the Magistrate to mean that he found that at 11 p.m. the accused left his door open and that it remained open for three-quarters of an hour. I read the Magistrate's statement in no other or different sense, and when I come to examine the subsequent part of the Stated Case, in which the Magistrate more fully develops the facts as he found them proved, I find nothing to warrant the suggestion that the premises were closed at 11 p.m. and merely opened temporarily for a minute or two minutes in the succeeding three-quarters of an hour. The facts relative to the second offence are found in clearer terms, because the Magistrate there says that he found it proved that the door of the premises remained open after a quarter to 11 until 11·10 p.m., when it was shut. I come, therefore, to the conclusion without hesitation that on both occasions the premises were kept open after prohibited hours.

Now in order to constitute an offence under the bye-law it is not necessary to prove anything more than that the offender kept the premises open, or suffered them to be kept open, after the prohibited hours. The Magistrate has in distinct terms, I think, found that on the two occasions libelled the premises were kept open after the prohibited hours, and therefore an offence was committed. I come, accordingly, without hesitation to the conclusion that the first question which is put to us, and which probably in its phraseology might be improved but the meaning of which we all understand quite well, ought to be answered in the affirmative, but that it is unnecessary for us to answer the second question.

LORD GUTHRIE—I concur. The bye-law is not challenged, and the complaint purports to be in terms of the bye-law. It is not so in fact, because, as your Lordship has pointed out, it introduces an element which the bye-law does not contain. The bye-law no doubt refers to the person registered to keep or use any house or other premises "as a place for public refreshment," but it then goes on to say, "shall not keep such premises open, or suffer them to be kept open," on certain days except during certain hours, the words "as a place for public refreshment" not being repeated. But the words "as a place for public refreshment" are used in the complaint not only in the passage where the registration is referred to but in the part where the charge itself is tabled—"you did keep open such premises as a place for public refreshment." That apparently has been done in forgetfulness of the case of *Lena* v. *Davidson*, in which Lord Kinnear said that if such words were introduced they would be plainly irrelevant. I agree therefore that in this case we are entitled to disregard them; and indeed, if an objection had been taken on this ground, the Magistrate would no doubt have given effect to the motion that would have been made to allow them to be deleted.

The decision which your Lordship proposes to pronounce will not, so far as I can see, in any way conflict with such a case as *Wood* v. *Campbell* (1877), 3 Coup. 508, which was a case of a door being opened after hours in connection with certain cleaning operations, and obviously bore no resemblance to the essential parts of the present case.

LORD ORMIDALE—To my mind the only difficulty in this case arises from the introduction into the complaint of the words "as a place for public refreshment." Occurring however where they do, I think they may be read as a mere parenthetical description of the premises—"being a place for public refreshment." But I think the complaint would have been better without them, because, agreeing as I do with what your Lordship has said as to the facts which it is necessary for a prosecutor to prove in order to secure a conviction of a contravention of the bye-law in question, it appears to me that by introducing the words I have referred to the procurator-fiscal ran the risk of finding himself called upon to prove more than was really necessary.

On the matter of the merits I have no hesitation in agreeing with your Lordship that the first question must be answered in the affirmative, and that it is not necessary to answer the second question.

The Court answered the first question in the affirmative, and found it unnecessary to answer the second question.

Counsel for the Appellant—Cooper, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent — Lippe. Agents—Menzies, Bruce-Low, & Thomson W.S.

COURT OF SESSION.

Tuesday, May 26.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

SCOTT *v.* NICOL.

Bankruptcy—Petition for Discharge—Expenses—Caution.

As a general rule a bankrupt is entitled to petition for his discharge without finding caution.

Alexander Scott, whose estates were sequestrated on or about 26th January 1906, and who had failed to pay five shillings in the pound, presented an application in the Sheriff Court at Aberdeen for his discharge.

Notes of objections were lodged for Alexander Tytler Nicol, solicitor, the trustee on the sequestrated estates, and for R. D. Cruickshank & Company, Aberdeen, creditors of the bankrupt.

On 21st January 1911 the Sheriff-Substitute (LAING) pronounced this interlocutor—"Allows the pursuer to answer the objections by the trustee upon finding caution to the satisfaction of the Clerk of Court for

the expense of this application, and that within a week from this date."

The bankrupt appealed, and argued—The bankrupt was entitled to apply for his discharge without finding caution—*Melrose-Drover Limited* v. *Heddle*, June 28, 1905, 7 F. 852, 42 S.L.R. 650; *Heggie* v. *Heggie*, June 6, 1855, 17 D. 802; *Hooper* v. *Ferguson*, July 20, 1850, 12 D. 1309. In *Gilmour* v. *Donnelly*, December 23, 1899, 7 S.L.T. 267, there were other circumstances besides the pursuer's bankruptcy which justified the order to find caution.

Argued for the respondents—The Sheriff-Substitute had a discretion to order the bankrupt to find caution—*Gilmour* v. *Donnelly* (*cit.*). *Melrose-Drover Limited* v. *Heddle* (*cit.*) was not inconsistent with the existence or exercise of such a discretion. The Court should be slow to disturb the Sheriff's finding, since it was an exercise of his discretion. A bankrupt was not entitled to his discharge until his trustee's expenses had been paid—*M'Carter* v. *Aikman*, July 20, 1893, 20 R. 1090, 30 S.L.R. 934.

LORD DUNDAS—This is an application by a bankrupt for his discharge. By the interlocutor appealed against the learned Sheriff-Substitute allowed the pursuer to answer the objections by the trustee "upon finding caution to the satisfaction of the Clerk of Court for the expenses of this application, and that within a week from this date." The pursuer is willing and apparently anxious to answer the objections, but he objects strenuously to the condition of doing so upon caution, and that is the subject of this appeal.

It may prove that the application for discharge will not be entirely plain sailing for the applicant, but the point at the moment, and the only point, is whether the condition of caution should be imposed upon him at this stage. I think it should not. I think he ought to be allowed to proceed in the meantime with his application unhampered by this obligation.

In the case of *Melrose-Drover*, (1905) 7 F. 852, to which we were referred, Lord President Dunedin said that the petition before him was one by a bankrupt for his own discharge, "and that is in a different position from a litigation by him about other matters. I do not think that a bankrupt applying for his discharge should be hampered by being ordered by the Court to find caution;" and the other learned Judges concurred. I do not take it that Lord Dunedin was there laying down a principle to which no exception could be found, but the general rule he states in perfectly distinct terms, and I cannot see anything in what we have before us to take this case out of the scope of that general rule.

I therefore move your Lordships to recal the interlocutor in so far as it orders caution to be found by the pursuer; and *quoad ultra* to adhere to the interlocutor and remit the matter back to the Sheriff-Substitute.

LORD SALVESEN—I concur. We are not in the habit of requiring a litigant to find caution, even though it be plain that he has no means to pay his opponent's expenses should he fail in his litigation. If so, the reasons for a similar practice are much stronger in the case of a man who has been divested of his estate, and who is seeking an opportunity to earn a livelihood free from the debts which led to his sequestration. Everything that he has hitherto earned has fallen into the net of the sequestration. He cannot, therefore, have any means from which to provide for the expenses of his opponents; and if he has no means, it can only be by the charity of his friends that he could implement the interlocutor of the Sheriff-Substitute.

These considerations have led to the settling of a general rule that a bankrupt who is petitioning for his discharge should not be ordained to find caution; and I can find nothing so exceptional in this case, where as yet there has been no inquiry, as to justify a departure from it. I accordingly agree with your Lordship that we should recal the part of the interlocutor appealed against.

LORD GUTHRIE—I am of the same opinion. There are cases in which a trustee in a sequestration who depends on the assets of the estate to meet his expenses has also the compulsitor that a discharge will not be granted unless the expenses incurred by him are paid. The course proposed by your Lordship does not in the least interfere—when the facts are ascertained, and if the case be a suitable one for applying the compulsitor—with the preservation of the trustee's rights.

The LORD JUSTICE-CLERK was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and remitted the cause to him to allow the appellant to answer the objections by the trustee without finding caution.

Counsel for the Appellant—Kemp. Agent—Wm. Geddes, Solicitor.

Counsel for the Respondents—Valentine. Agents—J. & A. F. Adam, W.S.

Tuesday, May 26.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

ANDERSON *v.* DICKIE.

Property — Real Burden — Constitution — Building Restriction.

A disposition of lands by X contained a declaration that it should not be lawful for A (the disponee) or his foresaids to sell or feu part of the lands disponed except under certain specified conditions as to the number and value of the dwelling-houses to be erected thereon, "which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of" B (another disponee of X) and his foresaids in all time coming.