think that under the statute it is imperative upon us to make it upon the conditions we think necessary.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—The amendment proposed in this case is no doubt a very radical one, but I agree with your Lordships in thinking that it is of the character of those amendments which section 29 of the Act of 1868 directs. I am of opinion that the Court must allow the amendment upon the conditions proposed.

The Court pronounced the following interlocutor:—

"The Lords having considered the amendments proposed by the defenders James Goodwin and others, and by the defender John Topping Goodwin, Nos. 223 and 224 of process, Allow said amendments to be made by said defenders on payment by them to the pursuers of the expenses of the action hitherto incurred; remit the same to the Auditor to tax and to report; further allow said amendments to be answered by the pursuers within eight days."

Counsel for the Pursuers and Respondents —Asher, Q.C.—Ure. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Reclaimers —Graham Murray—N. J. D. Kennedy. Agents—Davidson & Syme, W.S.

Thursday, January 22.

SECOND DIVISION.

BLACK & SONS, PETITIONERS.

Bankruptcy—Discharge of Trustee—Appointment of New Trustee—Nobile Officium.

Certain creditors upon a sequestrated estate in which the trustee had been discharged eleven years before and the bankrupt had not been discharged, presented a petition for a remit to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a new trustee, averring that they had been ranked for a debt still unpaid, and had now found out an asset belonging to the bankrupt not discovered during the currency of the sequestration. It was objected that the petitioning creditors' interest in the alleged asset was so trifling that the Court should not exercise their discretionary power of reviving the sequestration after the lapse of so many years.

Held that the creditors were entitled to have the prayer of their petition *granted.*

Upon 6th September 1876 the estates of William Chalmers, sometime steamboat owner, Clynder, Roseneath, in the county of Dumbarton, were sequestrated, and John M'Queen Barr, accountant, Glasgow, was thereafter duly elected trustee. Mr Barr entered upon the possession and management of the sequestrated estates, and realised the whole estates so far as available, but the sum obtained was insufficient to pay the expenses of sequestration and his commission, and he was exonered and discharged upon 5th January 1880. The bankrupt never received his discharge.

Upon 19th December 1890 Messrs William Black & Sons, merchants, Jamaica Street, Glasgow, presented a petition to the Second Division of the Court of Session, setting forth that they were creditors of the said William Chalmers, and as such were ranked in the said sequestration for the amount of £60; that since the date of the trustee's discharge it had come to their knowledge that the bankrupt was interested in an asset which was not discovered during the currency of the sequestration, and praying the Court to order intimation, and thereafter to remit to the Lord Ordinary on the Bills to appoint a meeting of the creditors of the said William Chalmers to be held with the view of having a new trustee appointed and the sequestration revived.

After intimation had been ordered and answers lodged on behalf of the bankrupt, it was explained for the petitioners that the asset they had discovered consisted of a piece of ground—the title of which stood in the name of the bankrupt—through which the avenue to a villa at Clynder ran, and without the use of which the villa would be isolated and its value greatly impaired, and that the value of the asset would probably be at least £50. It was argued for them that they were entitled to have the prayer of their petition granted, and that the recent case of *The Northern Heritable Securities Company, Limited* v. *Whyte*, November 21, 1888, 16 R. 100, was an authority in support of that petition.

It was explained for the bankrupt that his total debts amounted to £2200, and that the ground in question was held in trust for his brother, and it was argued that this was an appeal to the *nobile officium* of the Court, in whose discretion it lay to grant or refuse the prayer of the petition; that the petitioners could not have sequestration revived as a matter of right; and that seeing the alleged asset was too small, after paying the expenses already incurred and proposed to be incurred in the sequestration, to pay the petitioning creditors, whose debt was a small proportion of the entire liabilities, not more than an infinitesimal sum at most, the Court should not grant the prayer of the petition, especially after the lapse of eleven years since the trustee's discharge, and when to do so would destroy the business credit the bankrupt has been slowly and steadily acquiring in his efforts to earn a livelihood. There was no suggestion that the bankrupt had fraudulently cancelled any asset.

At advising—

LORD JUSTICE-CLERK—Certain creditors of the undischarged bankrupt Chalmers, who was sequestrated many years ago come to the Court alleging that there was

a substantial asset existing at the time of the sequestration which they never discovered, but which they have discovered now, and asking to be allowed to take steps by which they may make good their right to this asset. I think they are entitled to succeed in their petition.

I do not say that cases might not arise in which the Court might exercise their discretion and refuse such a petition, but in the ordinary case creditors have a right to obtain what is asked for here, and I am of opinion that in granting the prayer of the petition we are only doing a formal duty which we cannot refuse to perform. It is said this action on the part of the creditors may hamper or embarrass the bankrupt. We cannot help that. He may very possibly not need to interfere. If he sees fit to interfere, and is unsuccessful, it will be his own fault.

LORD YOUNG—I am of the same opinion. This is not a novel application. There was a case, as we have been told, so recently as 1888, in which the Court proceeded on the ground that there was a legal right in creditors of an undischarged bankrupt—there the bankrupt was discharged, but without having paid any composition—if the bankrupt's trustee had been discharged, to apply for the appointment of a new trustee to enable them to recover freshly discovered assets belonging to the sequestrated estate. The course is plain enough here unless there are exceptional grounds for exercising our discretion and refusing the application. Three grounds have been stated. It is said the bankrupt held the property in question really as a trustee for his brother—that does not appear upon any writing, and it is matter of controversy which it is not for us to determine. It is further said that the sum is so small—some £50—that it is not worth litigating about, but that is a matter for the creditors, and if they wish a trustee appointed they have an absolute right to get the appointment made, and the Court have no right to say they would not grant the prayer of the petition. Besides, the asset is said to be of some value. Being ground before villas which it is desired to buy up, it is impossible to say what the value may turn out to be. But lastly, it is alleged that this action on the part of the creditors will interfere with the prosperous career of the bankrupt which has now set in. I do not think it says much for his prosperous career that during the eleven years which have elapsed since his sequestration he has never applied for his discharge, probably because, as his counsel conceded, he saw no prospect of getting it. The fact remains that he is an undischarged bankrupt, and I cannot say my sympathies are with him so as to lead me to refuse such a motion as this.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I agree in the result, but I am not so clear as some of your Lordships seem to be that the Court is here doing a merely ministerial act. I think the power of the Court is more discretionary than the judgments pronounced imply.

The Court granted the prayer of the petition.

Counsel for the Petitioners — Steel. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Respondent—Orr. Agent —Robert Burnside, S.S.C.

Wednesday, January 14.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

THE LORD ADVOCATE *v.* THE EARL OF HOME.

Landlord and Tenant—Long Lease—Valuation of Buildings at End of Lease—Reference—Principle of Valuation.

A lease for ninety-years provided, *inter alia*—"In regard the present houses on the subjects hereby set are in a most ruinous condition, insomuch as to be only proper for a quarry, and as the" lessee and his sub-tenants "may during the currency of this lease, erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that at the expiry of this tack the whole houses and buildings then upon the subjects hereby let shall be valued and apprised by two neutral persons, one to be chosen by each party, and in the case of variance between the said persons, by an oversman to be named by them;" the lessor then bound himself to pay to the lessee the half of the valued amount.

A sub-tenant of the lessee erected a military barracks and other buildings in connection therewith, and at the expiry of the lease he sued the lessor for one-half of the value of the whole buildings. The defender averred that the buildings were not useful to him, and were not houses and buildings in the sense of the lease.

The Court *directed* the arbiters to intimate to what extent, if any, the value of the lands was enhanced by the buildings then on the lands.

By tack dated 25th May and 18th June 1791 Archibald Lord Douglas let for ninety-nine years to William Douglas of Brigton, and his heirs, assignees, and sub-tenants, "the park of Dudhope, with the houses and offices thereof, and particularly the materials of the old house of Dudhope and of the other houses on the subjects hereby let." . . . It was further provided—"In regard the present houses on the subjects hereby set are in a most ruinous condition, insomuch as to be only proper for a quarry, and as the said William Douglas and his foresaids may, during the currency of this lease, erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that at