is incompetent. But the complainer will in my opinion be entitled, if he is convened before the proper "civil court," to raise the question as to whether he falls within the exemption clause, or any other question he may be advised to raise, and to ask a judgment on such questions with a right of appeal if any point of law is involved. It appears to me, however, that the only point the complainer desires to raise is a pure question of fact and a very simple question of fact, and if we had any discretion in the matter I do not think it would be right to encourage the litigation of such a question through all the courts by a note of suspension and interdict, with all the expense and delay that would involve, when it can be so speedily and economically disposed of otherwise.

LORD DUNDAS—I think the interlocutor reclaimed against is right, but I do not agree with all that the Lord Ordinary says in the course of his opinion. I shall therefore state briefly my own grounds of judgment. The complainer claims to be exempt from military service because he is within the sixth exception contained in the First Schedule of the Act of 1916, being the holder of a certificate of exemption, still in force, under the Act. His certificate was granted by the appropriate Department of the Government, in virtue of section 2 (2) of the Act, as to one belonging to a class of men employed in a work of national importance. But section 3 (1) of the Act empowers the Department to review and withdraw such certificates if they are of opinion that in the circumstances of the case that should be done. In May 1917 the Home Secretary issued what is called a Decertification Order to the effect that exemptions to coal miners who had entered the industry after the war should be cancelled. The complainer says that in January 1918 he was informed by the Inspector of Mines that he was considered to fall under the Order. He avers, however, that he did not in fact fall under it as he was a pre-war miner. He appealed on this ground to the Colliery Recruiting Court, but that body dismissed his appeal. This procedure was all *ex facie* in order; and the result of the withdrawal of the complainer's certificate of exemption was that, as provided by section 3 (3) of the Act, he was after the lapse of two months "deemed to have been enlisted and transferred to the Reserve in the same manner as if no such certificate had been granted," and that takes one back to the terms of section 1. The complainer has now received notice calling him up for military service, and he brings this suspension and interdict with the view of proving in the Court of Session that the decision of the Colliery Recruiting Court was wrong, and that he was in fact a pre-war miner. It would certainly be a serious matter for the authorities if objections of this kind can be made the subject of litigation in the Court of Session and perhaps the House of Lords. I do not, however, think that such procedure can competently be resorted to. But the complainer is not in my judgment without an appropriate and sufficient remedy. His proper course is, I apprehend, to appear before the Sheriff in answer to the notice calling him up. The procedure is that which is appointed by the statutes (see, *inter alia*, the Reserve Forces Act 1882, section 15, and the Army Act, sections 167 and 190, subsections (33) to (37)), including an appeal in the usual way to the Court of Justiciary. The complainer will thus have ample opportunity of proving if he can that a mistake has been made, and that he is not liable to be called up. But the procedure to which he has here resorted is in my judgment wholly incompetent.

LORD SALVESEN—The facts in this case are somewhat different from those in *Green's* case, but the question of competency appears to me to be the same. I do not propose to add anything to what your Lordships have said on that point, but merely express my concurrence in the judgment proposed.

The Court adhered.

Counsel for the Complainer (Reclaimer)—Christie, K.C.—Ingram. Agent—R. D. C. M'Kechnie; Solicitor.

Counsel for the Respondents—Lord Advocate (Clyde, K.C.)—Solicitor-General (Morison, K.C.)—Pitman. Agent—George Inglis, S.S.C.

Wednesday, June 26.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

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

(*See* 1917 S.C. 490, 54 S.L.R. 384.)

Bankruptcy—Sequestration—Reduction—Competency—Relevancy—Firm and Partners Jointly Sequestrated—Citation of Partners—Oath of Petitioning Creditor—Mora—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20) *secs.* 20, 24, 25, *and* 26.

A joint sequestration of the estates of a firm and of the two partners thereof was awarded on 14th January 1915. The partners had been cited by a copy of the petition and warrant for each of them being left at the firm's place of business. The firm and the partners on 16th June 1917 brought an action for reduction of the award, but saving certain transactions entered into between the trustee and certain creditors of the partners subsequent to the date of the award. The pursuers alleged that the partners had not been duly cited to the bankruptcy process, because being furth of Scotland they should have been and were not cited edictally, and that the petitioning creditor being a company the affidavit upon which the award proceeded had not been signed by a principal officer of the company. They further alleged that if the sequestration was reduced *ab initio*

the partners would be entitled to the liferent of certain funds under their mother's will, which might, if the sequestration were not reduced, fall to others, who lodged defences to the action of reduction.

Held that an action of reduction of an award of sequestration is not necessarily incompetent, but that (*dub.* Lord Johnston) the present action fell to be dismissed—*per* the Lord President as being incompetent seeing that the statutory remedy of recal was available; *per* the Lord President and Lord Mackenzie as being irrelevant seeing that knowledge of the sequestration proceedings was not denied; *per* Lord Skerrington as being irrelevant seeing that only an alleged misconstruction by the Sheriff of section 26 of the Bankruptcy (Scotland) Act 1913 in the matter of citation was averred, and a review of his judgment on the point was prohibited by section 30.

Opinion per the Lord President (*concurring with* the Lord Ordinary) that in the matter of citation in this sequestration section 26 only of the Bankruptcy (Scotland) Act 1913 was applicable and no edictal citation of the individual partners was therefore necessary; *contra*, *per* Lord Johnston, Lord Mackenzie, and Lord Skerrington, that section 25 also was applicable and edictal citation of the individual partners consequently necessary.

Question per Lord Johnston to what extent the defenders, the reversioners of the liferent, had a title to defend, the validity of the sequestration being primarily a question between the bankrupt and his creditors only.

Held per Lord Mackenzie (*sus.* Lord Ormidale) that if the affidavit had not been signed by the proper officer of the petitioning company the pursuers had delayed too long to challenge the validity of the affidavit.

Bankruptcy—Sequestration—War—Emergency Powers—Courts (Emergency Powers) Act 1914 (4 *and* 5 *Geo. V, cap.* 78), *section* 1 (1).

Opinion per Lord Johnston that there is not required any application to the Court under the Courts (Emergency Powers) Act 1914, section 1 (1), prior to presenting a petition for sequestration, and that the requiring of such an application by a sheriff is without authority.

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20) enacts—Section 20—"... In all cases [of petitions for sequestration] the petitioning or concurring creditor shall produce with such petition an oath to the effect hereinafter specified ... failing which production the petition shall be dismissed." Section 24—"When the creditor is a corporation an oath of verity made as aforesaid by the secretary, manager, cashier, clerk, or other principal officer of such corporation shall be sufficient although the person making the same be not a member of such corporation. ..." Section 25—"When a petition for sequestration is presented without the consent of the debtor ... the ... sheriff to whom it is presented shall grant warrant to cite the debtor ... to appear within a specified period, if he be within Scotland, by delivering to him personally, or by posting in a registered letter addressed to him at his dwelling-house or place of business, or the dwelling-house or place of business last occupied by him, a copy of the petition and warrant, and if the debtor ... be furth of Scotland, to cite him to appear within a specified period by leaving such copy at the office of edictal citations and at the dwelling-house or place of business last occupied by him, to show cause why sequestration should not be awarded. ..." Section 26—"When the debtor is a company it shall be sufficient citation that a copy of the petition and warrant be left at the place where the business of the company is or was last carried on, provided a partner or a clerk or a servant of the company be there, and failing thereof at the dwelling-house of any of the acting partners, and if the house of such partner cannot be found, by leaving a copy at the office of edictal citations; and sequestration may be awarded either on the application of the company itself or on the application of a creditor or creditors to the amount aforesaid, without the consent of the company, of the estates of the company and partners jointly, or of their respective estates separately."

The Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78) enacts—section 1 (1)—"From and after the passing of this Act no person shall (*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether entered or made before or after the passing of this Act) for the payment or recovery of a sum of money to which this sub-section applies, except after such application to such court and such notice as may be provided for by such rules or directions under this Act; or (*b*) levy any distress, take, reserve, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this sub-section applies, for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or in default of the payment or recovery of any such sum of money, except after such application to such court and such notice as may be provided for by rules or directions under this Act. ..."

The Central Motor Engineering Company as a firm, and Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, the only partners thereof, as such partners and as individuals, *pursuers*, brought an action against William Brodie Galbraith, C.A., as an individual and as trustee in an alleged sequestration of the pursuers and the Anglo-American Oil Company Limited, and against Mrs Euphemia Constance Gibbs and her husband Antony Edmund Gibbs as curator and administrator-in-law of his wife and also as tutor and guardian

of his daughter Silvia Mary Gibbs, and the Scottish Amicable Life Assurance Society for any interest they might have, *defenders*, concluding, *inter alia*, for decree that "(*First*) a pretended interlocutor or decree dated 14th January 1915, pronounced by the Sheriff of Lanarkshire at Glasgow in a petition for sequestration of the respective estates of the pursuers at the instance of the defenders the Anglo-American Oil Company Limited, by which pretended interlocutor or decree the said Sheriff of Lanarkshire awarded sequestration of the estates of the said pursuers, the Central Motor Engineering Company as a firm, and of the said pursuers Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, the only partners of said company, as such partners and as individuals, and (*Second*) a pretended act and warrant, dated 27th January 1915, by the said Sheriff of Lanarkshire confirming the defender the said William Brodie Galbraith as trustee on said sequestrated estates . . . with all that has followed or may follow hereon, ought and should be reduced by decree of our said Lords, and the pursuers reponed and restored thereagainst *in integrum*, excepting always, and without prejudice to, any transaction entered into lawfully and *in bona fide* by any person or persons with the said William Brodie Galbraith in his capacity of trustee foresaid since the date of the commencement of said pretended sequestration, and in particular, but without prejudice to said generality, saving and reserving entire (*first*) the rights of the defenders the Scottish Amicable Life Assurance Society in and to a certain reversionary interest of the pursuers the said Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston which was acquired by the said Scottish Amicable Life Assurance Society, conform to assignment by the Equitable Life Assurance Society in their favour, dated 25th June 1915, and (*second*) the right of the said William Brodie Galbraith, as trustee foresaid, to one-half of the net profit to be derived by the said Scottish Amicable Life Assurance Society from said purchase."

The parties *averred*—"(Cond. 1) On or about 29th December 1914 a petition was presented at the instance of the defenders the Anglo-American Oil Company Limited in the Sheriff Court of Lanarkshire at Glasgow, for the sequestration of the estates of the pursuers the Central Motor Engineering Company as a firm, and of the pursuers Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, the only partners of said company, as such partners and as individuals. The said petition, which is referred to, was presented without the consent of the pursuers. *Answer* 1 *for defender William Brodie Galbraith.*—Admitted. *Answer* 1 *for defender Antony Edmund Gibbs.*—Admitted that on or about 29th December 1914 a petition was presented at the instance of the Anglo-American Oil Company Limited in the Sheriff Court at Glasgow for sequestration of the estates of the pursuers the Central Motor Engineering Company, and of the sole partners thereof the pursuers Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston as such partners and as individuals. *Quoad ultra* the said petition is referred to for its terms. Explained that the said petition sets forth that the pursuers had been rendered notour bankrupt in respect that a sale of their effects took place under sequestration for the rent of premises occupied by them at 51 Pitt Street, Glasgow, at the instance of their landlords John Haig & Company Limited. Further explained that on said 29th December the Sheriff appointed an interim judicial factor upon the estates of the pursuers. (Cond. 2) At the outbreak of the present war, both of the pursuers, Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, joined the army, and at the date of the presentation of said petition for sequestration they were furth of Scotland on active service with the British Expeditionary Force. *Answer* 2 *for defender William Brodie Galbraith.*—Not known but believed to be true. *Answer* 2 *for defender Antony Edmund Gibbs.*—Believed to be true that the individual pursuers joined the army at the outbreak of war. *Quoad ultra* not known and not admitted. (Cond. 3) Copies of said petition for sequestration, along with the warrant for service thereon, were left for the respective pursuers at the place of business of the Central Motor Engineering Company, 51 Pitt Street, Glasgow, in the hands of a servant, but notwithstanding that at the date of the said service the pursuers the said Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston were furth of Scotland, they were not cited edictally in terms of the Bankruptcy (Scotland) Act 1913. *Answer* 3 *for defender William Brodie Galbraith.*—Admitted. *Answer* 3 *for defender Edmund Antony Gibbs.*—Believed to be true that copies of the petition for sequestration along with the warrant for service were left at the place of business of the Central Motor Engineering Company, 51 Pitt Street, Glasgow, in the hands of a servant. *Quoad ultra* not known and not admitted. (Cond. 4) The pursuers, the said Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston were unaware of the presentation of said petition for sequestration owing to their absence abroad as above narrated. At a preliminary diet under the Courts (Emergency Powers) Act 1914, before warrant to serve the petition was granted, appearance was made on behalf of the pursuers, but without authority, by a Mr Chalmers, writer, Glasgow, who had acted as their agent in other matters. After service of the petition no appearance was made by or for them to oppose the same, they being unaware as before stated of its having been presented, and on 14th January 1915 the said Sheriff of Lanarkshire awarded sequestration of the estates of the pursuers the Central Motor Engineering Company as a firm and of the pursuers, Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, the only partners of said company, as such partners and as individuals. *Answer* 4 *for defender William Brodie Galbraith.*—Not known and not admitted

that the pursuers Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston were unaware of the presentation of the petition for sequestration against them, or that Mr Chalmers acted without authority. *Quoad ultra* admitted. (Cond. 5) On 27th January 1915 the defender William Brodie Galbraith was appointed trustee on the said sequestrated estates conform to Act and Warrant of Confirmation in his favour by the said Sheriff of Lanarkshire, and he has since the last-mentioned date acted as trustee in said sequestration. *Answer* 5 *for defender William Brodie Galbraith.*—Admitted. *Answers* 4 *and* 5 *for defender Antony Edmund Gibbs.*—Admitted that sequestration of the estates of the said company and of the individual pursuers as the sole partners thereof and as individuals was awarded on 14th January 1915, that the defender William Brodie Galbraith was on 27th January 1915 appointed trustee and has since that date acted as trustee. Admitted also that appearance was made on behalf of the pursuers at a preliminary diet under the Courts (Emergency) Powers Act 1914. *Quoad ultra* not known and not admitted. Explained that on 29th December 1914 an order was pronounced granting warrant for intimation of the petition for sequestration under the last-mentioned statute and appointing parties to appear on 4th January 1915, and that on that date an order was pronounced granting warrant to cite the defenders. This order bears to have been pronounced after parties' procurators were heard. In any event, the individual pursuers were aware of the sequestration shortly after it was granted. The pursuer Gordon Houston-Boswall-Preston has been resident in this country since 20th October 1915. (Cond. 6) The pursuers believe and aver that said award of sequestration and said appointment of trustee were wrongfully and illegally obtained, and they are desirous that the same should be reduced and declared to be null and void *ab initio* and that for the following reasons, viz.—*First*, In respect that the pursuers Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, who were furth of Scotland at the date of service of said petition for sequestration, were not cited edictally to compear in said petition as prescribed by section 25 of the Bankruptcy (Scotland) Act 1913; and *Second*, In respect that the claim produced by the defenders the Anglo-American Oil Company, Limited, on whose petition the said sequestration was awarded, was not deponed to in terms of section 24 of said statute. 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 said affidavit as an 'accountant and principal officer' of said company. The pursuers believe and aver, however, that the said Joseph Patterson is simply in the service of said company as an accountant and manager of the book-keeping department 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 section 24 of the Bankruptcy (Scotland) Act 1913. *Answer* 6 *for defender William Brodie Galbraith.*—Admitted that pursuers are desirous that the award of sequestration and appointment of this defender as trustee should be reduced and declared to be null and void *ab initio*. *Quoad ultra* not known and not admitted. *Answer* 6 *for defender Antony Edmund Gibbs.*—Admitted that the Anglo-American Oil Company, Limited, is a company incorporated under the Companies Acts, that their principal office is in London, and that they have branch offices in England and Scotland, and that their claim was deponed to by a Mr Joseph Patterson, who is described in the affidavit as 'accountant and principal officer' of the company. *Quoad ultra* not known and not admitted. (Cond. 7) In addition to the right, title, and interest which every person has to set aside a pretended award of sequestration of his estates, the pursuers, the said Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, have a special interest to have the said pretended award of sequestration of their estates reduced and declared to be null and void *ab initio*. Mrs Alice Mary Houston-Boswall-Preston, the mother of the said pursuers, 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 and 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, Bibury, 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 event 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 said pursuers 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 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 5 per centum 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 £12,500 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 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, 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 was also until recently 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 pursuers and of their creditors that both these litigations should be brought to an end, which they will be if decree in terms of the conclusions of the present action is pronounced. Further, the father of the said pursuers, who is a claimant to a large extent in the sequestration, is agreeable to discharge his claims against the pursuers' estates in the event of the sequestration proceedings being held as reduced. The claims of the said pursuers' father in the sequestration amount to more than £3000 out of total claims amounting to £5938, 14s. 3d. The pursuers have informed the said William Brodie Galbraith as trustee foresaid, and the creditors who have claimed on said sequestrated estates, of their intention to raise and prosecute the present action; and the said William Brodie Galbraith, and 97 creditors with claims amounting to £5752, 6s. 5d. out of 103 claims, amounting to £5938, 14s. 3d. as aforesaid, have approved of the sequestration being reduced as craved, provided the Court is satisfied that there are in law good grounds for so doing. With reference to the explanations in answer for the defender Antony Edmund Gibbs, it is admitted that the leave of the Court was not obtained to the sale to the Scottish Amicable Life Assurance Society, that the said Mrs Alice Mary Houston-Boswall-Preston was a domiciled Englishwoman, that the trust created by her will is being administered in England, and that the said Sylvia Mary Gibbs is a pupil. The said defender is not a creditor in the sequestration. *Quoad ultra* the explanations are denied so far as not coinciding with the pursuers' averments. *Answer 7 for defender William Brodie Galbraith.*—Admitted that the litigation in England is and in the Court of Session was proceeding as averred by the pursuers. *Quoad ultra* the will of the deceased Mrs Alice Mary Houston-Boswall-Preston and other documents mentioned are referred to for their terms, beyond which no admission is made. *Answer 7 for defender Antony Edmund Gibbs.*—Admitted that the said Mrs Alice Mary Houston-Boswall-Preston died on 9th July 1916, that by her will she made certain provisions whereby the life interest in certain funds was conferred upon the individual pursuers under the proviso that at the date of her death they should be living, and no act or event should have been done or have happened by reason whereof the life interest 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, and that should such act or event have been done or happened the income was to cease to be payable to the said pursuers and the capital and income was to be held upon trust for her granddaughter Sylvia Mary Gibbs absolutely should she survive the testatrix and attain the age of twenty-one years. On said 9th July 1916 the individual pursuers were bankrupt and the said trust funds were then held, and continue to be held, for the said Sylvia Mary Gibbs. *Quoad ultra* not known and not admitted, under reference for their terms to the said will and deed of appointment of the said Mrs Alice Mary Houston-Boswall-Preston, the mortgage by the individual pursuers dated 10th February 1914, the assignment by the Equitable Life Assurance Society dated 20th June 1915, the letter of the said William Brodie Galbraith dated 18th June 1915, and the said letter of undertaking or memorandum of agreement dated 25th June 1915. The leave of the Court under the Courts Emergency Powers Act was not obtained to the sale by the Equitable Life Assurance Society to the Scottish Amicable Life Assurance Society. The trustee in the sequestration has received a considerable sum from the Scottish Amicable Society under the arrangements between him and the Society, but it is believed that no part of that money has been distributed amongst the creditors. The pursuers are called on to produce the minute or resolution of their creditors relative to the proposed reduction of their sequestration. Explained that the

said Mrs Alice Mary Houston-Boswall-Preston was a domiciled Englishwoman, that her will, which was executed in conformity with English law, purported to exercise a power of appointment reserved to her by an English marriage settlement over funds comprised therein left unappointed, and that the trust created by the settlement and will is an English trust, and is being administered in England by trustees who are all resident there. The said Sylvia Mary Gibbs is a pupil, and this defender as her father is her guardian. (Cond. 8) The pursuers, while seeking for reduction *ab initio* of said award of sequestration of their estates and of the said act and warrant with all that has followed or may follow, do not desire to impugn the validity of any transaction entered into lawfully and *in bona fide* by any person or persons with the defender the said William Brodie Galbraith, as trustee foresaid since the date of the commencement of said pretended sequestration, and said transactions are specially excepted from the decree of reduction sought by the pursuers. In particular, and without prejudice to said generality, the pursuers desire that the reduction sought should be granted, saving and reserving entire (first) the rights of the said Scottish Amicable Life Assurance Society in and to the reversionary interest purchased by them as aforesaid, and (second) the right of the said William Brodie Galbraith as trustee foresaid to one-half of the net profit to be derived by the said Scottish Amicable Life Assurance Society from said purchase. *Quoad ultra* the averments in answer so far as not coinciding herewith are denied. *Answer 8 for defender William Brodie Galbraith.*—Admitted under reference to the conclusion of the summons. *Answer 8 for Antony Edmund Gibbs.*—The conclusions of the summons are referred to. The defender submits that the action is incompetent, and that in any event decree of reduction cannot be granted except under reservation of the rights of the other beneficiaries under the will of the said Mrs Alice Mary Houston-Boswall-Preston, in respect that the life interest of the individual pursuers has ceased and the funds are now held in trust for the said Sylvia Mary Gibbs in terms of the said will. It is solely with the object of depriving the said Sylvia Mary Gibbs of her right in the said funds and of having the same made available to the creditors of the individual pursuers that this action has been raised, and that the consent to it of the majority of the creditors has been obtained, and in these circumstances the defender as guardian of his said child has deemed it to be his duty to defend this action on her behalf. Explained that the creditors who have not assented to this action and the trustees under the will of the said Mrs Alice Mary Houston-Boswall-Preston are not called as defenders."

The pursuers *pleaded, inter alia*—"2. The pretended interlocutor or decree awarding sequestration of the respective estates of the pursuers, and the pretended act and warrant confirming the appointment of the defender William Brodie Galbraith as trustee on said sequestrated estates, ought to be reduced and declared to be null and void *ab initio*, and decree pronounced in terms of the conclusions of the summons in respect that (*a*) the pursuers the said Gordon Houston-Boswall-Preston and Alistair Houston-Boswall-Preston, who were furth of Scotland at the date of the service of said petition for sequestration of their estates, were not cited in said petition edictally in terms of section 25 of the Bankruptcy (Scotland) Act 1913; and (*b*) the claim produced by the defenders the Anglo-American Oil Company, Limited, on whose petition the pretended award of sequestration was made, was not deponed to in terms of section 21 of the said statute as condescended on."

The defender Antony Edmund Gibbs pleaded, *inter alia*—"1. The action is incompetent. 2. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed."

On 22nd December 1917 the Lord Ordinary (ORMIDALE) having heard counsel in the procedure roll dismissed the action.

Opinion.—"This action is at the instance of the Central Motor Engineering Company as a firm, and the only partners of the company as such partners and as individuals. It purports to be an action for the reduction of an award of sequestration, dated 14th January 1915, of the estates of the pursuers and of all that has followed thereon.

"If reduction is granted, then it is alleged that forfeiture of a valuable liferent provision made for the individual pursuers under their mother's settlement will be avoided.

"Defences have been lodged by the trustee in the sequestration, but he states that he and the bulk of the creditors (exceeding nine-tenths in number and value) approve of the reduction craved being granted. Their interest to do so is apparent.

"Defences, however, have also been lodged by the persons who come to be in right of the liferent provisions if a forfeiture has been incurred.

"The pursuers' mother died in July 1916. Her settlement is dated May 1915, several months after the date of the award of sequestration.

"There is no example in the books of the reduction of an award of sequestration. It is not a remedy contemplated by the Bankruptcy Statutes. It is declared (section 30, 1913 Act) that the deliverance awarding sequestration shall not be subject to review. On the other hand provision is made for the sequestration being recalled—at the instance of the debtor by a petition presented within forty days after the date of the award (section 30, 1913 Act), or at any time at the instance of nine-tenths in number and value of the creditors (section 31).

"The remedy of reduction has been sought in only two reported cases—*Gibson* v. *Munro*, 1894, 21 R. 840, 31 S.L.R. 706, and *Whitlie* v. *Gibb & Son*, 1898, 25 R. 412, 35 S.L.R. 355. These actions were both dismissed as irrelevant, but on grounds special to themselves. The competency of reduction was not negatived in either of them, and reduction was referred to as competent in the

proceedings at the instance of the present pursuers by way of petition to the First Division, in which they craved the Court in the exercise of its *nobile officium* to declare the proceedings in the sequestration void *ab initio*—*Central Motor Engineering Company* v. *Gibbs*, 1917 S.C. 490, 54 S.L.R. 384.

"I cannot therefore hold that an action of reduction of an award of sequestration is incompetent. But in the two cases to which I have referred it was pointed out that such a reduction would be competent only in very exceptional and special circumstances.

"What are the grounds on which reduction is sought in the present case? *First*, that the pursuers the individual partners, who were furth of Scotland at the date of the service of the petition for sequestration, were not cited edictally in terms of section 25 of the Bankruptcy (Scotland) Act 1913; and *Second*, that the claim of the creditor, being a company, who petitioned for sequestration was not deponed to in terms of section 24 of the Act in respect that the gentleman who took the oath of verity was not a 'principal officer' of the company although so described, but only an accountant and the manager of the bookkeeping department of a branch office of the company.

"This second ground for seeking reduction appears to me only to require to be stated to be at once rejected. The matter of the status of the party emitting the oath of verity may be of importance at the inception of a sequestration, and might afford a ground for its recal, but after the sequestration has proceeded for more than two years, and when there is no suggestion that the deposition was not in fact true, or that any prejudice has been suffered because of the deponent not being properly qualified, it is in my opinion altogether idle and extravagant to maintain that such a technical error—I assume that the gentleman in question was not technically a 'principal officer' of the petitioning company—forms a good ground for invoking the extraordinary remedy of a reduction of the award of sequestration and all that has followed thereon.

"With regard to the first ground of reduction, I note that no objection is taken to the citation of the company pursuer, and yet the reduction sought is not of the award of sequestration of the estates of the individual partners only but of the estates of the company also as a firm. It does not appear to me that if the award was bad in the case of the individual partners it necessarily follows that it was bad also in the case of the firm.

"But in my judgment not only the firm but also the individual partners of the firm were duly cited.

"The section that provides for the procedure to be followed where the debtor is a company as here is section 26. Section 25 deals with the case where the debtor is an individual. Under section 26 sequestration may be awarded of the estates of the company and partners jointly or of their respective estates separately (see *Wotherspoon and Hope* v. *Magistrates of Linlithgow*, 1863, 2 Macph. 348, Lord President at p. 353). The former was what I apprehend was done in the present case. If so, then there was no necessity for edictal citation of the individual partners. It is not averred that the procedure enacted by section 26 was not fully followed. Indeed, in condescendence 3 the pursuers state that copies of the petition for sequestration along with the warrant for service were left for the respective pursuers at the place of their company's business in the hands of a servant. That was sufficient citation. It is only on failure so to serve, and on the further failure to find the house of any of the acting partners, that under section 26 edictal citation is necessary. In my opinion, therefore, the first ground for reduction is irrelevant.

"But if I am wrong in holding that edictal citation under section 25 was not necessary, I am of opinion that failure to cite the partners edictally under that section is not a good ground for now having the award reduced. It might have been otherwise if there had been any relevant averment of prejudice suffered, but there is not. Nor is it said that the omission to serve edictally, a form of notice which is after all of very little or any value, was deliberate or fraudulent. The sequestration has gone on and has been allowed to go on by the pursuers for more than two years. No objection is taken to it on its merits, if I may so put it. There is no suggestion that there has been any irregularity in its conduct. Nor is it suggested that its course would have been other than it has been if edictal citation had been given to the individual pursuers. What is maintained, as I understand, is not that any injustice has been done in the course of the sequestration, but that there was here the omission of a statutory solemnity or requisite so vital and essential as to render the whole proceedings null and void. I am not prepared so to hold. The dicta of the Lord Chancellor in *Campbell* v. *Brown*, 1828, 3 W. & S. 441, at 448, to which I was referred, have no application to such an incidental error as occurred here.

"The omission to cite edictally would have been a good ground for invoking the statutory remedy of recall. There is no relevant averment that the pursuers were not in a position to avail themselves of the remedy within forty days of the award. They nowhere aver that they remained in ignorance of the sequestration for forty days, and I think it is very unlikely that they did. Further, judging by the attitude of the trustee and creditors, the remedy of recal under section 31 would not be difficult to operate. No doubt a recal might not answer the purpose which the pursuers have in view, but the fact that a statutory remedy is still possible furnishes an additional ground for the Court refusing the extraordinary remedy now asked."

The pursuers reclaimed, and argued—It was admitted that the reduction of a sequestration was not an incompetent remedy, and there were dicta to the effect that in suitable circumstances that remedy might be granted—*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. The only question was whether the circumstances in the present case warranted the granting of that remedy. The defender Antony Edmund Gibbs, who alone opposed the granting of decree of reduction, had no title to defend. He and those whom he represented had no interest in the sequestration in question as a diligence; their only interest was consequential, for it depended on whether or not there had been a valid sequestration, but the only parties who had an interest to try the validity of the sequestration were the creditors of the pursuers. The sequestration was invalid *ab initio*. Sequestration was a drastic diligence, and it was doubly so in the present case, for in addition to its ordinary effects it brought into operation against the individual pursuers penal consequences under their mother's will. It fell to be granted after certain peremptory statutory formalities had been complied with. Those formalities had not been observed in the present case and consequently the sequestration was vitiated from the outset. The first informality consisted in the want of proper citation of the individual pursuers to the sequestration process. Where a company was concerned, it alone might be rendered notour bankrupt and be sequestrated—Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), section 11, 1st case (B), where "debtor," as defined in section 2, included company—but along with the company the creditor might sequestrate the estates of the partners if they were notour bankrupt either by joint or by separate awards—section 26 at the end, which provisions showed how in the case of a company there might be collateral extensions of the sequestration. The first part of section 26 set out the requisites for citation in the case of a company and they had been complied with here, but those requisites did not apply to the collateral sequestrations mentioned at the end of section 26. Those were cases of sequestration of individuals, and in their case the requisites for citation were set out in section 25, and under that section it was imperative to cite the debtor edictally if as here he was furth of Scotland. That interpretation of the Act was sanctioned by authority—*Wotherspoon & Hope* v. *Magistrates of Linlithgow*, 1863, 2 Macph. 348, *per* Lord President Inglis at pp. 352 and 353. The absence of edictal citation was sufficient to nullify the whole proceedings, for section 25 was in imperative terms. In an analogous case an informality no more material than the informality here, had been held sufficient to nullify the whole proceedings—*Campbell* v. *Brown*, 1828, 3 W. & S. 441. The defect in citation could not be cured by anything that transpired in the proceedings under the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), for the preliminary diet was not warranted by that Act, and in the case of a sequestration that Act only came into operation where there was a duly pending process—section 1 (3). Further, the oath produced did not conform to the requisites of the Act—sections 20 and 24; it was not signed by a principal officer of the creditor company—*Campbell* v. *Myles*, 1853, 15 D. 685; *Anderson* v. *Monteith*, 1847, 9 D. 1432; *Dow* v. *Union Bank of Scotland*, 1875, 2 R. 459, 12 S.L.R. 339. On that point proof should be allowed. The estates of the company being inseparable from those of the partners, and the sequestration of the partners being invalid, the whole proceedings were invalid.

Argued for the defender Antony Edmund Gibbs—The Lord Ordinary was right. The usual method of getting rid of a sequestration was by recal; that was the only method prescribed by the Act of 1913. While reduction was no doubt competent it was appropriate only in very special circumstances and where there had been some substantial informality in granting the sequestration. The Act of 1913 was a consolidating Act, and if the sections here in question had been so open to criticism as the pursuers alleged, it was reasonable to expect that they would have been altered in a consolidating Act, but they merely repeated the sections in the earlier Acts. Section 25 set out the procedure in the case of individuals. Section 26 set out the procedure in the case of companies; it was quite self-contained. When a firm was sequestrated the partners could also be sequestrated for a firm debt. If, as was admitted here, the firm was duly sequestrated the partners were bound to know what had happened. But in any event citation was not a solemnity; its object was merely to secure that knowledge of the proceedings was brought home to the defenders. If the defenders appeared although the citation was defective, they could not object to the defect in the citation—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, rule 13. Here the defenders were aware of the proceedings, for they were represented by an agent at the preliminary diet for leave to proceed with the sequestration proceedings. The preliminary diet was quite a proper proceeding—Act of Sederunt of 28th September 1914. The pursuers had allowed too long a time to elapse before stating the present objection, and the pursuers could not, as was proposed, reduce the sequestration in part and leave it unaffected as regards the rest. As regards the objection to the oath, proof would be necessary to make clear the position of the official signing the affidavit.

The Court *ordained* the proceedings in the Sheriff Court to be transmitted. After those proceedings were transmitted the defender Antony Edmund Gibbs obtained leave to amend his pleadings, the pursuers and the defender William Brodie Galbraith to answer those amendments.

The *amendment* of the defender Antony Edmund Gibbs consisted in adding at the end of answer 8 the following—"The following facts are disclosed in the sequestration process, now made part of these proceedings:—On 29th December 1914 the Sheriff-Substitute appointed parties to appear on 4th January 1915, and on 30th December 1914 the petition for sequestration and the deliverance of 29th December were served upon

the present pursuers by copies thereof being left for them at their place of business in 51 Pitt Street, Glasgow.

"On 4th January 1915 the Sheriff-Substitute heard agents for the petitioners for sequestration and for the present pursuers, and having heard parties' agents the first order in the sequestration was then pronounced. On 6th January the petition for sequestration along with the order of 4th January was again served on the present pursuers, and on 14th January the order for sequestration was granted after consideration by the Sheriff-Substitute of the execution of citation. The order of 4th January had been duly intimated in the *Edinburgh Gazette*.

"Before the sequestration was granted the Sheriff had heard formal evidence of all the facts requiring to be established before granting sequestration, including proof of the fact that the present pursuers both as a firm and as individual partners thereof had carried on business and had a place of business at 51 Pitt Street, Glasgow, for the year preceding the date of the presentation of the petition.

"The statutory abbreviate of the sequestration was duly recorded on 5th January 1915, and the granting of the sequestration was duly intimated in the *Edinburgh Gazette* on 15th January 1915 and in the *London Gazette* of 19th January 1915.

"On 29th December 1914 there was also presented to the Sheriff at Glasgow an application for the appointment of a judicial factor for the interim preservation of the estates of the bankrupts, and that application was duly granted.

"Amongst the claims of creditors lodged is one by Mr A. M. Chalmers, solicitor, Glasgow, for work done by him on behalf of the pursuers. The account of Mr Chalmers produced as vouching his claim contains the following entry:—

"1915, Jany. 4. Attendance at Court and opposing the application for sequestration when same granted . . £1, 1s.

"As the statutory date of the sequestration is 4th January the account of Mr Chalmers as a debt due in the sequestration properly stops at that date, and his account therefore does not disclose what communications passed between him and his clients after the Sheriff's order was pronounced.

"The appointment of Mr Galbraith as trustee and of Mr Joseph Patterson of the Anglo-American Oil Company, Limited, as one of the commissioners were duly intimated in the *Edinburgh Gazette* of 2nd February 1915, as was also the date for examination of the bankrupts, which was fixed to take place on 11th February 1915.

"Amongst the claims lodged in the sequestration is one by Mr Harold E. Blaiberg, solicitor, London, which discloses that on 23rd November 1914 the individual pursuers executed a power of attorney in favour of a Mr Lea, for whom it is understood Mr Blaiberg acted in connection with the pursuers' affairs, and it also discloses that at and about the time when the sequestration was granted both the individual pursuers were in correspondence with Mr Blaiberg, whose account also shows that on 12th January 1915 he became aware of the sequestration, and that on 18th January Mr Blaiberg wrote to both the individual pursuers informing them thereof.

"The account of Mr Blaiberg lodged in process closes on 23rd February 1915.

"There is in process a memorandum by the trustee dated 18th February 1915, which shows that Mr Ernest Lea, solicitor, London, was attending to the pursuers' affairs at that date, and that negotiations were actively proceeding between the trustee and Mr Lea as representing the bankrupts with regard to the realisation of the pursuers' interests under their mother's settlements.

"The process does not disclose what direct communications passed between the trustee and the pursuers, but it is believed that the trustee communicated with them in accordance with the requirements of the Bankruptcy Act in relation to their affairs, and as to the diets fixed from time to time for their examination in bankruptcy.

"Amongst the claims lodged is one by the pursuers' mother executed at Paris on 18th March 1915 for £1790, 8s. 3d., being the amount of two sums advanced at different dates with interest thereon to the date of sequestration. There is a further claim lodged by pursuers' father, also executed at Paris on 18th March 1915, for £1232, 6s. 7d., being the amount of an advance with interest thereon to date of sequestration.

"In the *Edinburgh Gazette* of 4th June 1915 intimation is made of a meeting of the creditors to be held on 12th June 1915 'for the purpose of authorising the trustee to sell his reversionary interest as trustee in an estate liferented by the bankrupts' mother on terms and conditions to be explained in detail at said meeting.'

"Thereafter an agreement was entered into between the trustee on the pursuers' sequestrated estate and the Scottish Amicable Life Assurance Society with reference to the realisation of the said reversionary interest, and subsequently as shown by the closed record the pursuers threatened to take proceedings against their trustee in bankruptcy for having, as they maintained, acted illegally in disposing of their rights to the Scottish Amicable Assurance Society.

"At a meeting of the commissioners on the sequestrated estates held on 5th January 1917 explanations were made, as appears from the minute of meeting, 'that the bankrupts now wished to have the sequestration annulled *ab initio*, and that by way of a petition to the Inner House of the Court of Session, and that this would involve the making of certain averments by the bankrupts which the trustee and the law agent knew were probably untrue, and at the same time would involve some sort of an attack on the law agent regarding the steps taken in connection with the awarding of sequestration which would be unjustifiable.' The commissioners minuted their opinion 'that if the bankrupts would pay their creditors 20s. in the £1 they could pursue their proceedings in any fashion they chose and might find competent.'

"At a meeting of the commissioners held

on 19th January 1917 it was resolved 'that the creditors should be recommended to agree to the bankrupts' proposals for annulment of the sequestration on technical grounds,' and thereafter the proceedings for recal of the sequestration *ab initio* were instituted.

"With regard to the objection taken that the petitioning creditors' affidavit was not sworn to by a principal officer of the petitioning creditors, the process discloses that not only the affidavit preliminary to the granting of the sequestration was sworn to by Mr Patterson, but also the affidavit and claim to rank on the estate, and furthermore, Mr Patterson granted the usual mandate authorising a mandatory to act in the sequestration proceedings. Both the latter affidavit and the mandate have been acted upon throughout. Furthermore, at the first meeting of creditors Mr Patterson was elected one of the commissioners on the sequestrated estate, and has throughout taken a prominent part in the sequestration proceedings as a principal officer of the Anglo-American Oil Company.

"Since the present proceedings were instituted by the bankrupts their father has died, and his personal estate has been given up by his executor as amounting to £9869, 11s. 6d. gross and £9172, 14s. 1d. net. The bankrupts are entitled to claim their legitim out of their father's estate, and the trustee is entitled to do so as vested in their estate, and were legitim claimed the trustee would be entitled to pay the creditors with the funds representing the bankrupt's legitim and the moneys already received and to be received by the trustee from the Scottish Amicable Assurance Society, and if that were done the sequestration could then be recalled in ordinary course under the procedure prescribed by the Bankruptcy Act.

"The dependence of the present action, however, involves a challenge of the trustee's title, and it is believed that the trustee does not, pending the action, consider himself justified in claiming legitim, and the bankrupts themselves have not yet done so. The true object of the present action being insisted in is not to enable the bankrupts' creditors to be settled with, but is for the purpose of endeavouring to defeat the testamentary wishes of their late mother with regard to the trust funds referred to, and thereby to obtain possession of funds destined and held for behoof of the child of Mrs Gibbs, on whose behalf this defender has been advised that it is his duty to resist the action and to safeguard his daughter's rights. In existing circumstances the creditors in the sequestration have no interest in the trust funds in question, as the other assets of the bankrupts referred to are adequate to settle with the creditors.

"On or about 6th March 1915 the pursuer Gordon Houston-Boswall-Preston wrote a letter to his mother, from which it clearly appears that both he and the other pursuer Alastair Houston-Boswall-Preston were aware that sequestration of their estates had been awarded. In the course of that letter he writes—'I have had a long letter from Chalmers' (the company's law agent in Glasgow), 'and am going to make a statement to Galbraith' (the trustee in the bankruptcy) 'that it was lost betting, and A.' (his brother) 'is going to do the same. This appears to be the best way out of a jumble. He says that they will discharge us almost certainly. There are dozens of people going bankrupt owing to the war, and we can to the outer world have gone bankrupt owing to coming out here and losing the business and also Austin Daimler's failing. You will see we are trying to look at it from the best side. There are and will be lots of people going bankrupt owing to the war and no disgrace at all.'"

He also added the following plea-in-law: —"7. The pursuers are barred by *mora* and by their actings as condescended upon from insisting in the present proceedings, and the action should be dismissed."

The *answer* of the pursuers consisted in adding to condescendence 7 the following: —"With reference to the addition made by way of amendment to the answer for Antony Edmund Gibbs, it is admitted that the father of the individual pursuers has died since the institution of the present proceedings. The confirmation in favour of his executor and the sequestration process and other documents mentioned in the minute are referred to. Explained that the letter referred to is undated. *Quoad ultra* the averments contained in the said amendment are denied."

They also added the following pleas-in-law: —"3. The defender Antony Edmund Gibbs not being a creditor of the pursuers, and the award of sequestration having in a question with him been *res inter alios acta*, the plea of personal bar should be repelled. 4. For the same reasons the averments added by way of amendment should not be remitted to probation. 5. The said defender having no title to be heard to oppose or resist the conclusions of the summons, the defences should be repelled."

The *answer* for the defender William Brodie Galbraith consisted in adding to answer 8 of his defences the following:—"Explained that this defender has not claimed legitim on the pursuers' behalf because he does not at present know the amount of the legitim fund, and he believes it to be his duty in these circumstances not to do so. Further, until this action has been decided it will be impossible to ascertain the amount of the legitim fund. It is within the powers of the pursuers to make arrangements whereby, if they succeed in this action, their creditors shall receive 20s. in the £1, but they have not yet done so. *Quoad ultra* as regards the amendment for the other defender, the documents therein mentioned are referred to for their terms, beyond which no admission is made."

Argued for the pursuers—The defender Antony Edmund Gibbs had still failed to qualify a title to defend. The sequestration was a process as between the bankrupt and his creditors and they alone had a title to resist reduction. And he had no interest to defend. His child had no vested right under Mrs Houston-Boswall-Preston's will until she was twenty-one. She had merely a *spes* and no *jus crediti*. Further, the will was

not operative as regards the provisions in question till after sequestration had been awarded; and in any event it was not clear that the fact of sequestration would necessarily put the forfeiture clause in operation. The letter referred to by the defender did not indicate any knowledge by the pursuers of the sequestration proceedings at the time these were instituted, for the letter could not have been written earlier than May 1915. Valid citation was necessary, for if it was invalid it could simply be ignored, and in a sequestration valid citation was all the more necessary because recal became impossible in a short period. The pursuers were not personally barred, for the defender had not been caused to alter his position to his prejudice by their actings, and that was necessary to the plea of bar—*Mackenzie* v. *British Linen Bank*, 1881, 8 R. (H.L.) 8, *per* Lord Blackburn at pp. 15 and 18, and Lord Watson at p. 21, 18 S.L.R. 333; *Freeman* v. *Cooke*, 1848, 2 Exch. 654; *Cairncross* v. *Lorimer*, 1860, 3 Macq. 827; *Carr* v. *London and North-Western Railway Company*, 1875, L.R., 10 C.P. 307; *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600, *per* Lord Kinnear at p. 610, 31 S.L.R. 485. Nothing material had been added by the amendment of the defender, and the action should be disposed of as if no such amendment had been made.

Argued for the defender Antony Edmund Gibbs—There could be no question of the defender's title, for the pursuers themselves had called him as respondent in the prior petition to the *nobile officium*—*Central Motor Engineering Company* v. *Gibbs*, 1917 S.C. 490, 54 S.L.R. 384. The defender had also an interest at least in an action for reduction of the sequestration, for he averred that in the present circumstances he would be vested in the estate referred to in Mrs Houston-Boswall-Preston's will. He had, indeed, the only interest to oppose the present proceedings, for the partial reduction proposed was designed to exclude other opposition, and as an alternative means of paying the creditors he averred that the pursuers had right to a legitim fund out of which their creditors could get payment in full. Further, the pursuers were aware of the sequestration proceedings, and were represented by a solicitor who had a current mandate. They could have availed themselves of the natural remedy, *i.e.*, recal of the sequestration before their mother's death, and they could not, and did not, aver prejudice as the result of any informality there might have been in the sequestration process. Counsel for the defender recapitulated his former argument and referred to Goudy on Bankruptcy, 4th ed., pp. 125, 143, and 147.

At advising—

LORD PRESIDENT — Viewed from any aspect I consider this to be an ill-founded action. It fails alike on competency and relevancy. On the 14th of January 1915 the estates of the Central Motor Engineering Company as a firm, and of the two individual partners, the only partners of the company, as such partners and as individuals, were sequestrated under the Bankruptcy Act 1913. A trustee was duly appointed, and the sequestration proceeded for two and a half years, until the 16th of June 1917, when this action of reduction was brought. At the date when the petition was presented the two partners of the company were furth of Scotland. Accordingly a copy of the petition for each partner was left at the company's place of business in Glasgow in the hands of a servant. I presume that servant in due course communicated to the two partners, pursuers of this action, the fact that this petition had been presented. For it is expressly averred by the defenders, and is not denied by the pursuers, that "the individual pursuers were aware of the sequestration shortly after it was granted." This being a fact within the knowledge of the pursuers they must be held to have admitted it if they do not distinctly deny it. The one and only effective method of convening the partners of the company in the circumstances existing at the time was thus adopted and it apparently proved to be effectual. The partners were, I assume, immediately apprised of the sequestration proceedings by the servant whose duty it was to apprise them; and the two partners took no objection of any kind. Nevertheless we are asked in this action to reduce the whole proceedings in the sequestration on the ground that the two partners who were, as I have pointed out, duly cited were not edictally cited. An effective means of convening the partners was adopted; the ineffective means of convening them was omitted; and therefore, so runs the argument, a sequestration which has been pursuing its normal course for two and a half years without objection is to be set aside. To this demand there seems to me to be four separate and distinct answers each in itself conclusive. First, as was pointed out by Lord Kincairney in *Gibson* v. *Munro*, 1894, 21 R. 840, at p. 843, 31 S.L.R. 706—"There is no authority or precedent for the reduction of an award of sequestration. None of the counsel have found in the books any trace of such a decree, and that appears to me a very cogent argument against the pursuers." I add that in a case such as the present, which has about it nothing exceptional, this consideration appears to me to be decisive. The statute has provided a remedy—recal. If that remedy is open then it is under ordinary circumstances the only remedy. I cannot and do not attempt to figure a case in which reduction is the only remedy open. No such case has ever occurred. Obviously this is not such a case. Nobody says it is. I hold, therefore, without hesitation, that this is an incompetent action. Second, I hold the action to be irrelevant because, as I shall show, the pursuers must be held to aver upon record that they were aware of the sequestration of their estates shortly after it was awarded. And no explanation whatever is given, or attempted, of the two and a half years' delay. At the end of the fifth answer the defender avers—"In any event the individual pursuers were aware of the sequestration shortly after it was

granted." This averment is not denied by the pursuers. It is within their knowledge. Hence it is exactly as if they had made the averment. The situation is therefore so simple as this—The pursuers deliberately say we knew all about the sequestration of our estates for the best part of two and a half years. The only effectual means of letting us know was adopted. We allowed things to go on as usual without objection. But now, in order to defeat a clause in our mother's will, we assert that the proper mode of acquainting us with the fact that sequestration was demanded was not taken. No doubt that mode would have been quite ineffective. The only effective method was adopted; *de facto* it proved effective. But nevertheless as the ineffective method is enjoined by statute and the effective method is not, we lay claim to a remedy hitherto unheard of. I think I have fairly stated the pursuers' position. Thus stated it is plainly untenable. There is really nothing occult or mysterious about citation. It is simply the calling of a person to appear in a court proceeding. And if he is called (it matters not how), and does *de facto* know all about the proceedings to which he is convened, he cannot lie by and challenge the method by which he is convened after a long interval of time. The challenge to be effectual must be instant; otherwise it fails. Assuming therefore the objection to the mode of citation here to be well founded, inasmuch as the pursuers do not aver that they took action instantly knowledge of the sequestration proceedings was brought home to them, I hold the action to be irrelevant. Third, the sequestration of the estates of the company is unchallenged and unchallengeable. And it was stated to us by counsel for the trustee in bankruptcy that the estates of the company and of the two partners were inextricably mixed up, and that reduction of the sequestration of the partners' estates apart from the sequestration of the company estates was wholly impracticable. This statement was not challenged by counsel for the pursuers. For excellent reasons, I am bound to assume, we were invited on behalf of the two partners to grant decree of reduction in terms of the conclusions of the summons and in no other terms. The sequestration, in so far as affecting the estates of the company, being confessedly unchallengeable, I am unable to see on what grounds we could accede to this demand. Once more the action fails on relevancy. Fourth, I hold with the Lord Ordinary that the 26th section of the Bankruptcy Act 1913, alone applies to this sequestration, and that the 25th section of the statute has no application. The reasoning on this head in the opinion of the Lord Ordinary commends itself to me as sound. The debtor here is a company, and this being so the 26th section alone applies. It expressly enacts that sequestration may be awarded of "the estates of the company and partners jointly or of their respective estates separately." That is the very case we have here. And the same section expressly directs citation to be made where the debtor is a company by leaving a copy of the petition "at the place where the business of the company is or was last carried on" provided a servant of the company is there. This is exactly the method of citation followed in the case before us. The pursuers so aver. If so the statute has here been strictly followed. For it is only if the mode of citation which I have just described cannot be followed, and if the dwelling-house of any of the active partners cannot be found, that the idle form of edictal citation must be adopted. It is a last resort, to be turned to only if the reasonable and effective mode of citation by leaving a copy of the petition at the place the business of the company is or was last carried on is for some reason not available. Here it was available, and was with success resorted to. It must be kept in view that the Bankruptcy Acts does not deal in technicalities, but is concerned with business. It is therefore not surprising to find it prescribing, where available as here, the best possible mode of convening the bankrupts to the sequestration process.

I propose that we should affirm the Lord Ordinary's interlocutor.

LORD JOHNSTON—I have very great difficulty in concurring with your Lordships in affirming the interlocutor of the Lord Ordinary, and the more so that I understand your Lordships are not agreed as to the grounds of your judgment. I think it right therefore to express my reasons for doubt.

There is a preliminary point with which I shall first deal, viz., the practice of the Glasgow Sheriff Court in requiring under present circumstances a note to be lodged for leave to present an application for sequestration. I think I correctly describe this requirement, but I have no information beyond what is to be gathered from the papers. This is wholly unauthorised, and I do not very well understand its object, for the Sheriff could not refuse his warrant to cite if the application is accompanied by the necessary oath of verity, but it is apparently supposed to be required by the Courts (Emergency Powers) Act 1914. By that Act, section 1 (1), it is provided that no person (*a*) shall proceed to execution on any judgment or order of Court for payment of any sum of money of the class covered by the sub-section, except after such application to the Court and such notice as may be provided for by rules under the Act, or (*b*) shall levy any distress for the purpose of enforcing the payment of any sum of money covered by the sub-section except after similar application and notice. Sequestration is neither a procedure in execution nor is it a distress in the sense of the sub-section, nor in so far as I am aware have any rules been formulated in regard to this matter by the only authority authorised to make them, viz., the Court of Session, and certainly the Sheriff of Lanarkshire, if he has done so, as to which I am not informed, has no such power. This is made the more clear by the fact that by the same section, sub-section (3), the case of bankruptcy proceedings is specially provided for thus—

where a bankruptcy petition has been presented against any debtor and the debtor proves to the satisfaction of the Court having jurisdiction in the bankruptcy that his inability to pay his debts is attributable to the present war, the Court may stay the proceedings. But this is after the application for sequestration has been made and does not warrant any interference on the part of the Court before the application is made. The proceedings at the preliminary diet alleged to have been taken here under the Courts (Emergency Powers) Act 1914, before warrant to serve the petition for sequestration was granted, and which are referred to in condescendence and answer 4, were therefore improper and without any authority, statutory or otherwise, and nothing which occurred then can be founded on by the defenders or need now be inquired into.

But the petition for sequestration was presented, whether with or without the leave of the Sheriff does not matter, and on 29th December 1914 he granted warrant to cite and appointed parties to appear before him on 4th January 1915. On 30th December 1914 the petition for sequestration with the Sheriff's deliverance was served upon the present pursuers, that is, the Central Motor Engineering Company and its two partners, Gordon and Alistair Houston-Boswall-Preston, by copies thereof being left for them at their place of business, 51 Pitt Street, Glasgow. Although for reasons which are not apparent this action of reduction runs in name of the firm as well as in those of the two individual partners, there is really no question that there was good service made upon the firm. But though a good and valid sequestration of the firm's estate may have ensued, it does not follow that there was also a good and valid sequestration of the partners' estates, and they are not bound because their firm has been sequestrated to submit to concurrent sequestration of their individual estates if they can avoid it.

As regards the individual estates of the partners, there are two objections taken to the sufficiency of the service which strike at the validity and effect of the sequestration which followed.

One of these takes exception to the sufficiency of the oath of verity which under sections 20 and 24 of the Bankruptcy Act 1913 is required to be emitted. I do not propose to say anything further as to this exception in respect that it depends upon a matter of fact which is not ascertained. If the matter stands as the pursuers state it, it may notwithstanding be that the defenders have an answer which may or may not elide it.

But the second objection is one which arises *ex facie* of the proceedings, on sections 25 and 26 of the statute, and as at present advised I disagree with the interpretation which I understand that your Lordship puts upon these sections. Section 25 provides that when a petition for sequestration is presented without the consent of the debtor the Court shall grant warrant to cite the debtor to appear within a specified period to show cause why sequestration should not be awarded by delivering to him if he be within Scotland personally or by posting by registered letter, addressed to him at his dwelling-house or place of business, a copy of the petition and warrant, but if the debtor be furth of Scotland by leaving such copy at the office of edictal citations and at the dwelling-house or place of business last occupied by him. It is admitted that service was not so made on the individual debtors, Messrs Gordon and Alistair Houston-Boswall-Preston, because at the date of the citation they were absent on service in France and no edictal citation was made.

But section 26 provides that when the debtor is a company it shall be a sufficient citation that a copy of the petition and warrant be left at the place where the business of the company is or was carried on, provided a partner or a clerk or a servant of the company be there, and failing thereof at the dwelling-house of any of the acting partners, and if the house of such partner cannot be found by leaving a copy at the office of edictal citations. It is alleged that service was made at the office of the copartnery by delivery there to a servant of the firm. If so there was, as I have said, sufficient service on the firm as debtor, but this is not in my opinion necessarily sufficient service on the individual partners also individually as debtors.

The difficulty in interpreting and applying these two sections, if difficulty there is, arises from the fact that at the end of section 26 a paragraph is added which I am satisfied ought to have been a separate section, or else section 25 and section 26 ought to have been two initial sub-sections of one section, followed by the paragraph in question, for it is a provision which covers both the case provided for by section 25 and that provided for by section 26. It is as follows:—"And sequestration may be awarded . . . of the estates of the company and partners jointly or of their respective estates separately." Surely this can only be if the necessary citation provided for by section 25 has been made upon the partners as individuals, and that provided for by section 26 has been made on the company as a firm. But it was maintained, and I understand your Lordship so to hold, that a good citation of the company under section 26 warrants sequestration of the estates not only of the company but of the individual partners though there has been no good citation of the individual partners. It is to this that I except.

Passing now to the provision for recal of sequestration made in sections 30 and 31 of the Act of 1913, the power to recal under section 30 is limited to forty days after the date of the award of sequestration, and that under section 31 is limited to the case in which nine-tenths in number and value of the creditors ranked make the application. Neither of these provisions can be taken advantage of by the pursuers, and it is doubtful whether recal would meet the object which the individual pursuers have in view. For this peculiar position has

arisen—About eighteen months after the sequestration was granted a large succession but limited to a liferent opened to the Messrs Gordon and Alistair Houston-Boswall-Preston under their mother's will. It was, however, made subject to a condition that at the date of her death her said sons should be living, and that 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. Should that condition not be fulfilled the funds to be liferented by her sons were to go over to their niece, the daughter of Mr and Mrs Antony Edmund Gibbs of Winsor Manor, Gloucestershire. What amounts to a breach of that condition falls, we were given to understand, by reason of the domicile of Mrs Houston-Boswall-Preston or otherwise, to be determined by the English Courts, but I cannot think that there is much doubt that the valid and effectual sequestration of the Messrs Houston-Boswall-Preston prior to their mother's death would be a breach of the condition which would bring the destination-over into play. Hence the interest of the Messrs Houston-Boswall-Preston not merely to obtain a recal which the English Courts might or might not hold sufficient to clear the ground, but an annulment of the sequestration of their individual estates, which would put them in a stronger position.

There here arises the question whether reduction of a decree of sequestration is competent. On that point I have no doubt. It is, indeed, not a permissible remedy if recal is possible. But here the remedy of recal is not open. We have already held that recourse to the *nobile officium* of the Court is not competent, and that judgment involves, I think, the assumption that reduction is competent. If reduction is competent I think that it may proceed on even the most technical of grounds, if necessary, in the interest of the debtor.

Now I feel that the case has not had sufficient consideration in the aspect to which I have in the last place alluded. At the same time, as your Lordships are agreed, I hesitate to carry my doubt to the point of a dissent requiring the formulation of a direct contrary judgment.

But there are two further important considerations to be noted. On the one hand sequestration is the very highest form of diligence which can be taken out against a debtor. It is in fact a combination of all possible diligences, and where a man is subjected to diligence every formality must be rigidly attended to by his creditor. No equitable equivalents can be pleaded by the creditor—the equity is all on the side of the debtor. On the other hand where a provision under a settlement is subject to a conditional forfeiture, such forfeiture is of a penal nature, and its conditions must also be rigidly satisfied. Hence I think that the debtors here are entitled to take any, the most formal, objection to the correctness of the diligence executed against them.

Now the defence to this action is that not of creditors but of or in the interest of Miss Gibbs, the destinee-over of Mrs Houston-Boswall-Preston, and that defence introduces a great many considerations with which the creditors are not concerned. In fact the creditors as represented by the trustee in the alleged sequestration are at one with the pursuers. I am disposed to think that the question whether the sequestration was or was not inept is one between the debtor and his creditors, and is not one in which an outsider in the position of Miss Gibbs or her father on her behalf can be heard to plead anything which the creditors could not plead. They have been called, though curiously the pursuers have omitted to add what is usual and proper in such cases—"for their interest"—and if they had not been so called according to our practice they would have been allowed to appear for their interest, but merely to see that there was no collusion, and that the case for the creditors was properly and fully stated. But nothing more.

LORD MACKENZIE—This action is the sequel of the case reported in 1917 S.C. 490, in which the pursuers of the present action of reduction sought by an appeal to the *nobile officium* of the Court to have the proceedings in their sequestration declared void *ab initio*. That petition was refused.

The question is whether they have now made a relevant case for reduction. I am of opinion that they have not. Although such an action is not incompetent, as appears from the cases of *Gibson* v. *Munro*, 1894, 21 R. 840, 31 S.L.R. 706, and *Whitlie* v. *Gibb & Son*, 1898, 25 R. 412, 35 S.L.R. 355, there has hitherto been no case in which decree of reduction of a sequestration has been pronounced. The reason is that the Bankruptcy Act contains a statutory code in which careful provision is made for the method by which a sequestration may be recalled. It is only in a case where exceptional circumstances can be pleaded that the exceptional remedy by way of reduction could be granted. I agree with the passage cited from Goudy on Bankruptcy (3rd ed.), p. 164—"When recal has become incompetent owing to lapse of time it is possible that in some circumstances a reduction of the sequestration proceedings might be brought—as, for example, where the award has been obtained by forgery or gross fraud."

Here the objections taken to the sequestration are in the circumstances of a purely technical character. The sequestration was granted on 14th January 1915. The summons of reduction was not signeted until 16th June 1917. As regards the first ground upon which reduction is sought, I entirely agree with what is said by the Lord Ordinary, and have nothing to add. As regards the second ground, I am unable to put the same construction as the Lord Ordinary on sections 25 and 26 of the Bankruptcy Act 1913. In my opinion the citation of a company does not operate as citation of the individuals who compose it, nor does it dispense with the citation of the individual

partners. There was therefore necessity for edictal citation, and admittedly there was none. Amendments have been made upon the record since the case was before the Lord Ordinary, but the pursuers have been unable to aver more than that they were "unaware of the presentation of" the petition for sequestration. There is no averment that they were prejudiced because they were unaware of its presentation. They do not say that they were without knowledge of the sequestration for forty days after it had been granted. They fail to deny the defenders' statement at the end of answer 5, that the individual pursuers were aware of the sequestration shortly after it was granted. Edictal citation is merely a means of giving intimation, and if knowledge exists it then becomes mere technicality to say it was not conveyed by the appropriate means. It is in my opinion impossible to entertain an action of reduction of a sequestration upon such a ground, and I therefore agree with the Lord Ordinary.

LORD SKERRINGTON—I agree with the Lord Ordinary in thinking that an action to reduce an award of sequestration is not incompetent. There is no reason, for example, why sequestration obtained by fraud should be immune from challenge by reduction. Again, reduction would probably be competent if in awarding sequestration the Judge had disregarded the Act of Parliament either intentionally or by inadvertence. Suppose that a Sheriff sequestrated an individual without having before him any evidence whatsoever of citation as required by the 28th section of the Act, I should be disposed to regard that as an altogether lawless proceeding which could be set aside by reduction unless protected by personal bar—a plea not open to the real defender in the present action. In the present case the circumstances were entirely different. The Sheriff had before him evidence of citation which in his judgment was sufficient. He did not disregard the statute. On the contrary he construed it, and he construed it rightly in the opinion of the Lord Ordinary and of your Lordship in the chair. His legal view was that where a firm has been duly cited that is equivalent to the citation of the partners for the purposes of sequestrating their individual estates. With that view I am unable to agree, but it was a question as to the construction of a clause, or rather of two clauses, in an Act of Parliament, the 25th and 26th sections of the Bankruptcy (Scotland) Act 1913. It was the duty of the Sheriff to construe these two clauses, and he did so. It may be that he misconstrued them. In that case on a suitable opportunity I should have been prepared to review his judgment, but that is the very thing which is prohibited by the 30th section of the same statute. Accordingly I hold that this section fails because the pursuers have not relevantly averred that the Sheriff disregarded the Act of Parliament.

I do not need to consider what would have been the position if the pursuers had averred not merely that the Sheriff misconstrued the statute but had also alleged with proper specification that it was impossible in the circumstances for them to make use of the special remedy provided by the 30th section—a petition for recal of the sequestration. They would then have argued that upon a just construction of this section a deliverance awarding sequestration was not final unless the debtor had a genuine opportunity to present a petition for recal. To such a case there would have been two formidable answers, the one on the facts and the other on the law. It would have been argued that as the pursuers were engaged in trade they ought before leaving Great Britain to have appointed some person to attend to their interests during their absence, and that if they were unaware of the sequestration proceedings their ignorance was due to their own fault. In point of law it would have been argued that even if the pursuers had been able to aver a case of real hardship the maxim applied that "Hard cases make bad law," and that a case of injustice occurring once in a century afforded no good reason for departing from the primary and natural meaning of a statute. As to both these questions I reserve my opinion.

The Court sustained the second plea-in-law for the defender Antony Edmund Gibbs and dismissed the action.

Counsel for the Pursuers—Chree, K.C.—Moncrieff, K.C.—Leadbetter. Agents—Webster, Will, & Company, W.S.

Counsel for the Defender Edmund Antony Gibbs—Macphail, K.C.—M. P. Fraser. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender William Brodie Galbraith—C. H. Brown. Agents—Simpson & Marwick, W.S.

Saturday, June 29.

SECOND DIVISION.

SMITH'S EXECUTORS *v.* SMITH.

Succession — Testament — Construction — Heritage — Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap* 101), *sec.* 20.

A lady in possession of heritable as well as moveable property died leaving a holograph will whereby executors only were appointed. They were, *inter alia*, directed to distribute the residue of the testator's "estate." No express conveyance of or reference to the deceased's heritable property was made. There was more than sufficient moveables to satisfy all the pecuniary and specific legacies. *Held* (*dis.* Lord Salvesen) that as the word "estate" was a general word habile to convey, if not primarily applicable only to, heritable property, and there was nothing in the deeds to show that it was used in a restricted sense, the testator's heritable estate was carried by the deceased's testamentary writings.