contemplating in the use of those words a breach of his bargain with his landlord which would occur in the event of his non-payment of rent and his landlord consequently putting an end to the tenancy. I think what he meant was what he says —"I am going at the end of ten years, subject to a right to put an end to my tenancy at certain breaks, and when I go away," such and such things. That is how I construe the words, and I believe that that is what the parties meant.

With regard to the authority cited by the learned Judges of the Second Division of the Court of Session, the case of *Pendreigh's Trustees* v. *Dewar*, 9 Macph. 1037, so far as it is relevant at all, tells the other way. The learned Judges in that case, whether they were right or wrong—I think they were right—construed the instrument as containing two totally separate and independent stipulations, the one was that there was to be the relation of debtor and creditor between the parties, and the other was the relation of tenancy. They construed the former stipulation as one which was in any event to be implemented—that is to say, one was to be the borrower of the money and the other to be the lender of the money, and whatever was the termination of the other relation between them, although in that particular case the term was fixed, the borrower was to pay what he had borrowed to the person who had lent it. Under the circumstances it certainly would have been an extremely monstrous decision if it was to be held, the relation between the parties being that which the Judges hold to be the relation between them, that the obligation of the borrower to pay the money should be put an end to by the termination of the tenancy. What bearing that has on this case I a little fail to see, but the real tendency of that decision appears to me to be in the other direction from that for which it is quoted.

This case seems to me to depend entirely upon the use of one word in the stipulation, and looking at the context and at the person who uses the phrase, namely, the person who proposes to become a tenant, I do not think he contemplated the tenancy being put an end to by his own fault, and I think "awaygoing" in his mouth meant the awaygoing at the end of the period during which he was to occupy the landlord's land. For these reasons I move your Lordships that the judgment of the Court below be reversed.

LORD MACNAGHTEN—I am of the same opinion. I construe the words exactly in the same way in which my noble and learned friend on the woolsack construes them, and I have nothing to add.

LORD DAVEY—I also agree. The question turns entirely upon the meaning of the words used in this clause "at my awaygoing." I suppose if it were made clear that the right construction of those words was that they meant whether that tenancy expired by effluxion of time or whether it expired by the exercise by the landlord of his rights to re-enter, the Courts would give effect to it notwithstanding that the tenant was in default. But I am not prepared to differ from the construction which I understand all your Lordships put upon those words. Looking at the place in which you find them, where the only termination of the lease spoken of expressly in the missive letter itself is on the expiration of ten years or the determination of it by the break in 1902, I think it is probably the soundest construction to treat "my awaygoing" as referring only to the expiration of the tenancy by natural effluxion of time, and that being so there is no contract to purchase the sheep in the events which have happened.

LORD ROBERTSON—I entirely agree in what has been said by my noble and learned friend on the woolsack and also in the judgment of Lord Moncreiff. The clause for taking over the stock is expressed as part of a scheme for occupation of the farm on payment of rent during a period of years. The forfeiture clause on the other hand brings that scheme to an end owing to the inability of the tenant to carry it out, as is shown very plainly by the words which are put in to save alive the claim for rent up to the date of forfeiture. I entirely agree in what has been said by my noble and learned friend on the woolsack as to the case of *Pendreigh's Trustees* v. *Dewar*, which so far as it bears upon the matter at all rather supports the conclusion of Lord Moncreiff than that of the Second Division.

LORD LINDLEY — I am of the same opinion.

Interlocutor appealed from reversed.

Counsel for the Pursuer (Respondent)—Haldane, K.C.—Macmillan. Agents—Gill & Pringle, S.S.C., and Flux, Thompson, & Quarrell, London.

Counsel for the Defender (Appellant)—The Lord Advocate (Dickson, K.C.) — R. Scott Brown. Agents—Davidson & Syme, W.S., and Faithfull & Owen, Westminster.

Thursday, March 10.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Davey, James of Hereford, Robertson, and Lindley.)

HART *v.* COUNTY COUNCIL OF LANARK.

(In the Court of Session December 2, 1902, 40 S.L.R. 117.)

Local Government—County Council—Fees of Procurator-Fiscal — County General Assessment (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 68), *sec.* 3 (2).

The County General Assessment (Scotland) Act 1868 abolished the power of levying the assessment known as rogue money, and provided that certain salaries, fees, outlays, and expenses

might be paid by the Commissioners of Supply out of the County General Assessment to be levied as provided in the Act. These fees, &c., included (sec. 3, sub-sec. 2) "the salaries or fees and necessary outlays of procurators-fiscal in the sheriff and justice of the peace courts, . . . in so far as such salaries, fees, and outlays are at present in use to be paid by each county.

The Procurator-Fiscal of the Sheriff Court of the county of Lanark brought an action against the County Council of Lanark (as coming in place of the Commissioners of Supply), concluding for payment of fees for work done by him in perusing and considering police reports in cases of accidents and sudden deaths, on which he advised that no proceedings should be taken. It was proved that for at least seventeen years before 1868 the county authorities of Lanark had repudiated liability for such fees, and had in fact during that period never made payments in respect thereof.

Held (*rev.* judgment of the Second Division of the Court of Session) that the sole criterion of the liability of the County Council was whether the payments in question were in use to be paid in 1868, and that as such payments were not then in use in the county of Lanark, the defenders were entitled to absolvitor irrespective of the question whether such payments could have been legally demanded before the Act of 1868 came into operation.

Opinions reserved on the question whether, assuming that the County Council was liable for the fees sued for, the liability would extend to fees for considering reports in cases arising within the limits of the county of the city of Glasgow.

This case is reported *ante ut supra.*

The County Council of Lanark (defenders) appealed.

At delivering judgment—

Lord Chancellor — It appears to me that this judgment ought to be reversed. In my opinion the whole question is concluded by the Act of 1868, and it requires but a very short recital to show how the matter arises — Whether these payments for services were or were not included in the form of rogue money under the Act of 1724, whatever they were, they were transferred to the Commissioners of Supply in 1832, and then when we come to the Act of 1868 we find that the power of levying rogue money upon the freeholders of the county was abolished, and in lieu thereof the obligation, whatever it had been before that time, now arises under and must be referred to the enactments of the Act of 1868.

I am not absolutely sure that it is necessary to go beyond that Act itself, because it seems to me that the Act itself is sufficiently clear in its terms, but in so far as it may receive any exposition from the course of dealing and from considering what are the things referred to in the Act of 1868, it appears to me that they all tell the same story. The charges which at one time, whatever they were, lay upon the county were from time to time being to some extent relieved by subventions from the State, and one can understand that there was a general desire to substitute remuneration by salary for the uncertain and in some respects very objectionable mode of payment by fees in respect of particular services. Whatever may have been the controversies, it cannot be doubted that from the year 1851 down to the year 1868 there had been efforts by the persons filling these offices to enhance their emoluments. I do not think it is necessary to consider whether the case made by those officers was in accordance with justice or not; no doubt it was thought that it was right to do what was done; but really when we are considering what was in fact enacted in the year 1868, beyond rendering intelligible what was the subject-matter that was being dealt with, I think the history of previous transactions is somewhat unimportant, and I must say in that point of view I entirely and thoroughly agree with Lord Young, who says that he declines to look at these Treasury minutes, letters by the Lord Advocate, and Queen's and Lord Treasurer's Remembrancers, and so forth, because in the view that he takes (and I entirely agree with his Lordship) what is to be regarded is what is now the law as enacted by the Statute of 1868.

Now, what does that statute enact? First of all, by the second section (it has been altered by subsequent legislation, but it is immaterial to go into that) the power to levy this rogue money is abolished. It starts therefore with a new provision for the public service, whatever that is, and it then goes on to say that there shall be paid to the clerks and a certain number of officials enumerated therein the amount that is their due, whatever that may be, and that is absolute. It provides for the expenses; that also is not in dispute. But then it goes on—and in the light of what I have been saying it is intelligible—there were various modes of payment, and there were various rates of payment I suppose—and it goes on to say in plain terms that the power to make the rate which is by this statute substituted for the power to make a rate for rogue money shall be limited (for it is manifestly a limit) to the fees, salaries, &c., "in use" in "each county." Now, when I apply this Act to the facts to which it is to be applied it is not denied, and cannot be denied, that at the date of the passing of the statute, and for seventeen years before it, no such fee or salary, whatever it is to be called, had been "in use" in any of these counties, or at all events in the county of Lanark. It seems to me that that is decisive of the whole question.

We are here dealing with the county of Lanark—a subsidiary question which arises about the differences between the county of Lanark and the royal burgh situated within it does not arise unless we decided the other way, and to my mind that whole

question (it has been argued, as it seems to me at somewhat inordinate length, and upon considerations with reference to questions which really are not in issue here and need not have been entered into) is determined by the plain language of the statute itself.

The notion appears to have been entertained that these fees were by law leviable, and that therefore, though as a matter of fact they were not paid, that would make no difference. The view upon which the Court in Scotland appears to have arrived at its decision is that as they were payable by law therefore you may treat them as having been paid within the meaning of the statute, although they were not paid at the time it passed. The question of the fallacy of that argument would arise if there were any doubt entertained about its being a good argument in point of law, upon the assumption that the facts were other than they are. In point of fact you have to assume that this was a fee lawfully payable at that date; that is an assumption for which I think there is not the smallest amount of foundation. The circumstance that any fee resembling this can be paid does not arise in this case; that payment which alone is put forward as a justification for it is payable only under circumstances which, it is admitted, do not exist in this case. How, therefore, it is possible to suggest that the theory that it was payable by law though it was not in fact paid satisfies the language of the statute, is a mystery which I am not able to comprehend. At all events, to my mind it is enough to say that according to the statute, which is incapable of being misunderstood, the plain test of what is to be paid, and, what is more important, the test of what the County Council has a right to pay even if they wish, is to be limited by that which at the date of the passing of the statute was "in use" in the county of Lanark. It seems to me that that being the test, the only answer that can be made is that this was not paid, and that it was not "in use" in the county of Lanark at that time. Therefore it is impossible to say that this debt, which the conclusion of the summons asks to be included in the declarator and the decree, has been established by the argument to be due. Therefore I move your Lordships that the judgment appealed from be reversed, and that the respondents do pay to the appellants the costs both here and below.

LORD MACNAGHTEN—I am of the same opinion. I agree that the Statute of 1868 is conclusive.

LORD DAVEY—I also agree, and it seems to me that this case is capable of being disposed of on comparatively simple considerations.

In the first place, I ask myself, What is this action? It is an action for a debt which is alleged to be due from the County Council of Lanark to the respondent Mr Hart. Well, in an action for debt the debt must be established either by contract, or at common law, or by statute. There was certainly no contract to pay this money; it is not contended that there was any contract by the County Council to pay this money. Nor is there any rule of common law which makes it payable. But it is said that it is payable by statute, and the way in which that is attempted to be made out seems to me rather an extraordinary method of proceeding. It is said, in the first place, that the Rogue Money Act — which I observe in passing I agree with Lord Young was merely an enabling Act giving a discretion to the freeholders of the county—it is said that that Act was an Act which imposed upon the county the duty of paying for all charges of criminal administration. That seems to me, I confess, rather a strained construction of the Act, but I will assume that that is the construction of it which had been sanctioned by long usage and had become part of the law while the Act was in existence. However, the mode in which the expenses of the criminal administration of the county are to be paid for is left in the discretion of the freeholders of the county. By the Act they are not obliged to pay the fees for an abortive investigation such as the claim is for in the present case, but they may arrange a scale by which they will remunerate or give a subvention towards the remuneration of the Procurator-Fiscal, and provide for the expenses of criminal administration in such a way and on such terms as they may think fit.

Well, having established that these particular fees were a charge, as I think the learned Judges say, upon the Rogue Money, then we come to the Act of 1868. I will not repeat the language in which that Act is expressed; it has been stated by my noble and learned friend on the woolsack. I will only observe this, that if they bring it in at all under that Act it must be under the second sub-section—the one that deals with salaries and fees—because I agree with the learned counsel Mr Johnston in his reply that the other section relating to searching for criminals deals only with expenses and not with salaries or fees. There are two conditions then with which any claim for salaries or fees under that Act must comply; one is that they must have been "in use" by each county—the county of Lanark in the present case—at the time of the passing of the Act; and the other is that they must be such as are not provided for otherwise by law. Unless those conditions are complied with, as has been already pointed out, the county have no power to pay this demand at all, even if they desired to do so. Now, I am not satisfied that either of these conditions has been complied with, or rather I am satisfied that the condition relating to the payment being "in use" at the time of the passing of the Act has not been complied with; and I am not satisfied that the other condition as to its not being provided for out of other funds has been complied with either. The evidence seems to me to fall far short of any payment having been formerly made to the Procurator-Fiscal in

respect of these inquiries under the Rogue Money Act. We have no evidence anterior to the year 1845 that any such payments for merely reading reports of the police or of others and marking them "no proceedings," had ever been allowed as a proper subject of a fee; and it appears to me therefore that it would have been an exceedingly proper and reasonable view for the freeholders of the county or the Commissioners of Supply to take to say—We will pay the proper and sufficient fees for all work done which results in the prosecution of a criminal, or which results in a report to the Crown Counsel, or to the Sheriff, or to the Lord Advocate, as the case may be; but for any preliminary inquiries which are abortive, and which result in nothing at all, and are not of sufficient importance ever to come before those great functionaries, we will not allow any fee. It appears to me that that would be a very reasonable way of providing for the remuneration of the Procurator-Fiscal, and why the County should not have done that, if it thought fit to do so, I am at a loss to understand.

Now, how does the matter stand upon the facts before us? In the year 1845 the Sheriff (Sheriff Alison) drew up a new scale of fees, and he pointed out, as indeed was pointed out afterwards in some documents in evidence, the abuses that had arisen from the charges for these preliminary inquiries which ended in nothing, without any proper authority, and said it was so important that the Procurator-Fiscal should not be prevented from inquiring into cases of sudden death and suspicious cases generally, that he would allow for preliminary inquiries of that nature provided they were authorised by the information of the Sheriff or Sheriff-Substitute, but under no other circumstances. Whether that was acted upon or not I do not know. In the year 1851 some change was made in the remuneration of procurators-fiscal so far as it was allowed by the Exchequer—I think the Sheriff cases were paid for by the Exchequer, and I think the payments for unreported cases, that is, cases which did not come before the Crown Counsel and were conducted by the procurator-fiscal on his own responsibility, were allowed, provided that there was either a trial or a summons or libel. From that date the county refused to pay for these—I hardly like to call them preliminary—inquiries, because they do not amount to an inquiry; it is merely reading reports from somebody or other and marking them "no proceedings." The county from that date absolutely refused to pay these fees, and no attempt was made by the Procurator-Fiscal, if he had a right to do so, to compel them to pay them. From 1851 to 1868, when the Assessment Act came into force, there is no instance of fees of this character having been allowed in the Procurator-Fiscal's accounts. Under these circumstances I am at a loss to see how it can possibly be said that in this county it was "in use" to pay these fees at the date of the passing of the Act.

I entirely agree with the observations which were made by my noble and learned friend upon the words of the Act; they are to my mind quite free from difficulty or ambiguity; they are "which are 'in use' to be paid," not "which the county is liable to pay," but "which are at present in use to be paid by each county." That is to say, what you have to look at is the practice at the time when the Act came into operation, and I entirely agree with what was put so forcibly and strongly by Lord Young in his judgment, that really this consideration is conclusive of the whole matter, because if it be so, then there is no power in the County Council of Lanark to pay these fees even if they wished to do so.

It is unnecessary for me to express any opinion on the other point whether they could pay these fees relating to Glasgow, but it seems to me that if it were necessary to express an opinion on that point, the respondent would have some difficulty in satisfying my mind that the Lord Advocate or the Treasury had any power to impose a new charge upon the County Council, by transferring the burden of criminal prosecutions of the graver character from the shoulders of the City of Glasgow on to the County, as was done I think in the year 1856; but I may not be accurate in the date. Up to that time no fees of this character had ever been paid by the County in respect of Glasgow cases; no part of the criminal administration of Glasgow had ever fallen upon the County. Whether that was the legal state of things or not I really do not know, but it was the established state of things, and the effect of transferring the prosecutions to the Sheriff of the County, according to the view of the respondent, was to throw an increased burden upon the county ratepayers in relief of the ratepayers of the city. How that could be done by a Treasury Minute or by the Lord Advocate I am at a loss to understand.

LORD JAMES—I concur.

LORD ROBERTSON—I agree that the appeal must be allowed.

My judgment rests on a very simple ground—in fact, on the ground which has been stated by my noble and learned friend on the woolsack. The measure of the county's liability was limited in 1868 to the fiscal's fees in so far as those fees were then in use to be paid by the county; and no such fees as are now in dispute had in fact been paid by Lanarkshire for seventeen years prior to 1868, that county denying liability. The statute clearly makes the state of matters in each county *de facto* in 1868 the criterion of future liability for that county in the matter of fiscal's fees, and during this long argument I have heard no plausible suggestion by which a use of payment can be conjured up out of seventeen years' non-payment. Nor do I find it possible to discover an extension of the county's liability for fees in the general words about expenses which form the third head of section 4, the specific matter of fiscal's fees having been separately, and in expression exhaustively, dealt with in the second head.

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