Counsel for the Pursuer and Respondent—M'Kechnie—W. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defenders and Appellants—Jameson—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Saturday, November 26.

FIRST DIVISION.

MACDUFF, PETITIONER.

Bankruptcy — Sequestration — Acquisition of Property by Undischarged Bankrupt after the Discharge of the Trustee—Appointment of New Trustee on Petition of the Bankrupt — Nobile Officium—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 103.

An undischarged bankrupt, whose estates had been sequestrated in 1869, and whose trustee had been discharged in 1870, now averred that having since succeeded in business, he was able and willing to pay in full all his creditors, and craved the Court, in the exercise of their *nobile officium*, to appoint a meeting of the creditors for the election of a new trustee.

Held that the petition fell to be *granted*, on the principles followed in a series of cases where the petition was at the instance of creditors.

The estates of Robert MacDuff and of the firm of P. & R. MacDuff, storekeepers, Holm Street, Glasgow, of which the said Robert MacDuff was sole partner, were sequestrated on May 13th 1869, and Mr James Mair Davies, accountant in Glasgow, was confirmed trustee. The realised funds having proved insufficient to admit of any dividend being paid, the trustee obtained his discharge on August 29th 1870, but the bankrupt was never discharged.

On 5th November 1892 the said Robert MacDuff presented a petition to the First Division, praying their Lordships to appoint a new trustee on his sequestrated estates, or otherwise to grant warrant to hold a meeting of the creditors on the said sequestrated estates for the election of a new trustee.

The petitioner stated that recently he had been successful in business, and was now able and willing to pay in full all his creditors; that he had been compelled in the interest of his true and *bona fide* creditors to apply for the appointment of a new trustee, instead of making a private settlement with them, owing to the actings of Mr James Dunbar, writer, Glasgow, who had been law-agent for the trustee in his sequestration; that "the said James Dunbar, when he became aware of the intention on the part of the petitioner to pay his creditors in full, immediately put himself in communication with the largest creditors, and arranged with four of them to assign their claims to him for a very small sum. . . . The assignations were taken by the said James Dunbar, not in favour of himself, but in favour of William Daniel Baird, solicitor, Glasgow, who was at one time his partner in business;" and that actions were being raised to have the assignations reduced on the ground of essential error.

The said William Daniel Baird, as assignee in right of the debts for which certain creditors of the petitioner were ranked, was allowed to lodge answers to the petition. He stated that "sometime after his bankruptcy the petitioner left Glasgow, and till recently was not further heard of by his creditors. It now appears, and the respondent avers, that for many years the petitioner has been carrying on an extensive and lucrative business in Liverpool, and more recently in Glasgow also. . . . The petitioner must have a number of current obligations and debts incurred in connection with the said business." The respondent further averred that the petitioner in 1889 had applied for his discharge without composition, but declined to proceed with the application on learning that it would require to be advertised and intimated to his creditors; that in May 1889 he applied for and obtained a compromise of a debt for a very small sum on the plea of poverty; that he did not express any intention of paying his creditors in full till he was applied to for payment on behalf of the respondent, and that his agent thereupon asked the respondent to settle for 2s. 6d. in the pound; that the petitioner's means consisted exclusively of his earnings in business since the sequestration, which were subject to his current debts and liabilities, and could not be transferred to a trustee for the exclusive benefit of the creditors in the sequestration.

Argued for the petitioner—The answers were not relevant, nor even pertinent to the question before the Court. Section 103 of the Bankruptcy Act provided that estate subsequently acquired by an undischarged bankrupt should belong to the trustee. Where the trustee was discharged, the consistent practice for thirty years had been that the Court provided the machinery to give effect to the section by appointing a new trustee — *Thomson, Petitioner*, 2 Macph. 325; *Whyte* v. *Northern Heritable Securities Company*, 18 R. (H. of L.) 37, and 28 S.L.R. 950.

Argued for the respondent—The petition was unnecessary and incompetent. The petitioner had no interest to make the application; if solvent, he ought to pay his creditors, and if in doubt to whom he should pay, whether the assignors or the assignee, he could keep the money till distressed, and protect himself against diligence by consigning and raising a multiplepoinding. The petition was not in the interest of the creditors; it would lead to a competition and a crop of litigation; for it was settled that if the creditors allowed the bankrupt to engage in trade and acquire money, the old creditors could not claim the funds to the exclusion of the new creditors—*Abel* v. *Watt*, Novem-

ber 21, 1883, 11 R. 149. The petitioner here gave no specification of the estate now belonging to him; this application therefore differed in two respects from the previous cases, in all of which the petitioners had been creditors, and had indicated the particular funds or assets they wished to be divided.

At advising—

LORD PRESIDENT—It is admitted that the Court have in a whole series of cases exercised the *nobile officium* to the effect of reviving a sequestration where a trustee was dead or had been discharged, by directing that a meeting of creditors should be called in order to elect a new trustee. These cases, however, have taken place where the petitioner has been a creditor, and the point of novelty in the present case appears to be that it is not a creditor but the bankrupt himself who comes forward and makes the application to the Court. But when we consider the situation of the bankrupt in relation to his creditors, and to his own prospects of a discharge, I cannot help thinking that the same considerations which induced the Court to exercise the *nobile officium* in the previous cases apply here. This gentleman comes forward to assert that since his sequestration he has succeeded in business, and is now in possession of funds sufficient to pay his whole creditors in full, and it is not disputed by the respondent that he is in business, and only faint doubts have been thrown on his pecuniary sufficiency. Now, under these circumstances, why should the sequestration not be revived and put into gear? The interest of the creditors is to obtain payment in full, and equal payment share and share alike; and the interest of the bankrupt is to obtain his discharge. Now, the objecting creditor here says — "If his object is to pay his creditors, let him do so." The bankrupt replies with irresistible force — "I am still a sequestrated bankrupt. I am not to judge who are my true creditors. The proper authority to judge of that is the trustee in the sequestration, which is still existent, though a dormant one." And he says further—"I am not to pay at my own hand. Let the creditors meet and appoint another trustee. My object is to rehabilitate myself and obtain my discharge, and I cannot do so except through a schedule or sequestration process."

Now, I confess that appears to me irresistible, and it appears to me that the same principle as has led the Court in previous cases to grant such applications at the instance of creditors should be applied to the case of a bankrupt, where he makes averments which *ex facie* are probable and are not seriously disputed, who comes forward and says he will put funds in the hands of his trustee, and that he will pay if he is discharged. I am bound to say, after hearing all that has been said in support of the answers, I am still puzzled to understand what is the objection to a process which would give effect to the rights of all parties, including the rights of creditors.

LORD ADAM—This is a petition for the appointment of a new trustee in a sequestration. The ground of the application is, that the trustee who was appointed a good many years ago was discharged, and that accordingly the sequestration, which is still an existing sequestration, cannot now for want of a trustee be effectually used for the purpose for which it came into existence. Now, it is perfectly true that the application for the appointment of a new trustee is usually made by a creditor, for the reason that the statute provides no machinery whereby such an officer can be appointed, and therefore it becomes necessary to come to the Court for that purpose. But the usual case which happens is, that the creditors discover that there are funds to be distributed, and they come forward and say—"Here are funds we are entitled to have; there is no machinery to distribute them; we therefore ask the Court to give us assistance to set section 103 in operation." The novelty in this case is, that instead of the creditors having to enforce all usual legal means, the debtor comes forward and says—"Having made money since my sequestration, I am ready to pay all my creditors in full." Well, who is the proper party to whom that money should be paid but the trustee, if there is one? Well, as it happens that the trustee in this particular sequestration was discharged some years ago, it appears to me that the regular and natural course is that the Court should supply the defective machinery of that sequestration by appointing a new trustee, and that that having been done, and the sequestration put in active operation, the petitioner should pay over the funds for distribution to him. That is all that is proposed to be done, and I agree in thinking that that is entirely within the principles of what has been done in previous cases.

LORD M'LAREN concurred.

LORD KINNEAR — I am of the same opinion. The ground of judgment in the case of *Thomson* was that the Court thought that while the case of the resignation or death of the trustee had been expressly provided for by the Act, the case of his discharge before the business of the sequestration has been fully concluded had not been foreseen by the Legislature. It was therefore held that in the exercise of the *nobile officium* the Court has a discretion to supply the omission in this respect, and to revive the sequestration in the case of the trustee's discharge, just as in the case of his death or resignation. In short, the Court treated the matter as a *casus improvisus*.

That, then, being decided, it comes to be a mere question of discretion whether the Court is to exercise the *nobile officium* on the application of the creditors or of the bankrupt himself. I agree with your Lordships that there is no reason why it should not be exercised upon the application of the bankrupt, who has a perfectly good title and interest to set the machinery of the

statute again in motion in order to satisfy his creditors and get his discharge.

If this insolvent bankrupt had come forward to say—"I have made money, and I have no new creditors who desire to interfere; I want to distribute it among my creditors; I cannot give them 20s. in the pound, but a considerable portion of that sum"—could it be suggested that there was any other course to be adopted than to revive the sequestration and appoint a new trustee? The only objection stated here is, that the bankrupt is able to pay his creditors in full. Why his readiness to pay 20s. in the pound should debar him from the benefit of bringing his sequestration to an end I am unable to see.

By their interlocutor the Court remitted to the Sheriff of Lanarkshire to call a meeting of creditors for the election of a new trustee, granted warrant to the Sheriff-Clerk to deliver the Sederunt Book, and allowed the expenses of the discussion against the respondent, which they modified to five guineas.

Counsel for the Petitioner—Ure. Agents—Miller & Murray, S.S.C.

Counsel for the Respondent—W. Campbell. Agents—Gill & Pringle, W.S.

Tuesday, November 29.

FIRST DIVISION.

[Sheriff-Substitute at Airdrie.

HAUGHTON *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation — Relevancy — Special Duty of Railway Company towards Children — Expenses.

In an action of reparation against a railway company for the death of a child aged five, who was run over by an engine engaged in shunting operations, averments in an amended record which stated that the shunting lye was a dangerous place; that children of tender age were in the habit of frequenting it; that the servants of the defenders knew that, and also knew that on the occasion in question the pursuer's child was upon the line; that it was their duty to take the precaution, before proceeding to shunt, of seeing that the child was warned off, and that they had failed to do so, were *held* relevant (*diss.* Lord M'Laren, who thought no duty incumbent upon the defenders but which they had failed to perform had been set forth). The pursuer was found liable in the expenses of the action up to the date of the amendment, and approval of the issue was delayed until these should have been paid.

William Haughton, miner, 104 Nimmo's Square, Longriggend, brought an action in the Sheriff Court at Airdrie against the North British Railway Company for reparation for the death of a child, in which he averred — "Nimmo's Square adjoins Meadowfield Square. A fence separates Meadowfield Square from the Moss lye, which belongs to the defenders, and in this fence is a large wooden gate for the purpose of allowing carts to pass from and to the lye. The said wooden gate opens from the public square, and the rails are close on the other side. The gate is placed there for the purpose of protection during shunting operations. . . . On or about 10th March 1892 a child of the pursuer's, five years of age, named Alexander Haughton, was playing about Meadowfield Square, near his parents' door, and the said wooden gate between the square and the lye having been open, he went on the rails with a number of other children, and was run over by defenders' waggon, and sustained such injuries that he died in the Royal Infirmary two days afterwards. The said occurrence was due to the negligence of the defenders, or those for whom they are responsible, in not seeing that the gate was properly shut, so as to protect the line during shunting operations, or further, in not having a man in charge of the gate during the time it was standing open, it being in a public place, and known to defenders to be dangerous, or in failing to warn the child off the line during said shunting operations, or to give warning when shunting the train, it being in the knowledge of defenders, or those for whom they are responsible, that children were on the line at the time."

The defenders "denied that Meadowfield Square is near the pursuer's house, which is situated in Nimmo's Big Square, and some distance from Meadowfield Square. Admitted that a boy of the pursuer's, five years of age, having been allowed by his parents or guardians to wander or stray from the pursuer's at Nimmo's Big Square, improperly and illegally, and to the imminent danger of its life, entered into and trespassed on the defenders' said railway sidings, and went on the rails where waggons were, and was run over by one of them, it is believed, while amusing himself under or among the waggons, and thereby sustained injuries from which he afterwards died. Explained that at the time of the accident the gate leading into the sidings was necessarily open to allow carts conveying coals from the Longriggend Station siding to Messrs William Black & Sons' workers. It was well known to the parents of the injured child that this gate required to be open for the purpose of receiving and giving out the goods traffic. Further, the child was not attended by any proper guardian, and was wilfully trespassing on the defenders' private property at the time, and exposed himself to imminent danger."

The defenders pleaded, *inter alia*—"(1) The pursuer has not set forth facts relevant to support the conclusions of the action, which action will therefore fall to be dismissed. (2) The pursuer's child not having been injured through any fault of the defenders, or of anyone for whom they are