rule of practice. I do not see any reason or principle against such a proof. It is no doubt improbable that a creditor should give three consecutive discharges leaving arrears unpaid. But although that is a reason for requiring the pursuer to prove her debt it is hardly a reason for refusing to allow her to do so. I am further of opinion that there is no settled rule of practice against a proof at large in such a case. The authority chiefly founded on by the defender is the case of *Finlay* v. *Kinnaird's Trustees*, March 5, 1829, 7 S. 548, in which in an action by a landlord against a tenant, the tenant produced five consecutive receipts each bearing to be for the balance of his rent; and Lord Corehouse found it presumable in respect of these discharges that no arrears of rent previous to the last of them were due, and 'in respect the respondents do not offer to prove the reverse by the writ or oath of the advocator,' assoilzied the defender, and the Court adhered, Lord Balgray in the Inner House making particular reference to the special terms of these receipts. It is to be observed that the judgment of Lord Corehouse does not bear to proceed on the *apocha trium annorum*, but on the particular receipts on which the defenders founded. It is not a judgment to the effect that the presumption recognised as created by the *apocha trium annorum* cannot be overcome except by the writ or oath of the alleged debtor. There is no such judgment. At most there are dicta that the presumption may be elided by the defender's writ or oath—Stair, i. 18, 2; E. iii. 4, 10, iv. 40. 35—but no positive dictum that a wider proof would in all circumstances be incompetent. In *Cochrane* v. *Stewart*, 1669, M. 11,398, the proof actually offered was the oath of party, and it was held sufficient; but there is nothing in the judgment warranting the contention that no other evidence would have been allowed. In *Grant* v. *M'Lean*, February 11, 1757, M. 11,402, general evidence appears to have been held admissible, and in Tait on Evidence, p. 472, More's Notes, p. 124, and Hunter, ii. 445, the law is stated to be that the evidence afforded by three years' consecutive receipts is presumptive only, and may be overcome by proof to the contrary or of the establishment of a stronger presumption. In *Buccleuch* v. *M'Turk*, June 24, 1845, 7 D. 927, Lord Medwyn said that he had always understood that discharges for three years' rent 'only afforded a presumption of payment, throwing the burden of proof on the party alleging non-payment,' and I consider that this is a correct statement of our practice.

"The question came up more recently in the case of *Cameron* v. *Panton's Trustees*, March 19, 1891, 18 R. 728, where in an action for arrears of annuity payments for three consecutive terms was pleaded in defence, and it was agreed that the presumption could only be elided by the writ or oath of the debtor. This argument was overruled in the Outer House, and a proof before answers was allowed. That judgment was not taken to review, but the final interlocutor was. I do not observe that the plea that the evidence was incompetent was taken in the Inner House—at all events the Court in that case rejected the presumption altogether; they proceeded, or as I think must have proceeded, on the view that if it existed it had been overcome, for they decerned in favour of the pursuer. It is true that in the Inner House nothing was said about the prescription at all—it was ignored as if no such thing existed. This case cannot be quoted as a judgment in favour of the competency of a proof; but it may be permissible to notice that although it was agreed in the Outer House that a proof at large was incompetent it was not considered worth while to reclaim against the interlocutor allowing a proof, or to renew the argument in the Inner House.

"On the whole I think there is no authority for the proposition that this presumption cannot be overcome except by writ or oath. It was not disputed that if my judgment should be against the defender's plea there must be a proof."

Counsel for the Pursuer — Constable. Agents—Constable & Johnston, W.S.

Counsel for the Defender—C. N. Johnston. Agents—Turnbull & Herdman, W.S.

Friday, April 7.

OUTER HOUSE.

[Bill Chamber—Lord Kinnear.

BLAIR & COMPANY *v.* MACKENZIE

Bankruptcy — Sequestration — Competing Petition by Debtor—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 29,

By section 29 of the Bankruptcy Act 1856 it is provided that where a petition for sequestration is presented "by or with the concurrence of the debtor" the Lord Ordinary or Sheriff "shall forthwith issue a deliverance by which he shall award sequestration of the estates which may belong or which shall thereafter belong to the debtor before the discharge." *Held* that the section was not applicable where a creditor had already presented a petition for sequestration, and that in that event the debtor's petition fell to be dismissed.

On 28th March 1899 Messrs Blair & Company, brewers, Alloa, who are creditors of David Mackenzie, hotel-keeper, Bridge Hotel, Hawick, presented a petition in the Bill Chamber praying for sequestration of his estates, on which petition they obtained the usual order for intimation to the bankrupt and advertisement in the *Gazette*. In presenting this petition these creditors also lodged in the Bill Chamber a consent to provide against the contingency of the debtor presenting a petition at his own instance with the consent of another creditor craving immediate sequestration under section 29 of the Bankruptcy Act of 1856, and which is usually granted *de plano*. In this case the debtor did take the above course, for on 3rd April 1899 he (with the requisite concurrence) presented (also in the Bill Chamber) a petition craving sequestration. Lord Kinnear (Ordinary officiating on the Bills) appointed a hearing in the caveat lodged against a debtor's petition, and on 5th April 1899, after considering the argument, pronounced the following interlocutor:—"In respect of the dependence in the Bill Chamber of a petition presented on 28th March last, at the instance of Messrs Blair & Company, Alloa, creditors of David Mackenzie, the present petitioner, craving sequestration of his estates, and the induciæ upon which it is stated will expire to-day, sists procedure in this petition for three days, to allow the petition presented by the said creditors to be disposed of."

Thereafter upon 7th April 1899 Messrs Blair & Company, in the petition for sequestration at their instance, lodged the usual minute with certificates of intimation, *Edinburgh Gazette*, and productions, &c., showing Mackenzie to be notour bankrupt, and craved for and obtained an award of sequestration of his estates. At the same diet they also moved Lord Kinnear to dismiss the second or debtor's petition for sequestration. The motion was granted, and Lord Kinnear pronounced the following interlocutor and note:—"Recals the sist, and in respect of the award of sequestration made of this date in the petition at the instance of Blair & Company, Alloa, for sequestration of the estates of the present petitioner David Mackenzie, dismisses the petition and decerns."

Note.—"Before this petition was presented the first deliverance had been already pronounced in the petition at the instance of Messrs Blair & Company. These petitioners had thus acquired for themselves and the general body of creditors rights which could not be defeated by the bankrupt. In *Jarvie* v. *Robertson*, November 25, 1865, 4 Macph. 79, Lord Curriehill expresses the opinion that in such circumstances the Court is not bound to award sequestration upon a second petition by the bankrupt, and the reasons given by his Lordship appear to me unanswerable. If it were otherwise, the date of a sequestration might be postponed, and rights already acquired by the creditors might be defeated by the act of the bankrupt himself. It is true the Court has no discretion to award or refuse sequestration. But this is not a question of discretion. The question is whether in the present case the right conferred upon the bankrupt by the 29th section is not excluded by the prior right already vested in the creditors under the same statute. No reason has been given for presenting this petition, and sequestration ought, in my opinion, to be awarded, not upon it, but upon the earlier petition, so as to protect the rights of creditors from prejudice. It was stated that the petitioner is not aware of any preference that would be obtained if the other course were followed. But this cannot be ascertained at present, and I cannot proceed on the assumption that the date of the sequestration is of no importance."

Agents for the Petitioners—Steedman & Ramage, W.S.

Agents for the Respondents—Turnbull & Herdman, W.S.