the main line, and further, that they in consequence acquired it at a lower figure on account of its being in an inferior condition. That being so, the sum expended in renewing the section of the line, and bringing it up to the standard of the main line, was just part of the cost of taking it over, as if it had been in good order the appellants would have had to pay just so much more for it.

It was urged that when the details of the sum are looked at they show items which much more naturally fall under the heading of maintenance than as proper charges against the capital account, but these items must be read along with the pursuers' books, and so looked at it becomes perfectly clear that the sum of £9119 should be treated as the Commissioners have done, and that it really is a proper charge against capital.

As regards the alterations on the main line, it is to be observed that these do not take the form of a mere re-laying of the line after the old fashion, for that would not alter the character of the line. But when one kind of rail is substituted for another, and the new rail is of a superior quality, then the *corpus* of the heritable property of the company is thereby improved. Further, all that is charged by the Commissioners is for additional weight of steel rails and chairs, and this is a charge made for the permanent improvement of the appellants' property.

If the proprietor of an estate erects a new house on his lands the cost of this would properly be made a charge, not against income, but against capital; and so if a proprietor carries a line of railway through his lands the expense of this would be similarly treated. I therefore entertain no doubt as to the soundness of the Commissioners' determination upon both points.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Low—Salvesen. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Respondents—Gloag—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Wednesday, July 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BLAIR *v.* THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Bankruptcy — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 22—*Sequestration —Oath of Verity—Terms of Oath.*

In a process of sequestration the debt of the petitioning creditors was constituted by two Sheriff Court decrees to which they had obtained an assignation. The oath set out in general terms that the debt in question was due, and the decrees and assignation were produced to the Justice of Peace.

A petition by the bankrupt for the recal of the sequestration, on the ground that the oath did not set forth in terms that the sum in the decrees had not been paid either to the assignees or to the cedent, *refused.*

Observations upon cases of *Taylor* v. *Drummond*, 10 D. 335, and *Glen* v. *Borthwick*, 11 D. 387.

On 31st January 1889 a petition was presented by the North British and Mercantile Insurance Company to the Lord Ordinary on the Bills praying for the sequestration of the estates of William Blair, bookseller and stationer, Dundee, and on 1st April 1889 the Lord Ordinary (Wellwood) granted the prayer of the petition.

In May 1889 Blair presented a petition praying for the recal of the said sequestration. The grounds upon which this application was made are fully narrated in the opinion appended to the interlocutor of the Lord Ordinary (Kyllachy), who refused the petition.

"*Opinion.*—The recal of the sequestration is sought upon various grounds, some of which have been considered by my predecessor, but on none of which a final judgment has been pronounced. I have therefore considered the questions raised as still open, and have heard a full argument upon them.

"(1) The first ground of recal is the allegation that the petitioning creditors' debt, being also the debt upon which notour bankruptcy was constituted, was not justly due, in respect that although constituted by two decrees obtained of consent in the Sheriff Court of Dundee, those decrees had been accompanied by an arrangement that no diligence should be used upon them as against the bankrupt, and that the debt therein contained should be treated as a debt only against the bankrupt's property. Of this allegation the bankrupt now desires a proof, with a view to the recal of the sequestration. It appears to me to be quite clear that no such proof can be granted, the proposal being truly a proposal to contradict or qualify the terms of a formal decree by a general proof—that is to say, by parole evidence —which appears incompetent.

"(2) The second ground of recal is rested upon an objection to the terms of the petitioning creditors' oath, which is said to be disconform to the statute as interpreted by certain decisions, viz., *Taylor* v. *Drummond*, 10 D. 335; *Glen* v. *Borthwick*, 11 D. 387. The debt of the petitioning creditors is, as before-mentioned, constituted by two decrees of the Sheriff Court of Dundee, to which the petitioning creditors have obtained an assignation. The objection is, that the oath did not set forth in terms that the sum in the decrees had not been paid either to the assignees or to the cedent. In point of fact the oath is in general terms, and simply sets out that the debt in question is due to the petitioning creditors, the decrees and assignation being produced to the Justice of the Peace, but the oath itself not going into particulars. My opinion is that this objection is not well founded. The statute does not require that the oath shall set forth more than that the particular debt is justly due (secs. 21 and 22), and the oath in the present case in my opinion sufficiently complies with the statute. No doubt it has been held that where the petitioning creditors' title to the debt depends upon an assignation, and the oath proceeds upon the

principle of narrating first the constitution of the debt, and then its transmissions, and then proceeds to aver non-payment, it is necessary that the averment of non-payment shall apply both to the deponent and to the previous creditors. In other words, there must be no doubt upon the face of the oath that the petitioning creditor depones that the debt is due, and due to him. But each of the cases referred to proceeded on its own specialities, and they do not appear to me to have laid down any rule which is applicable to the present case.

"(3) The third and only other objection to the sequestration was one founded upon the provisions of sections 9 and 15 of the Bankruptcy Act, which relates to the commencement of notour bankruptcy and the date of presenting the petition for sequestration. It appears that the petitioner was rendered notour bankrupt so far back as July 1888, in virtue of a charge following on the decrees above referred to, and that sequestration followed on 28th August 1888, but was subsequently, on 8th January 1889, recalled by the Court in respect of an informality in the oath. New charges were thereafter given on 17th January, and notour bankruptcy being thus constituted anew, the present sequestration was awarded on 31st January 1889. The objection is that this sequestration was incompetent in respect that it was dated more than four months from the commencement of notour bankruptcy in July 1888. It appears to me that it is a sufficient answer to this objection that while the 9th section of the statute provides that 'notour bankruptcy shall be held to commence from the time when its several requisites concur, and when it has once been constituted shall continue in case of a sequestration till the debtor shall obtain his discharge, and in other cases until insolvency cease,' it is at the same time expressly declared that all this shall be 'without prejudice to notour bankruptcy being anew constituted within such period.' It seems to me that this provision was expressly designed to meet cases like the present. Reference may be made to *Balfour* v. *Pedie*, 3 D. 612, where a similar question was raised under the previous Bankruptcy Statutes.

"On the whole, I am of opinion that no grounds exist for recalling the sequestration, and I therefore refuse the petition with expenses."

The petitioner reclaimed, and argued—The oath of verity presented by the respondents along with their petition for sequestration was bad, as they did not specify that they were assignees of the debts, nor were the assignation and decrees constituting the said debts produced to the Justice of the Peace before whom the oath had been made, nor were they docqueted and signed in reference to the said oath.

The respondents argued that the proceedings were regular.

The Bankruptcy (Scotland) Act 1856, after providing by section 21 for the form of petitions for sequestration, and declaring that in all cases the petitioning creditor is to produce an oath to the verity of the debt claimed by him, provides by section 22 as follows:—"Such oath . . . shall be taken . . . before a judge ordinary, magistrate, or justice of the peace to the verity of the debt claimed," and the creditor "shall, in such oath, state what other persons, if any, are besides the bankrupt liable for the debt, or any part thereof, and specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than there specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect."

At advising—

Lord President—As to the second ground upon which the recal of this sequestration is sought, I can only say that I should not like to hold the cases of *Taylor* v. *Drummond* and *Glen* v. *Borthwick* as binding authorities. They have been questioned, and I think with very good reason. Apart from that, however, I think the oath here is good, as being an oath of verity in the terms required by the statute under section 22. The oath here declares that the bankrupt is indebted to the deponent in the sums claimed, conform to a state annexed thereto, and this is signed by a Justice of the Peace. I can see no ground therefore for saying that this is not a good oath of verity. It affirms that the debt is resting-owing, which is all that the statute requires. With regard to the other grounds of recal I do not think it necessary to enter into them.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel and Agent for the Reclaimer—Party.

Counsel for the Respondents—Low—Maconochie. Agents—J. & F. Anderson, W.S.

Wednesday, March 20.

OUTER HOUSE.

[Lord Fraser.

WATTS, WARD, & COMPANY *v.* GRANT & COMPANY.

Shipping Law—1878 *Black Sea Charter-Party—Liability of Consignee for Expense of Measuring and Weighing Cargo at Port of Delivery—Custom of Trade.*

A cargo of grain was shipped from Sevastopol to Aberdeen under a charter-party known as the 1878 Black Sea Charter-Party, which provided for the payment of freight according to cubic measurement. The cargo was consigned by weight and not by measurement, the bill of lading setting forth the weight in Russian "poods." The shipowners having weighed the cargo, and also measured samples thereof, in order to ascertain the whole measurement, sued the consignees for the expense of the operation, alleging a general custom of the British shipping trade in the carrying of grain cargoes that these expenses fell to be borne by the consignee. The defenders alleged a contrary custom in the port of Aberdeen known to the pursuers. *Held* that the de-