the defenders are entitled to absolvitor, with expenses."

The Sheriff-Substitute (ROBERTSON), after a proof, on 15th February 1916 granted the decree craved.

The defenders appealed to the Second Divison of the Court of Session, and argued —The farm labourer lived in a bothy where he worked, but kept all his belongings with his wife, who lived with his parents. His settlement was in the parish of his parents, and had he been unmarried this would have been absolutely clear. It was all a matter of intention. Counsel cited the following authorities—*Parish Council of Kilmarnock* v. *Parish Council of Leith*, (1898) 1 F. 103, *per* Lord President Robertson at p. 108, 36 S.L.R. 107; *Greig* v. *Duncan*, (1895) 2 S.L.T. 537; *Cruikshank* v. *Greig*, (1877) 4 R. 267, 14 S.L.R. 204; *Greig* v. *Miles*, (1867) 5 Macph. 1132, 4 S.L.R. 199; *Greig* v. *Simpson*, (1888) 16 R. 18, 26 S.L.R. 19; *Parish Council of West Calder* v. *Parish Council of Bo'ness*, (1905) 8 F. 57, 43 S.L.R. 68.

The respondents argued—There was now no presumption that a man's wife and family gave him a residential settlement—*West Calder* (*cit.*), *per* Lord President Dunedin, who at p. 63 expressed the opinion that the wife's residence only constituted an element of proof. *Allan* v. *Burton and Higgins*, (1868) 6 Macph. 358, 5 S.L.R. 240, was referred to.

At advising—

LORD SALVESEN—[*After the narrative above quoted*]—It was practically conceded that if M'Geachie had paid a rent for the room which his wife occupied, and if he had regularly stayed with her at week-ends, the case would be ruled by the decision in *Kilmarnock* v. *Leith*, 1 F. 103. I cannot think that it makes any difference that he had arranged with his own parents that his wife should live with them without paying rent until such time as the young couple had collected sufficient effects to furnish a house for themselves. I think, to apply the language of Lord President Robertson in the *Kilmarnock* case, he established and maintained a residence for his wife and child at Smithstone. He had no ties to Cassington except his work. He lived with his wife as much as the ties of his work would allow; in other words his home was at Smithstone, and he was merely at Cassington because he could not obtain regular employment nearer home. The *West Calder* case, 8 F. 57, is easily distinguishable. The man there had deserted his wife and family with the intention of not returning to them; and it would be hard to hold that under such circumstances he was constructively resident in a parish with which he had severed his connection, as he hoped, permanently. To use Lord M'Laren's words, he was neither there in fact nor in intention from the time that he left the parish where his deserted wife and family resided. The decision in that case accordingly presents no obstacle. It does not overrule or cast doubt upon the decision in the *Kilmarnock* case. It is nothing to the purpose to say that M'Geachie's wife remained in the house of his parents only so long as her husband could not find a house which they could occupy together. It was undoubtedly her residence, although intended to be of a temporary kind, and continued to be her husband's home although his work required him to be bodily absent during most of the days of the week. The doctrine of constructive residence has now been well established in our law, and in my opinion this is a clear case for applying it. It is a convenient rule, because in the case of labouring people, living on the borders of various parishes, the most permanent residence is that which the husband provides for his wife and family. His work may take him sometimes to one parish sometimes to another; but if his wife and family, whom he is supporting and with whom he lives as often as his work permits, are resident all the time in one parish, he is constructively resident there. I am therefore of opinion that we must recall the judgment of the Sheriff-Substitute and assoilzie the defenders from the conclusions of the action.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD DUNDAS was not present.

The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defenders.

Counsel for the Pursuers and Respondents —The Lord-Advocate (Clyde, K.C.)—MacRobert. Agents—Fyfe, Ireland & Co., W.S.

Counsel for the Defenders and Appellants —Christie, K.C.—Forbes. Agents—Simpson & Marwick, W.S.

Tuesday, March 20.

FIRST DIVISION.

CENTRAL MOTOR ENGINEERING COMPANY AND OTHERS *v.* GIBBS AND ANOTHER.

Process—Petition—Bankruptcy—Sequestration—Nobile Officium—Petition for Declarator that Sequestration ab initio Null and Void—Competency.

A firm and its partners having been sequestrated presented a petition founding on informalities in the citation to the sequestration proceedings and in the affidavit of the petitioning creditor, in which they craved declarator that the whole sequestration proceedings were null and void *ab initio*. *Held* that the petition was incompetent, as in effect it proceeded by application to the *nobile officium* to crave a remedy which might be sought by common law action of reduction.

The Central Motor Engineering Company, Glasgow and Edinburgh, and Gordon Houston Boswall Preston and Alistair Houston Boswall Preston, the only partners thereof, as such partners and as individuals, *peti-*

tioners, brought a petition against Sylvia Mary Gibbs and others, of whom Mrs Euphemia Constance Gibbs and her husband Antony Edmund Gibbs as her administrator-in-law and as tutor and guardian of the said Sylvia Mary Gibbs, his daughter, *respondents*, lodged answers. The petition craved the Court to find and declare that the warrant of confirmation and whole sequestration proceedings by which the petitioners had been sequestrated were void and of no effect *ab initio*, and to repone and restore the petitioners *in integrum*.

The petition as amended set forth—"The estates of the petitioners were on 14th January 1915 sequestrated on petition at the instance of creditors by the Sheriff of Lanarkshire at Glasgow.

"That William Brodie Galbraith, chartered accountant, 87 St Vincent Street, Glasgow, was appointed the trustee on the sequestrated estates of the petitioners conform to Act and warrant of confirmation in his favour by the said Sheriff of Lanarkshire dated 27th January 1915.

"That in August 1914, on the outbreak of the present war, both of the present petitioners joined the Army, and at the date of the presentation of the said petition for sequestration the present petitioners Gordon Houston Boswall Preston and Alistair Houston Boswall Preston were furth of Scotland on active service.

"That the said petition for sequestration was presented without the consent of the present petitioners. . . . . .

"A copy of the petition for sequestration and the warrant thereon were left at the place of business of the present petitioners in the hands of a servant under section 26 of the Act [*i.e.*, Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20)], but the present petitioners were not cited edictally as section 25 prescribes. These petitioners accordingly were not cited to appear in the manner prescribed in the last-mentioned section. Moreover, the presentation of the said petition for sequestration was not brought to the notice of these petitioners owing to their absence from Scotland on active service as above narrated until after said award of sequestration had been made, and they believe and aver that had said petition come to their knowledge prior to said award of sequestration said award would not have been made. Further, the claim produced by the creditors on whose petition the sequestration was awarded was not deponed to in terms of section 24 of the statute. These creditors (the Anglo-American Oil Company, Limited) are a company incorporated under the Companies Acts. Their principal office is in London, and they have branch offices at various places in England and Scotland. Their said claim was deponed to by a Mr Joseph Patterson, who is described in his affidavit as an 'accountant and principal officer' of said company. The present petitioners believe and aver, however, that the said Joseph Patterson is simply in the service of the said company as an accountant and bookkeeper in their branch office in Glasgow under the local manager there, and is not 'the secretary, manager, cashier, clerk, or other principal officer' of the said company within the meaning of said section 24 of the Act.

"In these circumstances the present petitioners are desirous of having it declared that the said proceedings and the pretended award of sequestration following thereon are and were *ab initio* void and of no effect, and they submit to the Court the following facts to show that it would be greatly to the interest both of the present petitioners and of their creditors that the said sequestration should be held as reduced *ab initio*.

"Mrs Alice Mary Houston Boswall Preston, the mother of the said Gordon Houston Boswall Preston and Alistair Houston Boswall Preston, by her will made certain provisions in their favour whereby the liferent of certain trust funds of considerable value was conferred upon them under the proviso that at the date of her death her said sons should be living and no act or event should have been done or have happened by reason whereof the liferent or any part thereof if held upon trust for them absolutely would be vested in or charged in favour of or be payable to any other person or persons or any corporation. The said will provided that in the event of the doing or happening of any such act or event the income to the said Gordon Houston Boswall Preston and Alistair Houston Boswall Preston was to cease, and in such event the said Mrs Alice Mary Houston Boswall Preston appointed that the capital and income comprised in said trust funds should be held upon trust for her granddaughter, Sylvia Mary Gibbs, daughter of Antony Edmund Gibbs of Winsor Manor, Bilbury, in the county of Gloucester, and residing there, should she survive her and attain the age of twenty-one years, then from and after her attaining that age or the death of the testatrix, whichever of such events should be the later, the capital and income of the trust fund should be held upon trust for her absolutely, but if she should die under the age of twenty-one years then the said trust fund should be held upon trust for her daughter Mrs Euphemia Constance Gibbs, wife of the said Antony Edmund Gibbs, and residing with him at Winsor Manor aforesaid absolutely. The said Mrs Alice Mary Houston Boswall Preston died on 9th July 1916. The capital value of the said trust funds was at that date £40,435 or thereby. If the petitioners were bankrupt at that date their rights under the said will ceased and determined. If the said sequestration proceedings be held void *ab initio* they will be entitled to the provisions in their favour made by the said will.

"By deed of appointment dated 4th December 1913 the said Mrs Alice Mary Houston Boswall Preston, mother of the said Gordon Houston Boswall Preston and Alistair Houston Boswall Preston, exercised in favour of her said sons a power of appointment conferred on her by her marriage settlement dated 5th May 1883 over funds therein mentioned (being part of the said trust funds) to the extent of a sum of £20,000, with compound interest at the rate

of five per cent. per annum, from 4th December 1913 until the date of her death.

"By mortgage dated 10th February 1914 the said appointees assigned their reversionary interest under the said marriage settlement to the Equitable Life Assurance Society in security of a loan of £12,000 made by that society to them. By assignment dated 25th June 1915 the Equitable Life Assurance Society, in consideration of the sum of £13,476, 19s. 10d., sold the said reversionary interest in the appointed sum of £20,000 and compound interest to the Scottish Amicable Life Assurance Society.

"By letter, dated 18th June 1915, the said William Brodie Galbraith as trustee foresaid consented to the sale mentioned in the last paragraph, and by letter of undertaking or memorandum of agreement, dated 25th June 1915, the Scottish Amicable Life Assurance Society undertook, in consideration of the said trustee's consent thereto, provided the said Mrs Alice Mary Houston Boswall Preston, the tenant for life of the property, should die on or before 25th June 1918, which as above stated she did, to pay to the said trustee one-half of the net profit which the Scottish Amicable Life Assurance Society might realise from the property so purchased, all on the terms and conditions set forth in the said letter of undertaking or memorandum. Litigation is proceeding in the Chancery Court, London, in connection with the said sum of £20,000 dealt with by the said deed of appointment, and litigation is also proceeding in the Court of Session at the instance of the said trustee against the Scottish Amicable Life Assurance Society in connection with the reversionary interest in the said sum of £20,000. It is in the interest of the creditors of the petitioners that both these litigations should be brought to an end, as they will be if the prayer of the present petition be granted.

"Further, the father of the petitioners, who is a claimant to a large extent in the sequestration, is agreeable to discharge his claims against the petitioners' estate in the event of the sequestration proceedings being held as reduced. The claims of the petitioners' father in the sequestration amount to more than £3000 out of total claims amounting to £6028, 17s. 4d.

"The present petitioners have been advised that the said Bankruptcy (Scotland) Act 1913 contains no provision to enable the Court to find and declare an award of sequestration to be void and of no effect *ab initio*, and that the present petition is the only competent process by which the result may otherwise be obtained.

"In these circumstances the petitioners make this application to the Court to grant in exercise of its *nobile officium* the prayer of the petition.

"The creditors of the present petitioners to the extent of £5901, 2s. 10d. out of a total amount of £6028, 17s. 4d. concur in asking your Lordships to grant the prayer of the present petition."

Argued for the petitioners — There had been no proper service of the petition for sequestration, for the partners of the firm had been sequestrated as individuals, but they had not been cited edictally as required by the Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 25. Further, the claim of the creditor petitioning for sequestration was not properly vouched, as it had not been deponed to by one of their principal officers, but by their accountant and bookkeeper in a branch office—section 24; *Anderson* v. *Monteith*, 1847, 9 D. 1432; *Campbell* v. *Myles*, 1853, 15 D. 685; *Dow & Company* v. *Union Bank*, 1875, 2 R. 459, 12 S.L.R. 339. Accordingly sequestration should not have been awarded. The only remedy which would exclude prejudice to the petitioners was declarator that the sequestration was null and void *ab initio*. Recal of the sequestration even if competent was useless, for it proceeded on the hypothesis that the sequestration had been valid, and that was sufficient to cause forfeiture of the petitioners' rights. Reduction of the sequestration did not appear to be competent — *Gibson* v. *Munro*, 1894, 21 R. 840, 31 S.L.R. 706; *Whitlie* v. *Gibb & Son*, 1898, 25 R. 412, 35 S.L.R. 355. Accordingly as there was no other remedy the petitioners were entitled to proceed by petition to the *nobile officium*. The petition was competent, and the circumstances were analogous to those in *Anderson*, 1866, 4 Macph. 577; *Macleish's Trustees*, 1896, 24 R. 151, 34 S.L.R. 93; *A B*, 1842, 5 D. 74; and *Ballantyne*, 1900, 2 F. 1077, 37 S.L.R. 798, where the Court had exercised the *nobile officium* to provide a remedy where there was no other competent.

Argued for the respondents—The petition was incompetent, for the Court would not exercise its *nobile officium* if another remedy was competent—Mackay's Practice, vol. i, p. 214. Here reduction of the sequestration was competent—*Gibson's* case (*cit.*), *per* Lord Young at 21 R. p. 848; *Whitlie's* case (*cit.*), *per* Lord Low (Ordinary) at 25 R. p. 419; Goudy, Bankruptcy, pp. 140 and 147. Further, a summary petition was incompetent if another remedy was available—*Carter-Campbell* v. *Lamont-Campbell*, 1894, 21 R. 614, 22 R. 260, 32 S.L.R. 203. Further, litigations were in progress in connection with the £20,000, and the *nobile officium* had never been exercised in the course of a litigation, to stay it. In any event the provisions of sections 24 and 26 of the Bankruptcy (Scotland) Act 1913 had been complied with.

At the close of the debate counsel for the petitioners offered to amend the prayer by inserting after the words *in integrum* the words "subject to any right acquired under the sequestration by the said Scottish Amicable Life Assurance Society."

LORD MACKENZIE — The estates of the petitioners, the Central Motor Engineering Company, and Gordon Houston Boswall Preston and Alastair Houston Boswall Preston, the only partners of the company, as such partners and as individuals, were on 14th January 1915 sequestrated on a petition at the instance of creditors by the Sheriff of Lanarkshire at Glasgow. This petition is now presented—as appears on the face of it — for recal of the sequestration proceedings, but when we turn to the prayer of the petition we find that the title is not borne

out by the prayer, because the Court is there asked to find and declare that "the whole sequestration proceedings are and were void *ab initio*, and to repone and restore the petitioners thereagainst *in integrum*." The ground upon which it is sought that the Court should grant this prayer in the exercise of the *nobile officium* is that there were informalities in two particulars in the proceedings leading up to the award of sequestration.

The first of these informalities is that there was not due compliance with section 24 of the Bankruptcy (Scotland) Act of 1913, inasmuch as the person who took the oath as to the debt of the petitioning company was not "the secretary, manager, cashier, clerk, or other principal officer," but a person occupying the position of bookkeeper and accountant. The other ground of objection is, that whereas the estates not only of the Central Motor Engineering Company but also of the two individual petitioners, both as partners and as individuals, were sequestrated, the proper procedure was not adopted as regards the citation prescribed by section 25 in the case of the sequestration of an individual; and that it is not sufficient that the procedure in regard to citation prescribed by section 26—which is provided in regard to the case of a company —was complied with.

It is unnecessary to say anything about the grounds upon which the petition proceeds. There is no doubt that these two individuals set out what seems to be a serious interest to them to get quit of the consequences of the sequestration, because they are beneficiaries under their mother's settlement which contains a clause of forfeiture. In that settlement a liferent is given to them under the proviso that at the date of their mother's death "no act or event should have been done or have happened by reason whereof the liferent, or any part thereof in trust for them absolutely, will be vested in any other person or persons or any corporation. In that event it is provided by the settlement that their interest is to go over to the persons who appear here as respondents to resist the prayer of the petition being granted.

The petitioners do not rely upon any of the sections of the Bankruptcy (Scotland) Act of 1913. There could not be an appeal to the provisions of section 30, because the procedure prescribed must be taken within forty days. And the necessary conditions have not been complied with as regards section 31, which, moreover, applies only to a recal by a petition to the Lord Ordinary.

I should be slow to set limits to what can be done by this Court in the exercise of its *nobile officium*. I will only say that no case has been cited which is a warrant for our doing what is here asked. It is an unprecedented application. And although Mr Sandeman was successful in citing cases where the Court had in the exercise of its *nobile officium* declared sequestration proceedings to be at an end, he was unable to produce any authority for a petition in the terms we have before us being granted.

It is sufficient for the disposal of this petition to hold that what is in effect asked is that we should in the exercise of our *nobile officium* pronounce a decree of reduction. I am unable to hold that sufficient grounds have been stated to induce this Court to accede to that demand. If the petitioners think that they can successfully maintain the grounds stated in the present petition as entitling them to set aside the award of sequestration, it is open to them to take the appropriate steps by bringing an action of reduction. I pronounce no opinion as to what view may be taken of the action of reduction when it is brought. The grounds upon which it is laid would be examined. I will only say that the door seems to me by no means shut by the two cases of *Gibson*, 1894, 21 R. 841, 30 S.L.R. 706, and *Whitlie*, 1898, 25 R. 412, 35 S.L.R. 355, that were cited, because in these two cases the view taken was that the facts set out did not warrant the remedy which was sought. For these reasons I am of opinion that the present petition should be refused.

LORD SKERRINGTON—I agree with your Lordship. I do not think that it is legitimate to ask the Court to exercise its *nobile officium* unless it is made clear that there is no other remedy open to the petitioners. An excellent illustration of a case in which the *nobile officium* is properly exercised in bankruptcy law is where in the peculiar circumstances justice requires that a certain sequestration should be declared at an end. Now apart from the *nobile officium* I know of no legal remedy that could be obtained in such cases. But in the present case there are two remedies which to my mind are *prima facie* competent, and which would probably serve the purpose of the petitioners. I do not say that they are competent, but it is the duty of the petitioners to try these remedies before asking an extraordinary remedy from us. I refer in the first place to an action of reduction, and in the second place to a petition under section 31 of the Bankruptcy (Scotland) Act of 1913 presented at the instance of nine-tenths of the creditors in number and value. We are told that an overwhelming majority in value of the creditors concurred in this petition, but we are not told that there is the necessary majority in number, and, what is more important, we are not told that the statutory majority are willing to sist themselves as petitioners to prosecute this petition as an application for recal under section 31. In these circumstances it seems to me that the petition must be refused as premature or incompetent in the particular circumstances in which it has been presented. On the merits of the application I express no opinion.

LORD CULLEN—I agree that the petition should be refused. The Bankruptcy Act of 1913, like its predecessor of 1856, makes provisions for bringing a sequestration to an end by recal. The petitioners here, however, do not seek to utilise these provisions. What they aim at is something different. They ask what is practically a decree of reduction of the sequestration proceedings declaring these proceedings void *ab initio*.

There is no precedent for such an application, and I do not think that we should entertain the present one. If the petitioners are not content with the statutory recal but desire decree of reduction, and conceive that there are competent grounds for such a decree, I think that they should proceed to seek it under the ordinary forms of process.

The Court refused the petition.

Counsel for the Petitioners—Sandeman, K.C. — Maclaren. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—Macphail, K.C.—Henderson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Trustee in the Sequestration—E. O. Inglis. Agents—Webster, Will, & Company, W.S.

Counsel for the Scottish Amicable Life Assurance Society — Gentles. Agents — Thomson, Dickson, & Shaw, W.S.

Saturday, March 17.

COURT OF SEVEN JUDGES.

[Sheriff Court at Edinburgh.

FINLAY *v.* ADAM.

Superior and Vassal — Casualties — Feu-Charter—Construction—Taxed Casualty —"A Duplicand" of the Feu-Duty.

The reddendo clause of a feu-charter granted in 1910 stipulated for certain sums of feu-duties in respect of the feus, to be payable "at two terms in the year, Whitsunday and Martinmas, by equal portions, commencing the first payment" at a certain date. There followed a clause providing for liquidate penalty in case of failure and for interest, and then the following words—"and paying a duplicand of the said feu-duties of" so much "at the term of Whitsunday 1930, and at the same term in every nineteenth year thereafter, in lieu of casualties, with interest and penalties in case of failure." *Held* (*dis.* Lord Johnston) that the sum payable to the superior in lieu of casualties in every nineteenth year was twice the amount of the feu-duties in addition to the feu-duties for the year.

Miss Eliza Russell Bruce Adam, *pursuer*, brought an action in the Sheriff Court at Edinburgh against Thomas Finlay, builder, Leith, *defender*, concluding for decree, *inter alia*, that the defender was bound to redeem the duplicand in lieu of casualties exigible in respect of a feu held by the defender off the pursuer, and that the amount of compensation payable therefor was £69, 1s. 6d.

The *disposition* which was the defender's title to the subjects provided, *inter alia*—"To be holden the said area or piece of ground of and under me the said John Baird and my foresaids in feu-farm fee and heritage for ever: Paying therefor yearly my said disponees (*In the first place*) to my superiors the said trustees of the deceased Sir George Campbell Baronet and their successors the sums of six pounds sterling and one penny Scots for each of the said three areas or building stances and buildings thereon (*First*) before disponed and one penny Scots for the area or piece of ground (*Second*) before disponed and coloured blue on the foresaid plan, being the proportions hereby allocated upon the respective subjects before disponed of the cumulo feu-duty of Three hundred and twenty-five pounds payable by me for the whole subjects of which those before disponed form a part in terms of power granted to me in the said feu-charter in my favour dated and recorded as aforesaid: And which feu-duties are hereby further allocated and apportioned as follows, *videlicet*:—The sum of six pounds upon the ground flats of each of said three tenements and one penny Scots upon the remainder of said tenements and payable said feu-duties with relative duplications interest and penalties if incurred all at the terms and in the manner mentioned in the said feu-charter in my favour dated and recorded as aforesaid and (*In the second place*) to me and my foresaids the further sum of twenty-four pounds sterling per annum in name of feu-duty for each of the two lots of building stances facing Smithfield Street and the buildings erected thereon respectively and twenty-eight pounds upon the corner lot or building stance partly facing Smithfield Street and partly facing Wheatfield Place and the buildings erected thereon which three lots or building stances form part and portion of the area or piece of ground (*First*) hereinbefore disponed making a total feu-duty of seventy-six pounds per annum payable to me and my foresaids and that at two terms in the year Whitsunday and Martinmas by equal portions commencing the first payment of the said feu-duties at the term of Whitsunday Nineteen hundred and eleven for the half-year preceding (no payment being made for the possession to Martinmas Nineteen hundred and ten) and the next term's payment at Martinmas following and so forth half-yearly termly and proportionally thereafter in all time coming with a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof and the interest of each term's payment at the rate of five pounds per centum per annum from the time the same falls due until paid and paying a duplicand of the said feu-duties of twenty-four pounds twenty-four pounds and twenty-eight pounds at the term of Whitsunday Nineteen hundred and thirty and at the same term in every nineteenth year thereafter in lieu of casualties with interest and penalties in case of failure if incurred all as provided with respect to said feu-duties."

The parties *averred*—"(Cond. 1) The pursuer is superior of the subjects before-mentioned, in terms of disposition in her favour by John Patterson, merchant, 13 Dumbiedykes Road, Edinburgh, dated 12th and recorded in the Division of the General Register of Sasines applicable to the county