dict, but very considerable injury might result to the complainer by refusal of it, the true equity of the case demanded that protection should be given in the meantime.

Lord COWAN had some hesitation, but did not dissent.

Lord BENHOLME concurred, observing that the main use of interdicts was to stop changes, and not to allow alterations in the state of possession while the question between the parties was being tried.

Lord NEAVES—I cordially concur. Without anticipating the merits there are some considerations in the case very favourable to the complainer and suspicious in the conduct of the respondent. If the respondent had used the word "Govan" alone, that would have been a clear fraud, which we would very soon have put down, but the star may be such an integral and substantial part of the complainer's mark as to entitle him to the same redress. He alleges that it has been used by him for many years, which I think we may assume, and that his iron is known abroad as star iron. Now, if that is so, one can easily see how the Coats bad iron marked with a star might be passed off as the Govan good iron. The want of the word Govan might easily be explained away. Then the respondent never used the star until the other day, and what fair or legitimate object could he have in adopting that mark? His iron is very inferior to the complainer's star iron, and one suspects something wrong at once when he begins to use the star. Then the respondent tells us that a Mr Hertz first ordered the iron to be stamped with a star. Now, assuming this gentleman to be an honest man, his ordering iron to be marked in this way is, to say the least of it, very suspicious. He wants inferior iron stamped with the mark of a well-known superior iron. We have no explanation of Mr Hertz's reason for wishing this done, and it looks like a device for injuring in the market the complainer's star iron. Now, pending the trial of the question it is quite plain that the complainers may suffer much injury by the interim interdict being withheld, but that the respondent cannot possibly suffer any injury by its being granted. It cannot be assumed that Mr Hertz is such a very unreasonable man as to withdraw his custom from the respondent unless he agrees to commit a breach of interdict.

The note was accordingly passed and interim interdict granted.

Agents for Complainer—Melville & Lindsay W.S.

Agents for Respondent—A. G. & W. Ellis, W.S.

BALLANTYNE *v.* JEFFREY AND BARR.

Bankruptcy — Recal of Sequestration — Voucher of Debt—Competency. A sequestration granted on the petition of the bankrupt with a concurring creditor recalled as incompetently awarded, in respect the creditor's account was not sufficiently vouched according to the requirements of the Bankrupt Act.

On 27th September 1866, John Jeffrey, with concurrence of Patrick Flannigan, pawnbroker, Falkirk, representing himself as his creditor to the requisite amount, presented a petition to the Sheriff of Linlithgowshire for sequestration of his estates. The account, upon which a sum of £57, 10s. was said to be due by Jeffrey, was produced, and also Flannigan's oath to that effect; but two of the items in the account—viz., "Cash lent you, £10," and "Amount of goods, £17"—were not vouched as is required by the statute. Sequestration was awarded by the Sheriff of Linlithgowshire, and Mr Barr was appointed trustee. A petition for recal of the sequestration was presented within forty days by Ballantyne, as a creditor of Jeffrey to the extent of £200, 2s. 6d.

The Lord Ordinary (Mure) refused the petition, on the ground that the petitioner must be held to have acquiesced in the sequestration. His Lordship added the following note explaining the grounds of judgment:—

"The question for consideration is whether, when the concurring creditor is truly a creditor to the extent required by law, it is necessary to recal a sequestration granted on an affidavit *ex facie* regular, and which is not said to have operated injuriously as regards the interest of the petitioner, or any others of the creditors on the estate, because vouchers for certain of the items in the account to which the affidavit relates, were not produced before the Sheriff when sequestration was awarded.

"The Lord Ordinary has felt this question to be attended with considerable difficulty, as the provisions of the Bankrupt Act are very precise as to the necessity of producing vouchers to instruct accounts. But on examining the authorities, he has come to be of opinion that the present case may be held to fall within the operation of the rules applied in the cases of M'Nab, December 13, 1851, and Ure, May 28, 1857, rather than in that of Campbell, 27th May 1853, relied on by the petitioner. For the decision in the case of Campbell appears to have proceeded on the ground that the concurring creditor was not in any sense a creditor of the bankrupt, and that there could therefore be no concurrence. The objection, however, now under consideration arises on the assumption that there was a debt of the requisite amount due to the concurring creditor, and it rested on the fact that when the Sheriff awarded sequestration, certain items of the account were not properly vouched. This is an objection, however, which, in the opinion of the Lord Ordinary, is not necessarily fatal to the sequestration, but one which may be waived or acquiesced in by a creditor so as to preclude him from on that ground applying to have the sequestration recalled.

"Now, it appears from the proceedings in the sequestration, that this is what occurred in the present case. For the petitioner granted a mandate to Mr Thomson, an accountant, who appeared and acted for him at the meeting for the election of trustee. At that meeting Mr Thomson proposed himself as trustee in opposition to the respondent; and the concurring creditor also appeared, and having produced the bill for £27 granted by the bankrupt, was allowed to vote without objection. Mr Thomson was not elected, but no protest or appeal was taken against the vote of the concurring creditor, or the resolution of the creditors to elect the respondent, whose appointment was duly confirmed on the 13th of October 1866. Upon this being done, the creditors proceeded, at meetings called in terms of the statute, to entertain and dispose of an offer of composition made by the bankrupt, and that without intimation of any objection on the part of the petitioner until the date of the present application. In these circumstances it appears to the Lord Ordinary that the petitioner must be held to have acquiesced in the sequestration, and is now foreclosed from seeking to have it recalled."

The petitioner reclaimed.

SCOTT, for him, argued—There being no proper

account and vouchers produced as required by the statute, the petition for sequestration ought, under the statutory direction, to be dismissed. There is no alternative but dismissal.

M'LENNAN, for the respondent, answered—It is admitted that, had the objection to the account and vouchers been taken when the petition for sequestration was before the Sheriff, the petition must have been dismissed. But review of the judgment on that petition is expressly excluded by the statute, which provides instead of it for a petition to recal. The grounds are not specified in the statute on which recal should be pronounced, and the Court has in various cases held it to be in their discretion whether to recal or not. There are here two main reasons against recal—1. That the petitioner had acquiesced in the sequestration by taking part by his mandatory in a contest for the trusteeship, for which his mandatory was a candidate. In Ure *v.* M'Cubbin, 28th May 1857, 19 D. 758, an act only a little stronger was held to constitute a personal bar to suing a petition for recal. 2. The whole of the creditors, except the petitioner, were content, and the sequestration proceedings were practically at an end through their accepting an offer of composition made by the bankrupt. In Macnab *v.* Hunter, 13th Dec. 1851, 14 D. 183, recal was refused on this ground, although the concurring creditor, being an undischarged bankrupt, was, in strict law, no creditor at all of the petitioner for sequestration. In Macnab's case, as in that of Ure, the Court had distinctly claimed and exercised a discretionary power as to recal, and there was no principle on which that discretion should be limited. Where there was no concurring *creditor* (according to strict law), as in Macnab's case, they refused recal, and it was hard to see why they should not refuse it where there was a creditor, as here, to the statutory amount, the only objection being that his account and vouchers were out of form. The case of Johnstone, 18th July 1840, 2 D. 1463, decided that such an account as was here objected to might be remodelled, a debt of the proper amount subsisting. The Court, therefore, in the whole circumstances, should refuse the petition, and give the concurring creditor an opportunity of remodelling his account.

At advising,

The LORD JUSTICE-CLERK—The statute confers upon any creditor the right to petition for recal. This was not an open account with a tradesman. The last two items clearly required vouchers. That was undoubtedly a statutory ground for refusing sequestration; and, if so, it is one for recalling. As Bell explains, sequestration may be recalled on legal grounds or grounds of expediency. This is a legal and statutory ground, and we have no alternative. The creditor was in no way barred by attending to his interests in the sequestration. The recal has not always the effect of annulling all that has taken place in the sequestration.

Lord COWAN—I think it is very important to remember the true nature of sequestration. Sequestration is a kind of diligence, and a very important one, by which the rights of creditors are equitably regulated. This being so, we must be extremely careful of the grounds on which it is granted, or, if wrongly granted, on which it is recalled. The Bankruptcy Statute gives a right to every creditor to petition for a recal of sequestration, without requiring him to state his interest in the matter. I entirely concur with your Lordship in holding that the objection taken in this case is a legal one, which, if it be well founded, cannot be overlooked by the Court.

The view taken by the Lord Ordinary is, that the petitioner is barred by homologation from proceeding in this recal. Now, I don't see how his Lordship can arrive at such a conclusion. It is provided expressly by the statute that the sequestration shall go on, even while proceedings are being taken by petition for its recal. What the petitioner here did, was merely by mandatory to appear and take part at a meeting of creditors, and his having done so cannot be held to bar him from using this legal objection, and seeking to obtain a recal of the sequestration.

Lord BENHOLME observed that there was an important distinction between flaws which appeared *ex facie* of the proceedings such as this and latent incompetency. In the latter case there might be room for the plea of personal bar, but not here.

Lord NEAVES concurred.

Agents for Petitioner—Macgregor & Barclay, S.S.C.

Agents for Respondents—Ferguson & Junner, W.S.

Tuesday, Jan. 29.

JURY TRIAL.

(Before Lord Ormidale.)

FINDLAY *v.* ANDERSON.

Jury Trial—Reparation—Slander—Assault. Verdict for pursuer—damages, £5.

This was an action of damages for slander at the instance of Lieutenant-Colonel Alexander Findlay of Millbank, residing at Balblair, near Nairn, against Robert Anderson, Esq., of Lochdhu; and the following were the issues laid before the jury:—

"1. Whether, on or about the 17th day of January 1866, on the public road from Lochdhu to the Kilravock road, at a point near the Lochdhu gate, in the shire of Nairn, the defender, in the presence and hearing of William Fraser, ground officer, Cantray, did falsely and calumniously use the following words of and concerning the pursuer:—'William stop that man; he is a great liar, you cannot believe a word he says; he is afraid to remain, as you might be a witness to what he might say; he is a coward; look at him walking off like a cowardly dog, as he is; he is a low unprincipled man, and all unprincipled men are cowards;' or did use words to the like effect of and concerning the pursuer—to his loss, injury, and damage?

"2. Whether, on or about the 4th day of April 1866, and at or near the march ditch dividing the Moss lands and Tradespark, belonging to the town of Nairn, Kildrummie belonging to Major Rose of Kilravock, and Lochdhu belonging to the defender, the defender, in the presence and hearing of Adam Davidson, town-clerk, Nairn; James Rose, fish-curer, Nairn; Alexander Hay, merchant, Nairn; M'Intyre, Nairn; William Leslie, druggist, Nairn; also Thomas Fraser, land-surveyor, and his assistant, Alexander Fraser, both residing at Burnside, in the parish of Ardersier, county of Inverness, did falsely and calumniously say that the pursuer had then and there told a gross falsehood, and that a grosser falsehood