is printed *ad longum* in the appendix. The holders are given preferable security over the company's heritable property. The terms of the conditions of issue of the stock are set forth in Schedule A annexed to the agreement. Clause 2 of the agreement, after providing that the stockholders shall have and be subject to the whole rights, privileges, obligations, and others specified in the conditions of issue in Schedule A, ends with the words—"The said stock shall be, and shall have the incidents of, personal estate." Counsel for the widow founded upon these words as importing that this stock is declared to be, for all purposes, personal estate, and argued that it must therefore be subject to *jus relictæ* in a question with the widow of a deceased stockholder. It seems to me improbable that the framers of this agreement had any such case in mind, or had any intention to effect a variation on the application of the general law of the land. I think it is more reasonable to suppose that the words quoted—though redundant, perhaps, and unnecessary—were introduced in order to make as clear as possible what is expressly stated in article 10 of Schedule A, viz., that executors of a deceased stockholder were alone to be recognised by the company as having any title to the share registered in his name. But, however this may be, the words appear to me to be, in my view, too wide and vague to achieve the purpose for which they are founded on by counsel for the widow. "Personal estate" or its "incidents" might refer equally well to estate personal at common law, or to estate made personal by the Statute 1661, cap. 32. But the latter view would not suit the widow's contention at all It would exclude her claim. I think, though the point is novel and a little puzzling, that her argument must fail. I am therefore for answering branch (*b*) of the seventh question in the negative.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD SALVESEN was absent.

The Court answered branch (*b*) of the seventh question of law in the negative.

Counsel for the First Parties—D. P. Fleming. Agents—Webster, Will, & Company, W.S.

Counsel for the Second and Third Parties—Blackburn, K.C.—Maconochie. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Fourth Parties—Murray, K.C.—Maclaren. Agents—Cumming & Duff, S.S.C.

Counsel for the Fifth Parties—Moncrieff, K.C.—R. C. Henderson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Sixth Parties—Fleming, K.C.—Inglis. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Seventh Parties—Constable, K.C.—Kemp. Agents—Wishart & Sanderson, W.S.

Tuesday, January 6, 1914.

SECOND DIVISION.

AITKEN *v.* ROBSON.

Bankruptcy—Sequestration—Discharge—Nobile Officium—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *secs.* 69 *and* 70.

In a sequestration the creditors elected a trustee but failed to decide on the sufficiency of the caution, and the election of the trustee was never confirmed by the Sheriff. After the lapse of seven years, it being no longer competent under the Bankruptcy (Scotland) Act 1913 for the trustee to obtain confirmation, the Court, on the petition of the bankrupt, in the exercise of its *nobile officium*, without making a remit to the Accountant of Court, discharged the bankrupt but refused to reinvest him in his estates.

Thomas Aitken, notary public, Edinburgh, an undischarged bankrupt, presented a petition to the Court for his discharge and for reinvestment in his estates.

The petition was as follows:—"That on 22nd November 1906 the petitioner's estates were sequestrated by the Lord Ordinary on the Bills on the petition of William Robson, S.S.C., Edinburgh. On 3rd December 1906 the statutory meeting of creditors for the election of a trustee and commissioners was held conform to certified copy of the minutes of said meeting, which is referred to. On 4th December 1906 said proceedings were duly reported to the Sheriff at Edinburgh in terms of the Bankruptcy (Scotland) Act 1856, section 70. That no security or caution for his intromissions has been found by or for any one as trustee in terms of section 72 of the foresaid statute, nor has the election of a trustee ever been confirmed by the Sheriff in terms of section 73 of said statute. That in fact no step has been taken in the sequestration since the proceedings at the foresaid meeting of creditors were reported by the preses of the meeting to the Sheriff. That if the sequestration proceedings had followed their normal course the petitioner would now have been entitled to apply for and to obtain his discharge, for although he has not paid his creditors 5s. per £1 on the amount of his indebtedness to them he is prepared to satisfy the Court that his failure to do so has arisen from circumstances for which he cannot justly be held responsible, all in terms of the provisions of the foresaid statute and also of the Bankruptcy and Cessio Act 1881, section 6. That owing to the failure to find security for the trustee's intromissions as resolved on at the said meeting of creditors, and to the failure of the creditors to proceed in the sequestration, the petitioner is deprived of his statutory right to apply in ordinary course for his discharge or to take any step at all in the sequestration, and he is therefore obliged to make the present applica-

tion to your Lordships' *nobile officium*. Before doing so he wrote the creditor on whose petition sequestration was awarded to inquire whether he was prepared to proceed with the sequestration and in answer received the following reply—'Thomas Aitken, Esq., 8 Cumberland Street. 25 *Queen Street, Edinburgh, 10th June* 1913. Dear Sir—We are in receipt of your letter of 7th. As we explained in our letter of 19th May, in our opinion Mr Robson is not in any way responsible for there being no trustee in the sequestration, and we cannot see that there is any obligation upon him to institute proceedings in the matter at his own expense. Yours truly, (Signed) ROBSON & M'LEAN.' The said letter is referred to. That the petitioner appeared at the foresaid meeting of his creditors held on 3rd December 1906 and delivered to the clerk a state of his affairs, and he has always been ready and willing to perform all the duties and acts incumbent on him in connection with the sequestration so as to entitle him to his discharge in terms of law. The creditors having declined to accept the diligence (in their favour) which the sequestration creates, it has thus practically run its course, and the petitioner in the circumstances respectfully maintains that he is entitled to be discharged, to have the sequestration declared to be at an end, and to be re-invested in his estates. May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute book in common form, and, together with the deliverance hereon, to be served upon the said William Robson, and to allow him to lodge answers, if so advised, within eight days; and also to order a notice of the presentation of this petition to be published in the *Edinburgh Gazette* requiring all concerned to lodge answers, if so advised, within eight days after such publication; and thereafter, upon resuming consideration of this petition, with or without answers, to find the petitioner entitled to his discharge, and to discharge him accordingly of all debts and obligations contracted by him or for which he was liable at the date of the sequestration of his estates, to declare the said sequestration to be at an end, and to declare the petitioner re-invested in his estates; further, to grant warrant for recording the said deliverance in the Register of Sequestrations and in the Register of Inhibitions; or to do further or otherwise in the premises as to your Lordships shall seem proper."

The Court appointed intimation and service as craved, and also service "upon the other creditors of the petitioner present or represented at the general meeting of the petitioner's creditors held on 3rd December 1906."

Answers were lodged by William Robson, which stated, *inter alia*—"The petitioner has made no offer of any dividend or any composition upon his debts, and has taken no steps to have the said sequestration proceeded with, or to obtain a report in terms of the Bankruptcy Acts, or to obtain his discharge in ordinary course, or to entitle him to be re-invested in his estates. The respondent submits that the prayer of the petition should be refused in respect that—(1) The petition is incompetent. (2) The appropriate procedure for obtaining a discharge under the Bankruptcy Statutes is provided by the said statutes. (3) The petitioner's averments are irrelevant and insufficient to support the application. (4) No offer of any dividend or composition upon his debts has been made by the bankrupt. (5) No report has been obtained by the bankrupt in terms of section 146 of the Bankruptcy Act 1856. (6) The petitioner's averments, so far as material, are unfounded in fact."

Argued for the petitioner—The bankrupt should be discharged and reinstated in his estates. Owing to the failure to find caution, the trustee had never been confirmed, but by sections 69 and 70 of the Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), which now, under section 192, applied to the sequestration, the trustee in order to obtain confirmation must lodge a bond of caution with the sheriff-clerk within seven days of his election, and that period had long ago elapsed. Accordingly it was no longer competent for the trustee to obtain confirmation, and since the bankrupt was thus deprived of his statutory right to obtain a discharge under the Bankruptcy Act, it was competent for him to obtain one from the Court through the exercise of its *nobile officium—Steuart* v. *Chalmers*, June 14, 1864, 2 Macph. 1216; *Anderson, Petitioner*, March 13, 1866, 4 Macph. 577, 1 S.L.R. 217; *White, Petitioner*, March 18, 1893, 20 R. 600, 30 S.L.R. 528. *MacDuff* v. *Baird*, November 26, 1892, 20 R. 101, 30 S.L.R. 109, was different, because in that case the trustee had been duly confirmed, and it was through his own fault that the bankrupt had failed to obtain his discharge before the trustee was himself discharged.

Argued for the respondent—The bankrupt was not entitled to be reinvested in his estates except with the consent of the creditors. Moreover, he was only entitled to obtain his discharge in the ordinary way. This he could do by petitioning for the appointment of a new trustee, as was done in *MacDuff* v. *Baird* (*cit.*). In any event, he should only be discharged after there had been an inquiry into the facts by a remit to the Accountant of Court.

LORD DUNDAS—This case is a peculiar one and is, I think, attended with a certain amount of delicacy. It is a petition by a sequestrated bankrupt for his discharge, and it is put in the form of an appeal to the *nobile officium* of this Court. I respectfully agree with the words of Lord Justice-Clerk Inglis in the case of *Steuart* v. *Chalmers* (1864, 2 Macph. 1216)—"It is necessary when we are asked to interpone"—I think that should be interpose—"in the exercise of our *nobile officium*, to set right proceedings in a sequestration which have been misconducted or by accident have got out of shape, to be satisfied in the first place that a *dignus nodus* has been made out—

a sufficient reason for interfering in the exercise of our *nobile officium;* and, in the second place, that we have parties before us who are justified in presenting the application."

Now what happened here was that as far back as 22nd November 1906 the petitioner's estates were sequestrated on the respondent's petition. On 3rd December 1906 the creditors held their statutory meeting; they elected a trustee, and they fixed a sum for which the trustee should find security, but they did not decide upon the sufficiency of the caution. That seems to have been not so much a mistake or accident as a deliberate failure by the creditors to comply with one of the requisites of section 72 of the Bankruptcy Act 1856. On the proceedings being reported to the Sheriff he refused to confirm the trustee. Matters have since apparently been at a deadlock and nothing has been done for, roughly speaking, seven years. The creditors apparently have not cared to face the expense of getting matters put into order. The bankrupt on the other hand cannot get his discharge in the ordinary way, because he cannot get a report from the trustee, which under the statute is a condition-precedent to a discharge in the ordinary way being granted. He therefore comes to us and asks for his discharge. It is true that in the petition he asks a good deal more; he asks us to declare the sequestration to be at an end, and to declare the petitioner reinvested in his estates, and further to grant warrant for recording the deliverance in the Register of Sequestrations and in the Register of Inhibitions. That part of the prayer was not, however, insisted in by Mr Menzies—I think quite properly—and will not be granted.

This unhappy person has been under the ban of sequestration for something like seven years. The respondent's counsel suggests that the proper remedy in these circumstances is not a petition of this nature, or at least is not this petition, but is for the bankrupt, I suppose at his own expense, to get a trustee duly appointed and confirmed and then go through the whole machinery of sequestration down to claiming the desired discharge if he can get it. That is what the respondent indicates in his answers as "the appropriate procedure for obtaining a discharge under the Bankruptcy Statutes . . . provided by the said statutes." I do not think that in the circumstances that would be an appropriate or a right and equitable course to adopt. Nor do I think that any good purpose would be served by making a remit, as was done in a previous case, to the Accountant of Court, and Mr Hamilton did not satisfy me that his client would be any better off if such a course were taken, or that he has any sufficient interest to press for it. In the very peculiar circumstances of this case—because I think it is a very peculiar one, and not on all fours with any case of which I am aware—I think the proper and the just course will be to grant the prayer of the petition so far as it relates to the discharge, but no further.

LORD SALVESEN—I am very clearly of the same opinion. I think this is a case for the exercise of the *nobile officium* of the Court, because the Bankruptcy Statutes provide no means by which this petitioner can obtain a discharge in his sequestration. The position in which he finds himself is due entirely to the failure of his creditors to proceed with the sequestration; they appointed a trustee but they did not take steps to ensure that sufficient caution should be found by the trustee, and accordingly the Sheriff refused to declare the trustee elected. If the creditors had had any genuine desire to go on with the sequestration they ought to have presented a petition to this Court or to some other Court having jurisdiction, and there is no doubt that they would then have been able to put the sequestration on a proper footing. They have not chosen to do so, and for the very obvious reason, which is stated in the answers, that they do not believe there are any assets in this sequestration which will justify the expense of the necessary proceedings for their distribution. That being so, they are not entitled to maintain the sequestration against the petitioner, and he, I think, is well warranted in coming to this Court and asking that now after the lapse of seven years he should be granted his discharge.

It is a totally different matter to say that he should be reinvested in his estates, although it may be that if there is any asset which originally vested in the sequestration the petitioner might at some future period take that up on the footing that the whole of the creditors had abandoned this asset. But that is not a matter which falls to be disposed of now, and Mr Hamilton's client, who is a creditor, might have the strongest objection to any such inference being drawn, seeing that one of the assets which is said to exist in the sequestration is a claim against himself. I accordingly appreciate entirely the motive of the respondent in opposing this petition as it was originally framed, but in so far as it is limited to the crave that we should discharge the bankrupt I am prepared to grant it.

I agree with your Lordship in the chair in holding that it would be a futile proceeding to remit the case for inquiry by the Accountant of Court. There may be many cases in which that is the appropriate course, but the penalty that the Court is in the habit of imposing upon a bankrupt who is not able to prove that the bankruptcy was caused by circumstances for which he cannot justly be held responsible, is merely to postpone the time at which the discharge shall take effect. After seven years I cannot imagine that any further penalty would be imposed upon this bankrupt whatever his conduct may have been, and as to this matter we are left entirely in doubt, because there is no averment by the respondent of a positive kind to the effect that the bankrupt was responsible—culpably responsible—for the state of his affairs. On these grounds I agree with your Lordship.

LORD GUTHRIE—I am of the same opinion. It may be true, as the respondent says, that the present petition is not the only method by which the petitioner could attain the

end he naturally seeks, namely, to get his discharge. He could adopt the procedure that was followed in *MacDuff* v. *Baird* (1892, 20 R. 101), namely, to get a trustee appointed to take up the whole matter of new. That procedure, however, seems to me unnecessary, because while it would cause great expense to the petitioner it would serve no interest of the respondent, and the creditors other than the respondent have not appeared to oppose.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find the petitioner entitled to his discharge: Therefore discharge him accordingly of all debts and obligations contracted by him or for which he was liable at the date of the sequestration of his estates, and decern: *Quoad ultra* dismiss the petition."

Counsel for Petitioner—A. J. P. Menzies. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for Respondent — Hamilton. Agents—Robson & M'Lean, W.S.

Friday, January 9.

FIRST DIVISION.

[Sheriff Court at Aberdeen

GRANT v. JOHN FLEMING & COMPANY, LIMITED.

Reparation—Negligence—Property—Common Stair—Visitor—Child—Averments—Relevancy.

A child of four, who had been visiting a neighbour's house, fell from the common stair and was injured. In an action by her father against the owners of the stair the pursuer averred that the stair was insufficient and defective and unsafe for the use of the public, and particularly for children; that in particular the iron railing at or near where the child fell over was only two feet in height; that one of the iron balusters at or near the point mentioned was awanting, allowing a gap in the balustrade sufficient for a child to fall through; that in consequence of these defects, or one or other of them, the child fell either through the gap or over the insufficient balustrade; that it was the defenders' duty as proprietors of the property in question to provide a safe access for members of the public visiting the houses, including children, and that they had failed to do so. There were no averments that the alleged defect formed a hidden danger or that it was known, or ought to have been known, to the defenders.

Held (*diss.* the Lord President) that the pursuer's averments entitled him to inquiry and proof before answer allowed.

Observations as to the duty of owners towards children lawfully using their premises.

Process—Proof or Jury Trial—Property—Remit to Sheriff—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

The pursuer in a Sheriff Court action of damages for £100 in respect of injuries sustained by his pupil child against the owners of a common stair from which she had fallen while visiting a neighbour's house, required the cause under section 30 of the Sheriff Courts Act 1907 to be remitted to the Court of Session for jury trial.

The Court sent the case back to the Sheriff, *holding* that in view of the specialties of the case and the difference of opinion as to the legal principles involved, it was unsuitable for jury trial.

Edwin L. Grant, labourer, 22 Links Street, Aberdeen, as tutor and administrator-in-law for his pupil daughter Agnes Grant, *pursuer*, brought an action against John Fleming & Company, Limited, Aberdeen, *defenders*, for payment of £100 as damages for injuries sustained by her through, as he alleged, the fault of the defenders in failing to keep in proper repair the railing of a common stair leading to certain properties belonging to them.

The pursuer averred—"(Cond. 2) The said properties have back stairs leading up to the first floor of the houses. Said stairs are made of stone and cement, with iron railings and banisters, and on the 17th day of October 1912, and for some time prior thereto, the iron railing on the back stair of No. 18 Links Street was insufficient and defective and unsafe for the use of the public, and particularly for children. In particular, the said iron railing or balustrade on said back stair was, at the turn of the stair at or near where the child fell over as after mentioned, only two feet in height, and thus afforded an insufficient guard for the protection of children using the stair, and in addition one of the iron balusters was awanting from the balustrade at or near the point mentioned, allowing a gap in the balustrade sufficient for a child to fall through, and in consequence of said defects, or one or other of them, the child fell as after mentioned. (Cond. 3) On or about said date the pursuer's daughter Mary Agnes Grant, aged four years, called at the house 18 Links Street aforesaid to ask her companion Dorothy Christie, who lived there (a girl about the same age as pursuer's daughter), to come out to play with her, and was coming out of said house 18 Links Street aforesaid along with said Dorothy Christie when, owing to the defective state of the stair railing of said stair, which is a common stair forming the only access to the tenements in said house 18 Links Street, the said Mary Agnes Grant fell either through the gap or over the insufficient balustrade from the stone steps on to the concreted ground below, severely and permanently injuring her head. (Cond. 4) As the result of said injury, the child had to be taken to the Sick Children's Hospital and surgically treated, and she has still to attend the hospital periodically for treatment. Since the accident she has been very dull and listless, and her mental faculties have been seriously impaired, and the sum of one