I purposely abstain from expressing any opinion as to (1) whether the work now sued for fell *de jure* within the Act of 1724, and was not legally payable by the county prior to 1868, and (2) whether that work is not within the duty of the Procurator-Fiscal and may not rightly be considered as such by his paymasters. But this last is not *hujus loci*, and it depends upon administrative criminal arrangements, which are in the very competent hands of the Sheriff and the Lord Advocate.

LORD LINDLEY—I also am of opinion that this appeal ought to be allowed. The point appears to my mind to be a very simple one. The key to the whole controversy lies in the remuneration which is claimed by the Procurator-Fiscal. He is not claiming a salary, he is not claiming a fee, he is not claiming an outlay; he is claiming a remuneration for his own loss of time, and what he has to do is to bring that within the scope of the Act of 1868. It appears to me that it is absolutely impossible for him to succeed in that task. There are two relevant clauses to section 3 of that Act. The first does not apply, for the respondent is not claiming fees "in use" in the county of Lanark in 1868. I see no possible method of getting over that difficulty except that which was adopted by the learned Judges in Scotland who have departed from the words of the Act, and have substituted for "in use," "liability to pay," which they got out of the Rogue Money Act. His claim does not come under the 3rd clause, for, as I said before, he is not claiming for any "expenses" incurred. That is the short answer to his claim.

Interlocutor appealed from reversed.

Counsel for the Pursuer and Respondent —Haldane, K.C.—H. Johnston, K.C.—Constable. Agents—Bruce, Kerr, & Burns, W.S., and Graham, Currey, & Spens, Westminster.

Counsel for the Defenders and Appellants —Ure, K.C.—Clyde, K.C.—T. B. Morison. Agents—Webster, Will, & Company, S.S.C., and Wm. Robertson & Company, Westminster.

COURT OF SESSION.

Tuesday, March 8.

SECOND DIVISION.

[Lord Low, Ordinary.

KINMOND, LUKE, & COMPANY *v.* JAMES FINLAY & COMPANY.

Bankruptcy—Right in Security—Assignation of Security Held by Creditor not Demanded by Trustee in Bankruptcy—Title of Bankrupt after his Discharge to Sue in Action of Accounting against Creditor Holding Security Subjects.

Held that where a trustee in bankrupty has refrained from demanding an assignation of a security held by a creditor of the bankrupt estate, the bankrupt, having been discharged on payment of a final dividend, is entitled to sue an action of count and reckoning against the secured creditor for payment of the balance of the security subjects after satisfying the balance of the creditor's debt which the final dividend left unpaid.

This was an action of count, reckoning, and payment at the instance of Kinmond, Luke, & Company, jute and yarn merchants, Dundee, against James Finlay & Company, merchants, 22 West Nile Street, Glasgow.

The nature of the pursuers' averments is disclosed in the following narrative, which is quoted from the opinion of the Lord Ordinary (Low):—"In 1883 the pursuers transferred 50 shares of £100 each of the Champdany Jute Company, Limited, to the defenders. Twenty-five of these shares were again transferred to the pursuers, leaving the defenders with 25 shares which were subsequently converted into 250 shares of £10 each. In 1893 the pursuers transferred 200 further shares of £10 each to the defenders. Further, in 1892 the pursuers assigned to the defenders their whole share, right, title, and interest in a business carried on in India under the name of the Calcutta Twist Company. These transfers and the assignation were *ex facie* absolute, but it is admitted that they were truly granted in security of advances made by the defenders to the pursuers.

"In 1894 the pursuers executed a trust-deed whereby they conveyed to Mr M'Intyre, C.A., Dundee, their whole means and estate for behoof of their creditors. All the pursuers' creditors, including the defenders, acceded to the trust-deed, and lodged claims with the trustee.

"The trust-deed contained the following provision:—'*Tenth.* That subject to the provisions of these presents in other respects, all matters whatsoever shall be settled as if sequestration of our estates under the Bankruptcy (Scotland) Act 1856, and all amendments thereof, had been awarded, and on the footing of the provisions contained in the said statutes as to rankings and valuations for rankings, and all other particulars.'

"The amount for which the pursuers lodged a claim was £8513, and the trustee called upon them to value and deduct the securities held by them. The pursuers valued the Champdany shares at £2250, and their security over the Calcutta business at £4417. Both of these valuations were accepted by the trustee, and the defenders were duly paid a dividend upon the amount of their debt, after deducting the value of the securities.

"By the 12th article of the trust-deed it is provided that—'On a final division of our estates among our creditors under these presents, and whatever be the amount of dividend such estates may yield to the creditors, we shall be entitled to our discharges from such creditors, and shall be *ipso facto* discharged of the full amount

of all our debts and obligations in the event of the trustee being of opinion that we are so entitled and certifying accordingly.'

"In terms of that provision, the trustee on the 3rd January 1896 granted a certificate to the effect that the estates of the pursuers had been realised and a final division thereof made, that he was of opinion that the pursuers were entitled to their discharge, and that they were therefore *ipso facto* discharged although their debts were not paid in full.

"The trustee did not require the defenders to assign the securities to him, and the defenders did not themselves realise the securities, but they still retain the shares in the Champdany Company and the interest in the Calcutta Twist Company.

"The pursuers aver that both of these companies have prospered, and that the dividends which the defenders have received from them have more than extinguished the pursuers' debt."

The defenders pleaded—"(1) No title to sue. (2) The action should be dismissed in respect (*a*) that it is incompetent; and (*b*) that the statements of the pursuers are irrelevant. (3) The pursuers having no right, title, or interest in said Twist Company or in said Jute Company's shares, the defenders should be assoilzied from the conclusion for an accounting."

On 20th November 1903 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having in the procedure roll heard counsel for the parties on the closed record, and considered the same, repels the first three pleas-in-law stated for the defenders, and appoints them to lodge in process within one month from the date hereof the accounts of their intromissions concluded for in the summons."

Opinion.—[*After narrating the facts ut supra*]—"The defenders plead that the action is incompetent and that the pursuers have no title to sue.

"In support of the first of these pleas the defenders argued that when the trustee elected not to demand a conveyance of the securities he abandoned them to the defenders for what they were worth. Accordingly, if the securities had turned out to be of less value than that which had been put upon them the loss would have fallen upon the defenders, and it followed that if, upon the other hand, they turned out to be of greater value it would be the defenders who would gain thereby.

"Now, that argument appears to me to amount to this, that where a trustee in bankruptcy does not demand a conveyance or assignation of a security, which has been valued and deducted in terms of the 65th section of the Bankruptcy Act, the creditor thereafter holds the subject of the security not as a security but as his own absolute property.

"I can find no warrant for that view in the statute. If it had been intended that there should be a transfer of the property of the security-subjects the statute would have said so, but it does not say so, but enacts that the trustee shall either be entitled to a conveyance or assignation of the security on payment of the value specified, 'or to reserve to such creditor the full benefit of such security.' It is therefore the security, and nothing more, which is reserved to the creditor.

"The defenders, in the next place, founded upon the fact that the transfers and assignation, although truly in security, were in form absolute. The argument was to the following effect: the result of the security being given in that form was that the defenders acquired an absolute title to the shares of the Champdany Company and to the pursuers' interest in the Calcutta Company, subject only to a right on the part of the latter to demand a retransfer and reassignation upon payment of the debt. When, however, the debt was discharged, the defenders could no longer demand payment of it, and therefore the correlative right of the pursuers to demand a reconveyance of the security-subjects was also extinguished.

"The argument is ingenious, but I do not think that it is sound. In a question between the pursuers and the defenders, the former had, notwithstanding the *ex facie* absolute title which they gave to the latter, the proprietary interest in the security-subjects, and although the defenders had a power of sale, yet if they had sold they would have been bound to account to the pursuers for any balance of the price after paying all the debts due to them by the pursuers. As I have indicated, I do not think that that position of matters was altered by the trustee electing not to demand a conveyance of the securities; neither do I think that it was altered by the discharge of the pursuers. It is true that after the discharge the defenders could not have demanded any further payment from the pursuers, but it does not follow that the defenders were entitled to anything more than the full payment of the debt. I cannot see how the discharge could entitle the defenders not only to pay themselves twenty shillings in the pound out of subjects which they held in security only, but also to retain these subjects, however valuable they might be, for their own use. Further, it is plain that the argument with which I am dealing would not have been open to the defenders if the transfers and assignation had been expressed to be in security only, and I do not think that the right of the creditor in a question with the debtor in such a position of matters as we have here can depend upon the accident of the security title being taken in this form or in that, so long as it is a security only.

"The defenders also contended that the pursuers had no title and no interest to sue, on the ground (1) that their whole estate had been conveyed to the trustees, who had never been divested thereof except in so far as it had been distributed among the creditors; and (2) that the right to the security-subjects, so far as they were not required to pay the defenders' debt, was not in the pursuers but in their other creditors.

"In regard to the first point, I think that it is sufficient to say that a general conveyance in trust does not divest the truster to any greater extent than is necessary to enable the purposes of the trust to be carried out, and when these have been carried out the truster's estate is relieved of the burden of the trust, and no reconveyance is necessary. A trust for creditors is no exception to that rule. It only creates an encumbrance upon the means and estate conveyed in general terms to the trustee.

"The answer to the second point is that the other creditors have all discharged their debts and cannot claim any further payment from the pursuers. There is no fraud suggested here, but only that what is probably a very unusual case has arisen, namely, that although the pursuers' whole means and estate have been divided among their creditors in strict accordance with the bankruptcy laws, it so happens (at least so they aver) that owing to certain subjects held by a creditor in security having become of more value than anyone anticipated, there is still part of their estate to which no creditor has any claim.

"I therefore propose to repel the first three pleas-in-law for the defenders, and to order accounts to be lodged."

The defenders reclaimed, and argued—A secured creditor being allowed by his debtor's trustee to retain his security, was entitled to any advantage accruing from a rise in the value of the security, just as he had to bear the loss if it fell in value. The defenders not having been asked to assign their security *debito tempore*, their right to the security subjects could not be challenged—*Henderson's Trustee* v. *Auld & Guild*, July 6, 1872, 10 Macph. 946, 9 S.L.R. 598. The pursuers in any case could not be entitled to any balance remaining after satisfaction of their debt to the defenders, they could not give the defenders a good discharge—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 155; *Whyte* v. *Northern Heritable Securities Company*, June 16, 1891, 18 R. (H.L.) 37, 28 S.L.R. 950.

Argued for the respondents—The reclaimers did not become absolute proprietors of the security subjects by reason of their being allowed to retain the security and receiving a dividend on the unsecured balance of the debt due to them; if the security held by them had depreciated in value before payment of the final dividend they might have revalued it in order to readjust their claim—*Commercial Bank of Scotland* v. *Speedie's Trustees*, November 27, 1885, 13 R. 257, 23 S.L.R. 167, 2 B.C. 7th ed. 361. The trustee was discharged when the trust purposes were satisfied, which they were when the respondents were discharged in terms of the trust deed by their creditors who acceded to that deed; accordingly the respondents had in virtue of their radical right a good title to sue the present action—*Whyte* v. *Murray*, November 16, 1888, 16 R. 95, 26 S.L.R. 67; *Geddes* v. *Quistorp*, December 21, 1899, 17 R. 278, 27 S.L.R. 224.

At advising—

LORD TRAYNER—I entirely agree with the Lord Ordinary. The defenders' right was originally a right of security, and nothing has happened which could convert that right into a right of property. The fact that the trustee did not take over the security at the defenders' valuation did not change its character; it simply left it as it was; the right, as a security right, was "reserved" to the defenders, and they will now get the full benefit to which it entitles them. The only point debated which seemed to me to call for attention was this, that the right to the reversion now claimed by the pursuers was or might be a right which the trustee was bound to vindicate in the interests of other creditors. But to this the answer seems conclusive, that no one has now any interest except the pursuers. Under the trust deed, to which the pursuers' creditors acceded, it was made matter of contract that on receiving a final dividend (as declared by the trustee) the pursuers should *ipso facto* stand discharged of all claims ranked on their estate. Such a dividend has been paid and the discharge given. In my opinion that operated practically as a discharge or composition would have done, and had the effect of reinvesting the pursuers. They accordingly have the sole right to any part of their estate held by the defenders after the defenders have operated out of the security subjects payment of the balance of their debt, to operate which alone the security was given to them by the pursuers and left with them by the pursuers' trustee.

LORD KINCAIRNEY—The pursuers of this action were possessed of certain shares in two companies called the Calcutta Twist Company and the Champdany Jute Company. In or about 1892 they assigned these shares to the defenders. It is admitted that the assignation was not absolute but was in security of debts owing by the pursuers to the defenders. The defenders have since been in possession of these shares, and the pursuers by this action call on the defenders to account for their intromissions with them. At first sight nothing can be clearer than the title and interest of a debtor to raise such an action against his creditor. The defenders, however, plead that the pursuers have no title or interest. The Lord Ordinary has repelled these pleas and the defenders have reclaimed. I am of opinion that the Lord Ordinary's judgment should be affirmed, and I assent generally to the reasons expressed in his note.

The circumstances on which the defenders found are these, that the pursuers on 11th May 1894 granted a trust deed for creditors which contains among other clauses this reference to the Bankruptcy Act 1856—[*His Lordship read the tenth clause, quoted supra*]. In virtue of this clause the 65th section of the Act became applicable to the case. Under this section a creditor of a bankrupt desiring to draw a dividend must value the

security which he holds over the bankrupt's estate; and it is provided that the trustee shall be entitled to a conveyance of such security on payment of the value specified out of the part of the common fund, "or to reserve to such creditor the full benefit of such security, and in either case the creditor shall be ranked for and receive a dividend in the said balance and no more without prejudice to the amount of his debt in other respects."

The defenders state that their claim was for £8513, 15s. 4d., and that their securities were valued at £6667, 1s. 11d., which left a balance of £1846, 13s. 5d. for ranking. There are averments about other claims between the parties which it is not necessary here to notice, but which apparently resulted in reducing this balance. The defenders state that the valuations put on the securities were ultimately adjusted and accepted by the trustee. The record is not quite distinct on the point, but I understand that the trustee did not demand any assignation of these securities and that none were granted, but that the defenders were ranked for the balance only.

The same dividend was paid also to the other creditors, and in accordance with provisions in the trust-deed to which the Lord Ordinary refers, the trustee, as authorised by the trust-deed, granted a certificate whereby the pursuers were discharged of their debts and the claims of the creditors were satisfied and discharged. It appears to me that the position of matters then was that the trustee had a formal title to the securities in question, but that the whole of the pursuers' estates except the shares held in security had been divided. The trustee could not divide these shares which he had not purchased. The question in this case is therefore who had right to these shares. There is no question here with the trustee, but I think it clear that the trustee has no right to these securities. He might have had them when they were valued if he had chosen, and he might have demanded an assignation of them, but if he did so he would (under section 65) have required to pay the value put on them by the defenders; not having done so it is impossible that he could claim them now, as indeed he does not.

Failing an assignation demanded and paid for, the provision in the sixty-fifth section, that the full benefit of the securities tendered by the creditor is reserved to the creditor, appears to apply, and that accordingly the benefit of these securities is reserved to the present defenders, but the nature of their right to the shares is not altered, their right is only reserved. It was a right in security, and remains so—nothing happened which could alter its quality. But the salient and proprietary right being neither in the trustee nor in the creditor must of necessity remain as it always was, in the debtor.

This case is only an accounting, and on the accounts various questions may arise, but I agree with the Lord Ordinary in holding that the defenders' pleas to title must be disallowed.

The pursuer might have called the trustee as a defender in this action or taken means to have it declared that the trust in the trustee having been fulfilled the radical proprietary right reverted to him subject to the defenders' security, but I agree that proceedings with that object were not necessary.

LORD JUSTICE-CLERK—I have perused the Lord Ordinary's note more than once, and I so entirely concur in the result at which he has arrived and in the reasons which he has given for it, that I feel that I cannot add anything with usefulness. I therefore confine myself to expressing my concurrence with your Lordships in the judgment proposed.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Macfarlane, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—M'Clure. Agents—Forrester & Davidson, W.S.

Tuesday, March 8.

SECOND DIVISION.

[Sheriff Court at Glasgow.

BENNIE *v.* CROSS & COMPANY.

Process—Appeal—Competency—Failure to Box Prints—Power of Court to Dispense with Observance of Act of Sederunt—Reponing of Appellant—A.S., 10th March 1870, *sec.* 3 (1) *and* (3).

In an appeal from the Sheriff Court the appellant omitted to box prints within fourteen days after the process had been received by the Clerk of Court as required by the A.S., 10th March 1870, section 3 (1). The omission was alleged to be due to an error on the part of the appellant's country agent in thinking that prints could not be boxed on a Monday.

The Court *sustained* the respondents' objection to the competency of the appeal, and thereafter *refused* the appellant's motion to be reponed.

Opinions per Lord Trayner and Lord Moncreiff that the Court had no power to dispense with the observance of the provisions of the section.

Boyd, Gilmour, & Company v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84, and *Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1, *commented on.*

The Act of Sederunt, 10th March 1870, provides—"3 . . . (1) The appellant shall during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal,