on the general question, it was stated that the British Linen Company had a claim against Mr Martin's estate in respect of bills discounted by them; and it was submitted that, as the bank might advance a claim of retention, the present question could not be tried without making the bank a party to the case.

At advising—

LORD DEAS—This is a question of importance if there could be any doubt about it. But I cannot say that there is. I am quite satisfied that the interlocutor of the Lord Ordinary is right. Mr Martin was employed by the two ladies to procure a security. He did procure a security, or the promise of it,—a specific security mentioned in the letters. After concluding the arrangements with the lenders, these cheques were sent to him on the part of the ladies, on the 7th or 8th June 1871. On 8th June Mr Martin acknowledges receipt of the cheques as follows:—"I am this morning favoured with your letter of yesterday, returning the two cheques, value £1020, 11s. 6d., indorsed by you and your sister. I enclose bank order in your favour for £20, 11s. 6d. The new bonds will be with you in the course of next week. I shall take care that the money is not paid over until the bonds are duly completed. As I mentioned before, they will bear interest at 5 per cent. from 26th of last month." Then it appears that the only reason why the bonds were not transmitted to the lenders was that something was not ready with the borrower's titles. Mr Martin, after keeping the cheques about seven days, very properly paid them into the bank for safe keeping, and they were entered specifically in the cash-books of the bank. The transaction was prevented from being completed by the death of Mr Martin. But for the delays caused, first, by the preparation of the titles, and, second, by Mr Martin's death, the transaction would undoubtedly have been carried out. About a year after, a sequestration of Mr Martin's estates is taken out. The question is, Whether the money is to go into the trustee's hands for behoof of the general creditors? To say that it is would be contrary to all law and equity. Had Mr Martin applied this money to his own purposes, which he had not the slightest intention of doing, it would have been a gross fraud. Apart from fraud, if a person gets money for a specific purpose, the money must be applied to that specific purpose or returned. That doctrine has been often recognised. It was laid down by the Lord President Hope in *Blyth* v. *Maberly's Assignees*, July 10, 1832, 10 S. 796.

As regards any claim the bank may have, there is no call for any reservation. I should be sorry to put in a reservation which might suggest to the bank that it was their duty to try a question not at all to their interest.

LORD ARDMILLAN—The two cheques from the London and Westminster Bank reached Mr Martin covered by a special trust for a well-defined purpose, and they passed into the possession of the British Linen Company's Bank only for temporary custody and security, with a view to the early—the almost immediate—fulfilment of the purpose of the trust, viz., the investment of the petitioners' money. All this appears clearly from the documents, the entries in the books of the bank, and the letters of Mr Martin. I have no doubt that Mr Martin was, up to the date of his death, which occurred within a week, under the responsibility of a special trust for the benefit of the petitioners. It was his duty —and I feel sure it was his intention—to apply that money, according to the trust, to the specific trust for which he held it. Martin was not rendered bankrupt during his life. When he died he was bound to fulfil, and appeared able to fulfil, the trust, as above. £1200 was then at his credit with the bank. Since his death it has been discovered that he was insolvent. In respect of that fact, of the subsequently ascertained insolvency, the trustee on the estate of Mr Martin claims this sum.

I am of opinion, and, I must add, without difficulty or hesitation, that the specific trust under which alone Mr Martin received the money was not discharged or impaired by the deposit for safe temporary custody in the bank, but that the trust adhered to the sum so deposited. To have used the money for his own purposes would have been a breach of trust and a fraud on the part of Mr Martin, and I am of opinion that Martin's trustee cannot claim this money.

The authority of the law of England on this question is most important, and is explained by Mr Lewin (Lewin on Trusts, p. 647), who refers, among other cases, to a case of *Pennell*, which is very instructive.

LORD PRESIDENT—I agree with your Lordships. I think that the doctrine laid down by the Lord President Hope in *Blyth* v. *Maberly's Assignees* directly applies to this case, and the point raised was expressly decided in the case of *Pennell*, cited by Lewin, p. 647.

I agree also that we ought not to insert any reservation of the bank's claim. That is not necessary to the safety of the bank. If the bank have a claim, it must be one of the nature of retention, and that can quite competently be tried in a suspension.

The Court adhered.

Counsel for Petitioners—Watson and Strachan. Agents—Watt & Anderson, W.S.

Counsel for Respondent and Reclaimer—Lord Advocate and Marshall. Agents—Campbell & Smith, W.S.

Tuesday, November 5.

SECOND DIVISION.

[Sheriff of Forfarshire.

NOTE OF APPEAL FOR JOHN COOPER.

Sequestration—Discharge—Bankruptcy Act 1856.

Conviction in Circuit Court against a bankrupt of embezzlement of trust funds, *held* not necessarily to bar his obtaining discharge.

On 5th March 1870 the estates of John Cooper, corn merchant in Dundee, were sequestrated under the Bankruptcy (Scotland) Act 1856, and on 17th March a trustee was appointed on the estate. On November 16th, 1871, the bankrupt presented a petition for discharge to the Sheriff of the county of Forfar (CHEYNE), in which he stated that eighteen months have now expired from the date of the deliverance actually awarding sequestration, and the petitioner is desirous of being finally discharged of all debts contracted by him before the date of the sequestration, and has accordingly procured the concurrence in this petition of a majority in number and value of the creditors who have produced oaths in the sequestration, all conform to the trustee's certificate and consent of the creditors. That the trustee has, in terms of the statute,

prepared a report with regard to the conduct of the petitioner, and as to how far he has complied with the provisions of the said Act. The report of the trustee was to this effect:—"I hereby certify and report that the bankrupt has complied with the provisions of the Bankruptcy (Scotland) Act 1856; and, in particular, that he has made a fair discovery and surrender of his estates, has attended the diet of examination, has not been guilty of any collusion, and that his bankruptcy has arisen from innocent misfortunes or losses in business."

To this petition A. Fraser and J. Scott, two creditors, lodged objections, in which they stated that the bankrupt had embezzled certain trust funds, in consequence of which they had been defrauded, and they pled that the petitioner's conduct had been such as to disentitle him to a discharge from his debts.

On 6th January 1872 the Sheriff allowed parties a proof. From the evidence led it appeared that Cooper had accepted the office of trustee on the estate of a Mrs Fraser, by whose trust-settlement she, *inter alia*, appointed her trustee, as soon as convenient after her death, to invest the sum of £600 sterling on heritable or personal security, railway debentures, or otherwise, as to her said trustee might seem best, and to pay the annual produce to be derived therefrom, half-yearly, quarterly, or at such other times as her said trustee might consider best, to David Fraser, her son, as an alimentary provision during all the days of his life, which should not be assignable, or subject to his acts or deeds, or liable to be attached by the diligence of his creditors, but paid to himself, on his own receipt therefor; and at the death of the said David Fraser, or as soon thereafter as convenient, £100 of said sum to be invested should be paid to David Fraser, son of the said David Fraser; and the balance of £500, or, failing the said David Fraser junior, the said sum of £600, to be equally divided betwixt the objector Andrew Fraser, her son, and Jessie Fraser, now wife of the objector James Scott, her daughter, or their issue.

It also appeared that this sum of £600 had never been secured by the petitioners, but that although the interest at 5 per cent. had been regularly paid to the beneficiary, the principal sum had been invested in his own name in house property, so that on the sequestration the subjects formed part of the bankrupt's general estate for division amongst his creditors. In consequence of this, the objectors, who by the death of the original beneficiary were vested in the principal sum, did not succeed in obtaining more than an ordinary ranking on the estate, which yielded them a smaller sum than otherwise they would have obtained.

On 16th January 1872 the Sheriff deferred consideration of the petition for three months, and appointed the Sheriff-clerk to transmit the proceedings to the Lord Advocate, for his consideration.

The proceedings were accordingly transmitted, and a criminal charge was preferred against the petitioner for breach of trust and embezzlement.

The trial on this charge took place before the Circuit Court of Justiciary held at Dundee on 24th and 25th April last, before a jury. After evidence had been led, and addresses delivered by the counsel for the Crown and the petitioner, the jury, after retiring, returned with a verdict finding, by a majority of five, that the petitioner was guilty of breach of trust, but without felonious intent.

The presiding Judge stated that he could not take that verdict; and having read over the libel to the jury, he asked them to retire again and reconsider their verdict. They did so, and returned to the Court with a verdict unanimously finding the petitioner guilty as libelled, but recommending him to the leniency of the Court; and thereupon the presiding Judge sentenced the petitioner to three months' confinement.

On 7th August 1872, after having undergone his sentence, the petitioner lodged a minute with the Sheriff, craving him to resume consideration of his petition for discharge. This was opposed by the same creditors who had previously objected in respect of the objection previously lodged.

The Sheriff pronounced the following interlocutor:—

"*Dundee, 16th September* 1872.—The Sheriff-Substitute having heard parties' procurators, and at avizandum considered the process,—in respect it is in his opinion proved that the petitioner has been guilty of breach of trust and embezzlement in connection with the sum of £600 of trust-funds referred to in the objections, Finds that he is not entitled to a discharge under the Bankruptcy Statute: Therefore, dismisses the petition and decerns: Finds the objecting creditors, Andrew Fraser and James Scott, entitled to their expenses, whereof allows an account to be given in, and remits the same when lodged to the auditor of Court for taxation.

"*Note.*—As the petitioner's agent did not, at the recent debate, dispute the justice of the conclusion arrived at by the jury in the criminal proceedings which the Crown authorities saw fit to institute, the Sheriff-Substitute may content himself, so far as the merits of the objections are concerned, with saying that, after perusing the evidence led before him in January, he is unable to reach any other conclusion than that the serious charge made against the petitioner in the objections has been established. But if he is right in this, it seems to him that his duty is a plain and simple one. 'It is,' as is well said by Professor Bell (Com. ii. 367, 7th ed.), 'the policy of mercantile bankruptcy, in so far as regards the person of the bankrupt, to give encouragement, on the one hand, to honesty and fair mercantile enterprise, by affording him a reasonable relief against those misfortunes to which every man exposed to the chances of trade is liable; and, on the other hand, to restore to the public the exertions of a trader or manufacturer who has, without his own fault, become a bankrupt.' In other words, the discharge provided by the Bankruptcy Statute is a privilege conferred upon the honest and innocent debtor, who has complied with all the statutory requirements; and the dishonest debtor cannot claim the benefit of it. Applying these principles here, the Sheriff-Substitute feels constrained to find that the petitioner is not entitled to a discharge."

The petitioner appealed.

Authorities cited—Bell's Com. II. 367, 1st Ed; *Wilson* v. *Wilson's Creditors*, 5 D. 346; *Dickson* v. *Campbell*, 5 Macph. 757.

At advising—

LORD JUSTICE-CLERK—The question here comes to be, whether the offence should induce the Court to withhold the bankrupt's discharge. On the whole matter, looking to the punishment already suffered by the bankrupt, and that there has been a year's delay in granting his discharge, and that all the statutory requisites have been complied with. I think it should be granted now.

LORD COWAN—I concur. I was presiding Judge at the trial, and must say there were circumstances led me to take a lenient view and pass a light sentence. The large terms in which the trust-deed was expressed may perhaps have led the bankrupt into the path of wrong-doing. I think the sentence was intended to be a sufficient punishment. This is not a case for inflicting additional punishment. There has been no concealment of funds. All the statutory requisites have been complied with.

LORD BENHOLME—I concur. I think a long enough time has elapsed, and that the discharge should now be granted.

LORD NEAVES—I concur. The trustee's report determines the perfect openness of the bankrupt in dealing with his creditors; and he has sufficiently expiated his crime by undergoing the sentence.

The Court recalled the judgment of the Sheriff, and granted the discharge.

Counsel for Appellant—Solicitor-General Clark and Scott. Agents—Adam & Sang, W.S.
Counsel for Respondents—Shand and Asher. Agents—Lindsay, Paterson, & Hall.

AUTUMN CIRCUIT.

Friday, September 27.

GLASGOW.

(Before Lord Justice-Clerk and Lord Cowan.)
[Sheriff-Court of Lanarkshire.

BRASH *v.* MOSSON.

Appeal—Remit—Competency—Small Debt Court.

Appeal against a Small Debt decree, on the ground that the Sheriff-Substitute had ignored or misconstrued sec. 14 of the Local Turnpike Act, 4 and 5 Will. IV. c. 72, and where remit was made to ascertain the ground or grounds on which he proceeded,—*dismissed* as incompetent.

On 5th September 1871 the appellants raised a summons before the Sheriff Small-Debt Court of Lanarkshire, at Lanark, against the respondent, for £2, 5s., being toll dues owing by him on account of horses and carts passing through Carnwath toll-bar, of which the appellant is tacksman. The respondent admitted resting-owing in a balance of 19s., and that the account was correctly stated as to the dates and number of times the horses and carts passed through the toll-bar, and that there was on each time of passing a new loading, but contended that the charge of 6d. for each horse and cart could be made only once in one day, notwithstanding the number of times the horses and carts passed through the toll-bar, and though there was a new loading each time.

The Sheriff-Substitute gave decree for the admitted balance, holding that, according to the proper construction of the General Turnpike Act, the driver of a loaded cart might pass through a toll as often as he pleased in a day, each time with a new loading, provided there was no new hiring. He did not take into consideration, or at least did not give effect to, section 14 of the Local Turnpike Act, 4 and 5 Will. IV. c. 72, by which the tollage at the said toll-bar was regulated, and which expressly provides that every time a cart passes through a toll-bar with a new loading, toll shall be leviable. The present appeal was accordingly taken against the Sheriff-Substitute's judgment, and reliance placed on the said 14th section of the Local Act. The case was first heard before Lord Deas at Glasgow Circuit, who, after debate, and reserving all questions of competency, remitted to the Sheriff of the county to ascertain on what ground or grounds the Sheriff-Substitute had pronounced judgment, and the Sheriff's report bore that the case had been decided entirely on the General Turnpike Act, the local Act not having been pleaded to him in the Small Debt Court. In answer to this it was now maintained for the appellant that in point of fact the Sheriff-Substitute had the local Act before him when pronouncing judgment, and, at all events, he had gone totally wrong in deciding the same, and the decree ought therefore to be recalled, and a remit made to him to hear the cause of new, and proceed therein in accordance with the statutory law applicable.

The Court held that, even assuming the Sheriff-Substitute to have erred in his judgment, the error was committed in deciding the merits of the cause, which, by the Small Debt Act, they were precluded from considering, and accordingly held the appeal incompetent, and dismissed it with expenses, modified to Four guineas.

Counsel for Appellant—Brand. Agent—John Annan, Lanark.
Counsel for Respondent—Lang. Agent—John Alexander, Lanark.

Friday, September 27.

GLASGOW.

(Before Lord Justice-Clerk and Lord Cowan.)
[Sheriff-Court of Dumbartonshire.

M'KAY (SANITARY INSPECTOR FOR THE BURGH OF DUMBARTON) *v.* PATERSON (INSPECTOR OF POOR FOR THE PARISH OF CARDROSS).

Appeal—Small Debt Court—Excess of Jurisdiction—Competency—Poor.

An appeal against a Small Debt decree, on the ground that the Sheriff-Substitute had exceeded his jurisdiction, or otherwise had pronounced an incompetent judgment, in determining that a certain woman was a pauper, though the roll of paupers was produced to prove that she was not on the roll—*dismissed.*

M'Kay, Sanitary Inspector for the burgh of Cardross, under the Public Health Act, 30 and 31 Vict. c. 101, had incurred expenses, amounting to 15s., in interring the infant of a poor woman, and sought to recover the same from the respondent, the Inspector of Poor for the parish of Cardross, on the ground, as stated in the Small Debt summons, that the woman was a pauper chargeable to the Parochial Board of the said parish. The Sheriff-Substitute gave decree for the sum claimed, and against this judgment the defender Paterson appealed, mainly on the following grounds, viz., that