of title to sue, and therefore, though the question may be foreclosed in this cause owing to the form of the interlocutor, the Court gives no decision whatever on the abstract question, and I reserve my opinion as to the competency of an action by the executors of a deceased apprentice for an assault committed on him during his lifetime, but to which his death is in no way attributable. My impression, I repeat, is that the question is not ruled by the case quoted by the Lord Ordinary, and I am inclined to be against the title to sue. But assuming that the pursuers have a title to sue, I am of opinion with the Lord Ordinary that they have no good ground of action in point of fact. I refrain from going into the evidence, and generally I concur with his views. The captain of a ship is undoubtedly at liberty to chastise an apprentice for misconduct at sea, and a court of justice cannot review his judgment as to whether that chastisement was merited. There can be no good ground of action unless it can be shown that the alleged misconduct was only a pretence to give apparent justification to a desire to act with cruelty towards the apprentice. I think the evidence falls very far short of this, and though the captain appears to have on certain occasions acted in an exceptionally severe and reprehensible manner, the evidence does not show that he was actuated by a desire wantonly to ill-treat the lad. Therefore, on the whole matter, and without going into the evidence in detail, I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed. I think it right to state that the Lord Justice-Clerk, who is unable to be present to-day, and who heard the opening speech for the reclaimer, read over the evidence, and his impression is in accordance with the interlocutor which I propose we should pronounce.

Lord Craighill—I am of the same opinion. I think that the pursuers have no good ground of action in point of fact. I do not go into the evidence, but concur entirely in the Lord Ordinary's views on it. I desire, however, to reserve my opinion as to the question whether there is title to sue here. Through a mistake in the form of the interlocutor pronounced by us on 14th December 1882, the question is, I apprehend, foreclosed as regards the present case, but in any future similar case the question is still open.

Lord Rutherfurd Clark—If the plea of no title to sue were still open for our judgment I should be inclined to hold it good. I do not give a decision, however, on the question, but only desire to express my extreme doubts of the pursuers' title to sue such an action as this. As regards this case, the proceedings which have taken place are conclusive. On the merits I have come, after very anxious consideration, to be of the same opinion as the Lord Ordinary. I do not mean to enter into the evidence, but I cannot refrain from saying that I think there must be great exaggeration in the evidence given by the pursuers' witnesses. The captain was a man who had done well in all that he had been called to do, his character was good, and it is scarcely credible that he could be so inhuman as that evidence represents him to have been.

The Lord Justice-Clerk was absent.

The Court adhered.

Counsel for Pursuers — R. Johnstone—Kennedy. Agent—John Macpherson, W.S.

Counsel for Defender — Trayner — Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, December 1.

FIRST DIVISION.

[Lord Kinnear, Bill Chamber.

FLEMING *v.* YEAMAN.

Bankruptcy—Petition for Sequestration—Oath of Petitioning Creditor.

In a petition for sequestration of the estate of a debtor who had become notour bankrupt, the petitioning creditor deponed to a debt forming the balance of an account current, and vouched by a number of I O U's. It appeared from a letter of agreement by the creditor, which was produced, that the creditor had agreed that until adjustment of the account between him and the debtor the I O U's "should be retained as vouchers of the said current account, upon which I cannot sue you nor do diligence for them against you." *Held* that the debtor having become notour bankrupt, the creditor was not debarred by this agreement from applying for sequestration, founding on the I O U's as vouchers of the debt.

Notour Bankruptcy—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34).

A charge was given on a decree obtained in the Court of Session against a debtor. The debtor was insolvent, and the charge was allowed to expire without payment, but after its expiry the debtor presented an appeal to the House of Lords, which he had intimated while the charge was current. *Held* that there was notour bankruptcy under the statute, which could not be affected by the appeal.

On the 1st October 1883 a petition was presented to the Sheriff of Forfarshire at Dundee by Robert Yeaman of The Lea, in the county of Edinburgh, for sequestration of the estates of Alexander Gilruth Fleming, of 57 Commercial Street, Dundee. The petitioner produced (1) an oath to an alleged debt of £1060, 13s. 8d., of which £1000 was said to be an advance by the deponent to Fleming, conform to a bill drawn by Fleming on the firm of J. & W. Kinnes, and endorsed in blank by him to the deponent, and produced with the oath, the remainder being interest thereon; (2) an oath to £1591, 12s. 11d., being the balance on an account-current between Fleming and the deponent from 21st May 1879, conform to thirteen holograph acknowledgments of debt or I O U's granted by Fleming to the deponent, and constituting the vouchers of the debit side of the account. The Sheriff having in common form granted commission to recover evidence of Fleming's notour bankruptcy, and of the other facts necessary to be established in order to obtain his sequestration, there were recovered extract decrees in a petition for recovery of calls at the instance of the liquidators of the Pant Mawr Slate and Slab Quarry Company

(Limited), dated 20th March and 16th May 1883, with execution of charge thereon dated 8th June 1883. This charge expired on June 14, 1883. There was also recovered a trust-deed for creditors granted by Fleming in May 1879 in favour of Mr R. F. Hunter, solicitor, Dundee, on which a dividend of 1s. 6d. per £1 had been paid. This trust for creditors was still in existence.

Fleming having entered appearance to oppose the petition, parties were heard by the Sheriff.

With regard to the decrees for calls it appeared that on 13th June 1883, the day before the charge expired, informal intimation of an appeal to the House of Lords was made by Fleming's agent, but the order for service of the appeal was not obtained till 18th, or served till 20th June, six days after it expired. The liquidator had obtained an order for interim execution pending appeal on condition of finding caution for repayment to the petitioner in case the appeal succeeded. By agreement between the parties, in place of said interim execution, Fleming had consigned in bank, in name of the agent for the liquidators, and of another person, the amount in the decrees.

With regard to the oath for £1591 there was produced a letter (signed by Yeaman, but not holograph of him or tested) to the following effect—"Dear Sir,—Referring to the agreement betwixt you and me, dated 9th May 1881, by which I agreed to advance you £1000 on certain conditions, I hereby declare that although it is mentioned in said agreement that I had advanced you £1000 on an I O U, that said £1000 has been advanced or is to be advanced to you at various times on I O U's on an open current account betwixt you and me, and the first advance on said open current account in connection with said loan of £1000 was made on 28th February 1881, and so on thereafter from time to time. Referring also to the £500 originally advanced by Mr David Stewart for your furniture, and latterly by me, and for which I ultimately accepted a bill signed by your brothers James and David Fleming, with interest thereon added, and in order to pay this advance and any balance which may be due me on said open current account before referred to, over the above said £1000, under the said agreement, which falls to be deducted from said current account before said balance can be declared, I hereby acknowledge having received a deposit-receipt of the Scottish Banking Company (Limited) for £1000, dated 22d January 1883, and lodged for a period of five years, with interest payable at overdraft rates six monthly—£600 of said deposit-receipt being from David Fleming in payment of said bill for furniture, and £400 from you, which £400 is in excess of any balance due me, which can be charged against you, and for personal advances under said open current account, and interest due under said agreement after £1000 under said five years' agreement has been deducted. The I O U's granted or to be granted by you in connection with said current account, shall, until final adjustment, be retained by me as vouchers of said current account, upon which I cannot sue you nor use diligence for them against you. In the adjustment of said account sums fall to be credited said current account for bills lodged with me at various times as against any of these I O U's, and also other payments made by you on my behalf. Likewise on said adjustment, all advances on I O U's against the High Street stance belonging to me shall not be chargeable against you in said account, are null and void. Also any advances on I O U's which were made in connection with a joint adventure with J. & W. Kinnes' estates and properties shall fall to be adjusted, and shall not be included in said current account, but shall be charged against the account for the joint adventure."

The Sheriff (Cheyne) (before whom insolvency was not disputed by Fleming, it being maintained for him that notour bankruptcy had not been constituted) granted sequestration.

This was a petition by Fleming for recal of the sequestration, which was opposed by Yeaman.

The petitioner pleaded—"(1) The petitioner not being, and not having been, at the date of presenting the said petition for sequestration notour bankrupt, the sequestration ought to be recalled. (2) Under the agreements before referred to, the respondent having stipulated that he should not be entitled to sue or do diligence on the documents founded on in the oaths produced with the petition for sequestration, the said proceedings were inept. (3) The alleged debt deponed to in the second oath produced with said petition having been unascertained and contingent could not form a ground for sequestration."

The Lord Ordinary on the Bills (Kinnear) dismissed the petition.

"*Opinion.*—The petitioner seeks to have the sequestration recalled upon two grounds—(1st) That he is not notour bankrupt; and (2d) that the debt upon which the petitioning creditor claims is not sufficiently vouched, or at least is not a debt upon which he can obtain sequestration.

"1. Notour bankruptcy is said to be constituted under the 6th section of the Debtors Act 1880, 'by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment.' The charge, which proceeded upon extract decrees for calls, expired upon the 14th of June 1883. It is not disputed that it was duly executed, nor that the days of charge expired without payment. But it is said that on the 13th of June the petitioner intimated to the agent of the liquidator, who had obtained the judgments on which the decrees in question proceed, that he was about to appeal to the House of Lords, that an appeal was presented accordingly, and that the usual order of service of appeal was duly served upon the 20th. A petition for interim execution was thereafter presented to the Court by the liquidator, the prayer of which was granted on condition of the liquidator finding caution for repayment to the petitioner in the event of the appeal being successful. Payment has not been made in terms of this order, but by agreement between the parties the sum due under the decree has been consigned in bank to await the result of the appeal, and that consignation must be taken as equivalent to payment under the order for interim execution.

"If there were no other evidence of insolvency I should have difficulty in holding that in these circumstances notour bankruptcy had been constituted by non-payment within the days of charge. But it is not alleged that the petitioner is solvent, and his insolvency is proved by the production of a trust-deed which he has granted for behoof of his creditors, and which proceeds

upon the narrative that his affairs had become embarrassed, and that he is unable to pay his debts. The insolvency of the petitioner was not disputed either in this Court or, as I understand, before the Sheriff when sequestration was awarded. But if insolvency is proved there can be no question as to the notour bankruptcy. The new mode of constituting notour bankruptcy differs from the methods for which it has been substituted in this respect, that the conditions required by the 7th section of the Bankruptcy Act 1856, in cases where imprisonment was competent, were such as in themselves afford a very much stronger presumption of insolvency than the mere expiry of a charge, but if insolvency be otherwise established, then, under the statute of 1880, the lapse of the days of charge without payment operates in precisely the same manner in the constitution of notour bankruptcy as incarceration concurring with insolvency under the Act of 1856. The petitioner, therefore, was undoubtedly notour bankrupt before he presented his appeal, and if notour bankruptcy has once been constituted it cannot be affected by any proceeding for bringing the decree under review — *Sutherland* v. *Sutherland*, 5 D. 544; *Ker* v. *Scot*, 7 S. 438. Nor does it appear to me that the arrangement under which the debt has been satisfied affects the question. For the reasons given by the Sheriff it does not take off from any presumption of insolvency which might have arisen from the fact of a charge having expired without payment, but it is hardly material to consider how far such a presumption might have been affected, since the insolvency is established otherwise and independently of the charge.

"2. I think the Sheriff right in sustaining the debt of £1591, which forms the subject of the second oath, as a sufficient qualification to apply for sequestration. The claim is for a balance said to be due to the petitioning creditor on an account current, the debit entries of which are duly vouched by I O U's. The true balance is said not to have been ascertained. But no ground was suggested for holding that the oath and vouchers would not be a perfectly sufficient qualification were it not for the very peculiar terms of the stipulation quoted in the petitioner's condescendence.

"By this stipulation the creditor undertakes that 'until final adjustment of the account by you'— that is, by the bankrupt — the I O U's 'shall be retained as vouchers of said current account, upon which I cannot sue you, nor use diligence for them against you.' No doubt sequestration is a diligence, but it is not in my opinion a diligence of the kind contemplated by the agreement, or that can possibly operate in the way which the agreement was meant to prevent. The meaning appears to me that although I O U's are to be granted, which will *ex facie* be liquid documents of debt, they are not to be used as grounds of diligence for enforcing payment of the sums contained in them until the true amount of the balance due shall have been ascertained. But they are nevertheless to be available as vouchers, and even if the debtor had remained solvent, I do not think it doubtful either that the petitioning creditor might have used them as vouchers in any process which he might have found it necessary to raise for the purpose of ascertaining the balance, or that when the balance had been so ascertained, he might have enforced payment by decree obtained in that process. But now that the debtor is notour bankrupt I think he is entitled to use them, not as grounds of direct diligence for immediate payment, but as vouchers of a debt upon which he may obtain sequestration as the only process of liquidation binding upon all parties. The sequestration will not enable the petitioning creditor to obtain payment, either of the I O U's or of a dividend upon the sums contained in them, until the true balance shall have been ascertained, and it will not enable him in any way to defeat the stipulation because he is using the I O U's only for the purpose for which they were granted, and which is expressly reserved to him by the terms of the agreement—that is, as vouchers to prove a debt. It may not be a liquid debt, but in the course of the sequestration it will be liquidated, and in the meantime it is a perfectly sufficient qualification. Agreeing with the Sheriff that the claim for £1591 is sufficient, I do not think it necessary to consider the question as to the sufficiency of the other debt for £1000 also.

"On the whole matter I think that the sequestration was properly awarded, and that it cannot be recalled."

The petitioner reclaimed, and argued—(1) That there was no notour bankruptcy in the present case, but even if there was, the petitioning creditor was not duly qualified, because the debt with which he supported the petition was contingent, and proceeded upon vouchers which he (the petitioning creditor) had barred himself from using. (2) There was no expired charge on the decree for calls, owing to the appeal to the House of Lords, by which appeal also any effect the decree might have to constitute notour bankruptcy (assuming insolvency) was prevented. But (3) the petitioner was not insolvent, and should be allowed a proof to that effect.

Counsel for the respondent were not called upon.

At advising—

Lord President—I do not think that any sufficient reason has been stated by the reclaimer to induce us to alter the interlocutor of the Lord Ordinary. The grounds upon which it is sought to have this sequestration recalled are two in number—(1st) That the reclaimer is not notour bankrupt; and (2d) That the debt upon which the petitioning creditor claims is not sufficiently vouched, or at least is not a debt upon which he can obtain sequestration. Now, as to the first of these, in which the reclaimer maintains that he was not insolvent at the date of this petition for sequestration, I cannot help thinking it a somewhat curious plea in the circumstances, as the question of insolvency and notour bankruptcy were the very matters which were investigated before the Sheriff. No doubt the proof was all on the one side, but the reason for that was because the bankrupt does not appear to have produced any evidence of his solvency, while, upon the other hand, there was sufficient evidence of insolvency in the fact of his having granted a trust-deed for behoof of his creditors upon which a dividend of 1s. 6d. per pound has been paid, and which proceeded upon the narrative that his affairs had become embarrassed and that he was unable to meet his obligations. Now, this deed is still in existence, and the debtor under it, the

reclaimer, has not been discharged. The evidence therefore is the same as when sequestration was granted by the Sheriff, and to my mind it is conclusive. But we have in addition the statement by the Sheriff which has been read to us, that the bankrupt did not allege that he was solvent, nor is there any averment to that effect upon record even now. Then, further, as to the manner in which the reclaimer was constituted notour bankrupt, I have no doubt upon the matter. The requirements of the Act of 1880 all concur, and they consist of "insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment." Now, notour bankruptcy being so constituted cannot be affected by a subsequent appeal to the House of Lords.

As to the nature of the petitioning creditor's debt, I agree with the Lord Ordinary in the view which he has taken of it. No doubt the agreement bore that the loan of £1000 should not be called up for a period of five years, but no stipulation of this kind in an agreement such as the one now before us would prevent the creditor when insolvency supervened from putting in a claim for his debt. The I O U's could not of course by the common law, and apart altogether from the terms of the agreement, be used for any separate or direct diligence for enforcing payment of the sums contained in them, but they form items in the agreement, and the terms of the agreement offer no obstacle whatever to the creditor claiming in the sequestration, nor do they prevent him in any way from petitioning for sequestration.

I therefore agree with the Lord Ordinary that the diligence contemplated by the agreement was not sequestration, but that what was intended by the letter of agreement was that no separate diligence should be done on the I O U's. On the whole matter, therefore, I think that the Lord-Ordinary was right.

Lords Deas and Mure concurred.

Lord Shand—I am of the opinion expressed by your Lordship. I think that notour bankruptcy was established in the Sheriff Court when the order for sequestration was pronounced, for there was "insolvency along with a duly executed charge, followed by the expiry of the days of charge without payment." It is now argued that because after the days of charge had elapsed without payment an appeal was taken to the House of Lords, that that would control the terms of the statute, but as the days of charge had expired before any steps were taken in the appeal I cannot see how anything that was done in it can affect the present question. Insolvency was proved, and it is not even now averred on record that there was solvency, and yet in spite of the absence of any averment to that effect we are now asked to allow the reclaimer a proof of his solvency as at the date of his sequestration—a course of procedure which it is hardly necessary to say could not for a moment be entertained. The arrangement for the continuing loan was no doubt to exist for five years, but when the reclaimer became bankrupt the agreement fell to the ground, and the creditor was entitled to use diligence to recover his debt. I agree with your Lordships that he could not sue upon the I O U's separately, but I think with the Lord Ordinary that they may competently be used as vouchers on one side of the account. On the whole matter I see no grounds for interfering with the interlocutor reclaimed against.

The Court adhered.

Counsel for Petitioner — Pearson — Kennedy. Agent—William Officer, S.S.C.

Counsel for Respondent — Gloag — Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Saturday, December 1.

SECOND DIVISION.

[Sheriff of the Lothians.

MANSON'S TRUSTEES *v.* FORSYTH.

Process—Sheriff—Appeal—Competency of Appeal—Sheriff Courts (Scotland) Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24—*Court of Session Act* 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 53—*Sheriff Courts (Scotland) Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 27.

A petition to interdict a sale by a creditor under a poinding having been presented in a Sheriff Court by the trustees under a postnuptial contract of marriage entered into by the debtor, on the ground that the articles poinded belonged to the petitioners as trustees, the Sheriff-Substitute granted interim interdict on condition of the petitioners finding caution for the debt and expenses. They appealed to the Court of Session. *Held* that the appeal was incompetent.

George Thomson, James Storm Fraser, and Mrs Mary Miller or Manson, presented a petition in the Sheriff Court at Edinburgh to interdict David Forsyth, S.S.C., "from carrying out a sale under a debts recovery decree obtained by him in the Sheriff Court of the Lothians and Peebles at Edinburgh against Joseph Manson, leather merchant, of certain articles of furniture and other effects situated within the dwelling-house in No. 3 Cochran Terrace, Edinburgh, occupied by the said Joseph Manson, and which furniture and effects belong to the pursuers in trust under a postnuptial contract of marriage executed by Joseph Manson and Mrs Mary Miller or Manson, his spouse, and of which the pursuers duly and validly got possession and delivery, and in the meantime to grant interim interdict." They averred that they as trustees were proprietors of the furniture, and had obtained possession of it by virtue of the marriage-contract, and of an instrument of possession thereon; that the defender having obtained decree in the Debts Recovery Court at Edinburgh on 22d October 1883 against Joseph Manson for the sum of £13, 5s. 6d. sterling of principal, with £2, 15s. 9d. of expenses, had executed a poinding of the furniture or other effects within No. 3 Cochran Terrace, of which they were proprietors. They pleaded that the articles of furniture being their property they were entitled to interdict, and in the meantime to interim interdict.

The Sheriff-Substitute (Hamilton), after hearing parties' procurators, pronounced this interlocutor:— "On the pursuers finding good and sufficient caution acted in the Sheriff Court Books