Dunfermline, against John M'Queen, miner, also residing there.

Proof was allowed and led. The defender was called and examined as the first witness for the pursuer, and afterwards gave evidence on his own behalf. The Sheriff-Substitute (GILLESPIE) decerned in favour of the pursuer, but on appeal the Sheriff (CHISHOLM) recalled his interlocutor, and assoilzied the defender from the conclusions of the action. The pursuer appealed to the Court of Session.

LORD PRESIDENT — [*After stating his opinion that the pursuer had failed to prove her case*] — I should like to add a word as to the practice of a pursuer calling the defender as the first witness. For many years strong disapprobation of this practice has been expressed from the bench, not only in this Court but in the House of Lords. It is not (unless under very exceptional circumstances) the proper mode of conducting a case. The defender is put into the witness-box in order to get him to commit himself during a hostile examination on some point or points in regard to which it is intended to bring other witnesses to contradict him. It has repeatedly been said that (unless under exceptional circumstances) where a witness is called by either party, he is presented to the Court by that party as a witness of credit, and that the party cannot be allowed afterwards to contradict or discredit him.

This case is an illustration of the injustice which may result from the practice of a pursuer calling the defender in order that he may afterwards be contradicted and treated as a witness who should not be believed.

LORD ADAM — [*After dealing with the facts*]—I entirely concur with your Lordship's observations on the practice — an entirely improper practice in my opinion—of attempting to hamper the defender by producing him as a witness in order to try to get him to perjure himself on some more or less irrelevant and collateral point, and then to contradict him by independent witnesses. I think that is not a fair practice to the defender, and should be discouraged.

LORD M'LAREN—There are cases, such as the reduction of a will, when it may be necessary for the pursuer to put his adversary in the witness-box as a necessary witness to prove a matter of fact which cannot be proved without his testimony. In such cases the examining counsel will be allowed to examine him as an adverse witness—in fact, to examine him according to the rules of cross-examination. But the present is not a case of that sort, for the facts are not necessarily to be proved by the defender's evidence—indeed, if the pursuer's case had to be proved by the evidence of the defender, cases like this would never be brought. Without going so far as to say that the pursuer, if she puts the defender in the box, is bound by everything which he says—for instance, if he denied the fact of connection, I should not hold her bound by that—I think it must be assumed that the defender is put forward by the pursuer as a person of credit, not necessarily on the main issue, but on all the minor facts of the case from which light on the main issue may be obtained. In so far as he speaks to matters of fact with regard to which he must be familiar, and in so doing discredits the pursuer's averments, I think the case must be taken as if one of the pursuer's principal witnesses had failed to establish the facts for which he was adduced.

LORD KINNEAR concurred.

The Court refused the appeal.

Counsel for the Pursuer and Appellant—A. M. Anderson. Agent—P. R. M'Laren, Solicitor.

There was no appearance for the Defender and Respondent.

Friday, June 28.

FIRST DIVISION.

[Lord Low, Ordinary.

GRANT *v.* GREEN'S TRUSTEE.

Bankruptcy—Sequestration—Acquirenda—Debt incurred after Sequestration—Vesting Order — Diligence — Arrestment — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 102 *and* 103.

The tenant under an agricultural lease was sequestrated in 1893, and a trustee was appointed. By the lease all assignees voluntary and legal were excluded, and it was provided that if the tenant should be sequestrated the lease should, in the option of the proprietor, become *ipso facto* null and void, but that the tenant should be entitled to be paid as an outgoing tenant. It was also provided that the tenant at waygoing should be entitled to be paid for grass, dung, and meliorations on the ground. Upon the sequestration of the tenant the landlord claimed to set off the sum due by him to the tenant at outgoing against arrears of rent amounting to a larger sum, and this claim was not disputed. The whole assets of the tenant other than this claim were bought and paid for by his wife, who had arranged with the landlord to become tenant. The trustee did not take any steps to take up the lease on behalf of the creditors. Ultimately, instead of the arrangement with the bankrupt's wife being carried out, the bankrupt himself continued to occupy the farm, and remained in it till Whitsunday 1898, when he left in consequence of being warned away by the landlord. The trustee in the sequestration had meantime been discharged but the bankrupt himself had not been discharged. At the bankrupt's waygoing in 1898 a certain sum was found to be

due to him by the landlord. This sum was arrested in the landlord's hands by a creditor of the tenant for a debt incurred by the tenant, subsequent to the date of the sequestration, in the course of carrying on business in the farm. A new trustee was appointed. In a competition between him and the arresting creditor the trustee maintained that he was entitled to the whole of the sum due by the landlord at the tenant's waygoing in 1898, in virtue either of section 102 as being a sum due in respect of a right vested in the bankrupt at the date of the sequestration, or of section 103 as being acquired by the bankrupt after the date of the sequestration but before his discharge. *Held* that the sum in question did not vest in the trustee by virtue of section 102, in respect that it did not belong to the bankrupt at the date of the sequestration, and that although a personal right to it vested in the trustee under section 103, the claim upon it of the arresting creditor was preferable in respect that the trustee's right had not been made real by means of a vesting order under the latter section.

This was an action of multiplepoinding in which the fund *in medio* was a sum which had become payable to an undischarged bankrupt after the date of his sequestration, and the competing claimants were his trustee in bankruptcy and an arresting creditor whose debt had been incurred by the bankrupt in the course of carrying on business after the date of his sequestration.

Peter Green, the bankrupt, was tenant of the farm of Delmore under a lease for seven years from Whitsunday 1888. His estate was sequestrated under the Bankruptcy Acts on 30th January 1893, and a trustee was appointed.

The lease provided, *inter alia*, as follows:—"Declaring always that with the exception above written (which was not material to the present question) all assignees and legatees, voluntary as well as legal, and all creditors and adjudgers, and all sub-tenants and cottars, unless with the express written consent of the proprietor or his factor, are hereby expressly excluded. . . . If the tenant . . . shall become bankrupt or be sequestrated in terms of the Bankruptcy Acts . . . the lease shall in the option of the proprietor become *ipso facto* void and null without any declarator or process of law to that effect, and the claims and rights of the tenant in virtue thereof forfeited and annulled, and the possession shall revert to the proprietor at the first term of Whitsunday after any of the said events shall happen, at which term the tenant shall be obliged to remove, but shall be entitled to be paid as an outgoing tenant." The lease provided that at his outgoing the tenant should be paid for grass and dung, and also for certain gates and fencing and crop on the ground.

The trustee in Green's sequestration submitted to the second meeting of creditors, which was held on 9th March 1893, a state of affairs prepared by him showing that the assets amounted to £71, 18s. 9d., being the value put upon the live stock and implements upon the farm, and upon certain wire fences. The liabilities were stated to be £1113, including £187 for rent. The minute of meeting bore that a letter was produced intimating that the landlord claimed the subjects on the farm which could not be sold as a set off in part against the larger claim he had against the estate; that the wife of the bankrupt appeared and intimated that the landlord had let her the farm with entry at Whitsunday 1893, and that she was prepared to take over the live stock, implements and wire fencing on the farm at the valuation put thereon; and that the meeting considering this reasonable advised the trustee to accept this offer. Mrs Green accordingly bought and paid for the assets mentioned. The trustee made no claim to the tenancy and did not take up the lease. The landlord's claim of set off was not disputed by the trustee.

The arrangement above mentioned between Mrs Green and the landlord was not in fact carried out, and instead thereof Green himself continued to occupy the farm as tenant after Whitsunday 1893, and remained in it until Whitsunday 1898, when he left in consequence of being warned away by the landlord.

Meantime the trustee in the sequestration had been discharged on 25th July 1894, but Green himself was not discharged.

At his outgoing in 1898 Green made certain claims upon the landlord for grass, manure, and ameliorations left by him upon the farm. This claim was submitted to arbitration, and on an adjustment of Green's claims and the landlord's counterclaims, it was found that a sum of £105, 18s. 6d. was due by the landlord to Green.

In the autumn of 1897 Green let to one Grant the grazings upon the farm for the summer of 1898 at a rent of £88, for which Grant on 13th October 1897 granted a bill to the bankrupt payable six months after date. This bill was met by Grant at maturity. As Green, being warned to remove from the farm at Whitsunday 1898, was not able to give Grant the whole of the grazing for which he had stipulated, he gave to Grant a bill for £40 at six weeks dated 16th April 1898, which was the day upon which Grant's bill became due. Green failed to meet the bill for £40 when it became due. Grant protested it for non-payment, and thereafter, on 8th June 1898, used arrestments upon the extract registered protest and warrant thereon in the hands of the landlord and his factor to the extent of £50, more or less, due to him by Green.

After Green's removal from the farm certain of the creditors in the sequestration of 1893 took steps to have the sequestration revived, and on 2nd December 1898 Mr John Foster, solicitor, Elgin, was appointed trustee. He did not apply for a vesting-order under section 103 of the Bankruptcy Act 1856 with a view to having his right to the sum found due by the landlord to

Green at his outgoing declared to be vested in him.

Questions having arisen between Grant and the new trustee as to their respective rights in the said sum, on 4th May 1900 Grant, as real raiser, brought the present action of multiplepoinding in name of the landlord's testamentary trustees as pursuers and nominal raisers, in which the said sum was the fund *in medio*.

The defenders called were (1) the bankrupt Green; (2) Grant himself; (3) Foster, the new trustee; and (4) Mrs Green, the bankrupt's wife.

Claims were lodged (1) for the real raiser and defender Grant; and (2) for the trustee. Grant claimed to be ranked and preferred upon the fund *in medio*, *primo loco* and preferably to all other claimants to the extent of the principal sum of £40 contained in the bill above mentioned, with interest and expenses of diligence. The trustee claimed to be ranked and preferred to the whole fund *in medio* in respect that it formed an asset of Green's sequestrated estate.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), enacts as follows:—Section 102. "The Act and Warrant of Confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee for behoof of the creditors absolutely and irredeemably as at the date of the sequestration, with all right, title and interest, the whole property of the debtor. . . . Sec. 103—" If any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him . . . the same shall, *ipso jure*, fall under the sequestration, and . . . be held as transferred to and vested in the trustee as at the date of the acquisition thereof . . .; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstance to the Lord Ordinary, who shall . . . declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee as at the date of the acquisition thereof. . . ."

On 2nd November 1900 the Lord Ordinary (Low) repelled the claim for Grant, and ranked and preferred the trustee on Green's sequestrated estate in terms of his claim for aught yet seen.

Opinion.—[*After narrating the facts his Lordship proceeded*]—"It was argued for Grant that the trustee had abandoned the lease and allowed the bankrupt to carry on the farm for his own behoof, and that in these circumstances he had no claim for any sum to which the bankrupt had right by virtue of the lease. In any view, he argued that any debts which the bankrupt had incurred in carrying on the farm fell to be paid preferably out of the fund.

"Now, although the trustee did not take up the lease, I do not think that there was any abandonment of any asset which would otherwise have fallen under the sequestration. An asset can only be abandoned by the creditors, or by the trustee with the consent of the creditors—*Whyte*, 16 R. 100, *per* Lord President—and there is nothing to suggest that the creditors here intended to abandon their right to any sum which might be payable to the bankrupt at the termination of the lease. Apparently the original trustee had not taken the trouble to make himself acquainted with the terms of the lease, otherwise I think that he would have dealt in some way with the right of the bankrupt to obtain payment at the end of the lease. I do not think, however, that the creditors can be prejudiced because the trustee was negligent in that respect. Again, I do not think that the fact that the trustee did not take up the lease, and that the bankrupt was allowed to carry it on, prevents the sum in question falling under the sequestration. It may very well be that if a bankrupt is allowed to continue a lease, not for behoof of the creditors but on his own account, the former cannot claim any profits which he may earn. But the sum in question was not profits of the farm, but represented capital of the bankrupt which he had put into the farm, and which it was agreed that the landlord should repay him at the end of the lease.

"In regard to Grant's alternative argument, a nice enough question might have arisen if his debt had truly been incurred for the purpose of carrying on the farm—for example, if he had been a merchant who had supplied the bankrupt with seed. But I do not think that it is possible to regard that as being Grant's position, as his claim against the bankrupt was merely a claim against the latter because he was unable to implement his contract.

"It was further argued for Grant that if the trustee claimed the fund as falling under the sequestration, his course was to present a petition for a vesting order under the 103rd section of the Bankruptcy Act. The view maintained by the trustee, on the other hand, was that the right to claim payment for grass, dung, and the like, was in the bankrupt by virtue of the lease at the date of the sequestration, although payment could not have been demanded, nor the precise amount ascertained, until the end of the lease. That is a point upon which I do not think that it is necessary to indicate an opinion. If I am right in holding that the fund falls within the sequestration, Grant's claim cannot be sustained, and that is sufficient for the decision of this case."

The claimant Grant reclaimed, and argued—The creditors in the sequestration of 1893 had allowed Green to continue on the farm, and the claimant was a creditor of the new business so carried on by the bankrupt. The only question was whether the fund *in medio* fell under the original sequestration as being the sum to which the bankrupt was entitled on waygoing in 1893, and whether it had never been abandoned by the creditors; these questions could only be answered in the negative because there was no balance due to the tenant at his waygoing in 1893. The trustee could have no claim to the fund *in medio* without obtaining a vesting order under section 103 of the Bankruptcy

Act—*Abel* v. *Watt*, November 21, 1883, 11 R. 149; *Taylor* v. *Charteris & Andrew*, November 1, 1879, 7 R. 128.

Argued for Green's trustee—Whatever a bankrupt acquired before his discharge fell under his sequestration, and the process in an application for a vesting order under section 103 of the Bankruptcy Act was purely declaratory—*Lord Napier's Trustee* v. *Lord de Saumarez*, February 28, 1899, 1 F. 614. The balance due on waygoing was part of the capital which the bankrupt had put into the farm, to be repaid by the landlord on the termination of the lease, and it was vested *ipso jure* in the trustee by his act and warrant. The creditors had not consented to the bankrupt's tenancy being continued in 1893. They were entitled to accept the assurance that his lease was at an end and that his wife was to be the tenant. Though the tenant's rights under the lease with regard to waygoing were not exigible until the termination of the lease, they were vested, and constituted an existing asset at the date of his sequestration in 1893—*Barron* v. *Mitchell*, July 8, 1881, 8 R. 933.

At advising—

LORD KINNEAR—The fund *in medio* is a sum of £105, which is payable under certain estate regulations by a landlord to an outgoing tenant on the termination of his lease; and the question arises in a competition between a creditor of the tenant, who claims to have arrested the fund in the landlord's hands, and the trustee in the tenant's sequestration. The Lord Ordinary has preferred the trustee, holding that the fund belongs to the sequestrated estate and has vested in the trustee, either by virtue of the general vesting clause, section 102, or by virtue of section 103, which carries estate acquired after the date of the sequestration, and that it is unnecessary to determine whether it comes to the trustee by force of the one or of the other of these two clauses. I cannot agree with his Lordship that it is possible to decide the question in dispute without first deciding on which of these clauses the trustee's right depends. The question arises on a competition of diligences, because a sequestration is a combination of all kinds of diligence, and I know of no rule by which it is possible to determine which of two competing diligences is to be preferred to the other without ascertaining in the first place the date at which each may be supposed to have become effectual. But, for another reason, it seems to me that the first question which arises, and which it is indispensable to decide, is, whether the fund was carried to the trustee by the 102nd section, because if it was there is an end of all possible controversy between the trustee and any subsequent creditor. The property covered by that section is vested in the trustee for behoof of the creditors "as at the date of the sequestration," to the entire exclusion of all future creditors, not only as regards the power to do diligence, but also as regards their claim to participate in the fund. Now, the estate was sequestrated on the 30th of January 1893, and the competing creditor's arrestment was used on 8th June 1898 to enforce payment of a debt owing upon a bill dated 16th April 1898. It is perfectly obvious that the creditor in such a debt can have no claim whatever upon the estate vested in the trustee by the confirmation of the act and warrant, and that any diligence he may have used to affect it must be altogether inept, whereas the question whether he has acquired a right by diligence or otherwise in property acquired by the bankrupt since the date of the sequestration depends upon totally different considerations. I cannot see, therefore, how we can avoid deciding this first question; and I am of opinion that it must be decided against the trustee. The fund *in medio* could not be vested in the trustee by the 102nd section on the confirmation of his act and warrant, because it did not belong to the bankrupt at that time. The fund is a sum payable by a landlord to a tenant as the value of grass and manure and ameliorations left by the tenant on the farm at the term of Whitsunday 1898; and that is a claim which cannot possibly have vested in a trustee in 1893—years before it had emerged as a right in the bankrupt, and at a time when it could not be foreseen that any such right would ever arise at all. It did not exist at the date of the sequestration. But it is said that the obligation under which payment is claimable—that is, the lease—is of prior date to the sequestration, and the argument was, that as the tenant's right under the lease was attached by the sequestration, all the emoluments he might derive from the lease, including the claim now in question, were attached at the same time. This is altogether erroneous. The lease under which the bankrupt held his farm at the date of the sequestration was not carried to the trustee by force of the statute, and the bankrupt's right to the payment now in question did not arise under that lease. The lease contains a clause excluding in express terms all assignees, voluntary as well as legal, and all creditors and adjudgers, and all subtenants and cottars, except with the express written consent of the proprietor; and it also provided that if the tenant should become bankrupt the lease should at the option of the proprietor become *ipso facto* null and void without any declarator or process of law to that effect, and the claims and rights of the tenant in virtue thereof forfeited and annulled. It follows that no right in the lease could possibly be attached by the sequestration or vest in the trustee. At the same time it is clear enough that any personal claim against the landlord for the payment of money which had already vested in the tenant would pass as matter of course to the trustee in the same way as any other debt due to the bankrupt. And there was such a claim, because the bankrupt-tenant was entitled to the value of the grass, dung, straw, and fallow on the farm at the termination of his lease. But then that clause turned out to be of little value to the creditors, because the landlord claimed right to retain the

amount as a set-off in part against a larger sum due to him by the bankrupt-tenant, and his claim was not disputed by the trustee. When that was once settled every right which the trustee could claim for the sequestrated estate under the existing lease was determined. The Lord Ordinary, however, treats the fund *in medio* as a sum payable to the bankrupt under the lease, and he says that the bankrupt continued to possess as tenant under the lease until Whitsunday 1898; and in the condescendence attached to the summons it is averred in like manner that Peter Green continued as tenant by tacit relocation. I do not think this is a sound view. The lease came to an end by the bankruptcy of the tenant, and that the landlord acted on his option to treat it as thenceforth null and void is made apparent, in the first place by his intimation of his claim to retain the waygoing crop or its value to meet the amount due to him—a claim which could not possibly arise unless the tenant were going out as at the termination of the lease; and in the second place, by his making an arrangement, of which the creditors were informed, to let the farm to Mrs Green, the bankrupt's wife. All that appears very clearly from the minute of meeting of creditors held on 9th March 1893, which sets forth that the trustee produced a letter from the agents of the landlord intimating that he claimed the subjects on the farm which could not be sold as a set-off in part against the debt due to him; and that Mrs Green appeared and intimated that the landlord had let the farm to her, and that she was willing to take over the stock, implements, and fencing at a valuation. The creditors approved, and the result was that Mrs Green bought from the trustee on the sequestrated estate the stock, &c., which had passed to him, and paid for it. It is true that this arrangement was not ultimately carried out; and that instead of Mrs Green entering upon the farm as a new tenant, her husband, the original tenant, was continued in the tenancy until he was warned to remove in 1898. But this was certainly not by virtue of the old lease renewed by tacit relocation. Tacit relocation was completely excluded by the transactions I have already mentioned. That principle operates only when tenant and landlord continue in fact to occupy their old relation, maintaining at the same time a perfect silence as to their mutual intentions; and therefore its operation is excluded when any new bargain is made. Now, the tenant in the circumstances could not be replaced in the tenancy, his wife could not be displaced, and he could not resume his old position as tenant without a new agreement. The terms of such new agreement do not appear, but some new arrangement must have been made, because the condition of things was entirely altered from that created by the arrangement embodied in the minute of 9th March 1893. I suppose it was a verbal agreement, for no writing is produced, and its effect may very probably have been that the tenant should remain under the same conditions as those expressed in the lease. But that is not material. The point is, that it was not by virtue of the lease that the tenant occupied the farm after the bankruptcy, but by virtue of a new agreement with the landlord that he should be allowed to continue his occupancy notwithstanding the termination of the lease.

In the meantime the sequestrated estate was distributed and the trustee was discharged. But then the bankrupt was not discharged, and so long as he remained an undischarged bankrupt I do not think it doubtful that he could be required to communicate to his creditors the benefits of the lease. But that is not because the lease or any money or property which might accrue to him in carrying on his business as a tenant farmer was vested in the trustee at the date of the sequestration, but because it is estate acquired by him after the date of the sequestration to which his creditors have right under the 103rd section of the Bankruptcy Act. But then the question arises, not between him and his creditors, but between the creditors at the date of the sequestration, and the persons to whom he incurred liability in the course of the business he was carrying on. That question is, whether the former can deprive the latter of their just claim upon the new assets which have been created since the sequestration by his carrying on business since that date. I think the right of the later creditors is clear, both on principle and on authority. The rule is, that "if creditors allow the bankrupt to embark anew in trade and to acquire funds or property in business on the footing that he is entitled to enter into the market and trade as if he were *sui juris*, then they are not entitled to prevent new creditors from ranking on the newly acquired estate." Principles of equity, as the Lord President Inglis says in *Abel* v. *Watt*, come in here to qualify the rules of the statute, and the rules of the bankrupt law being themselves founded on equitable considerations must yield to a stronger equity, and therefore if this formal operation of the statute had been to vest the bankrupt's earnings in his business as farmer absolutely in the creditors, there would, in my opinion, be strong ground for holding that if creditors act in the manner in which we must assume that they have acted in this case they could not exclude posterior creditors from participation in the estate earned by a common debtor in the business he had been allowed to carry on. We must assume that the business was carried on with the consent of the creditors and with their knowledge, because nothing is said to the contrary, and it is impossible to suppose, having regard to the nature of the district, that this farmer's creditors and neighbours did not know that he was still going on in the farm. But I do not think there is any conflict between the statute and this equitable principle to which I have referred. The 103rd section vests in the trustee *ipso jure* a right to the *acquirenda*, but that is only a personal right which to be fully

effectual requires to be made real by certain statutory procedure. It is the duty of the trustee when he comes to the knowledge of such acquisitions to apply to the Lord Ordinary to "declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee at the date of the acquisition thereof, to the same effect as is hereinbefore enacted in regard to the other estates." The estate dealt with in this section, therefore, cannot be practically brought under the sequestration without the intervention of the Court. It follows that till this is done earnings which are not vested by a declarator of the Lord Ordinary to the effect set out in the section remain open to the diligence of creditors whose debts have been incurred after the sequestration, and if any such creditor has made his right effectual by diligence before the trustee has made the right of prior creditors real by the statutory procedure, the right first made effectual must prevail. Now, the creditor John Grant used diligence to attach the fund, and his diligence was completed before any real right was vested in the trustee. I am of opinion that he is entitled to prevail in the competition.

The Lord Ordinary says that the sum in question represented capital of the bankrupt which he had put into the farm, and which the landlord was to repay him at the end of the lease, and that that capital being the creditors' money, its fruits, the sum in question, must belong to the creditors also. There is no evidence of this, and it cannot be assumed. On the contrary, we must assume, since there is no allegation of fraud, that the whole estate of the bankrupt had been honestly given up, and that when the trustee was discharged it had been divided among his creditors, and therefore that the bankrupt started with no capital of his own with which to carry on the farm, and therefore with no capital belonging to his creditors. No doubt he required money to carry on his business, but the obvious inference is that he carried on the farm with money not stolen from his creditors but supplied by his friends. His wife, who appears to have had money, and had bought from the trustee what belonged to him on the farm, may have supplied the money. At all events, we cannot assume that it was money stolen from his creditors. The case of *Abel* v. *Watt*, 11 R. 149, has no bearing. That was a case in which the creditors in the sequestration claimed to retain an abandoned asset. Here the question is one of competition between creditors as to priority in making their rights effectual.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and the claimant Grant ranked to the extent of his claim. The trustee will be entitled to the balance, but it would be premature to give him a ranking at this stage, because he has not completed his right by the statutory procedure. It was suggested that the necessity for this is obviated by this process of multiplepoinding, because when a fund is in the hands of the Court it can be reached by the order of the Court, and that such order may be made with safety, as everyone interested was called in the multiplepoinding. But I think it would be premature to proceed on that view, because the point was not really argued to us, but was merely mentioned as tending to show that no vesting-order under section 103 was necessary, the fund having vested *ipso jure* in the trustee. The best course will therefore be to pronounce findings, and to remit to the Lord Ordinary to consider the best way of disposing of the trustee's claim.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court recalled the interlocutor of the Lord Ordinary, and ranked and preferred the claimant Grant in terms of his claim, and found *quoad ultra* that the claimant, the trustee on Green's sequestrated estate, was entitled to be ranked and preferred for aught yet seen to the balance of the fund *in medio*; and remitted to the Lord Ordinary to proceed.

Counsel for the Claimant and Reclaimer—Ure, K.C.—M'Lennan. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Claimant and Respondent—Campbell, K.C.—Hunter. Agent—Alex. Mustard, S.S.C.

Wednesday, June 26.

SECOND DIVISION.

[Sheriff-Court at Paisley.

FULLERTON, HODGART, & BARCLAY *v.* LOGUE.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1) *and* (2) (*c*) — *Accident Arising Out of and In the Course of Employment — "Serious and Wilful Misconduct" — Workman Using Hoist to Procure Tools Contrary to Notice.*

A workman in an ironfoundry was ordered to fill scrap iron into barrows. In order to procure hand leathers to equip himself for this purpose he ascended to the furnace platform in a hoist, and was killed. There was a ladder which led to the furnace platform, and the workmen were forbidden to use the hoist by a notice posted near it. Shortly before the accident certain alterations on the hoist had rendered it more dangerous. At the time of the accident the deceased had been for a fortnight employed in the foundry, but he had previously worked there before the alterations were made upon the hoist. The Sheriff did not find that the workman knew of the notice. It was not proved that his attention had been specially directed to the alterations in the hoist. All the workmen, in spite of the notice, made use of the hoist.