payment; while, on the other hand, certain parts of the work were not executed, and for these Mrs Beveridge claimed deduction of the price,—and in reference to these claims disputes arose between the parties.

In these circumstances Hutchisons & Weir presented a petition, in which Mrs Beveridge was respondent, to the Sheriff-Substitute, praying him "to decern and ordain the respondent instantly to deliver the said contract between the respondent, on the one part, and the petitioners, Hetchisons & Weir, and other parties therein named, on the other part, and that to the said Peter Maccallum, architect in Dunfermline, as the acting architect and sole arbiter nominated therein, to be retained by him so long as the same may be necessary, for the purpose of proceeding with and determining the claims of the petitioners, Hutchisons & Weir, under the submission therein contained between the respondent and the petitioners, Hutchisons & Weir."

The Sheriff-Substitute (LAMOND) pronounced the following interlocutor:—

"*Dunfermline, 28th February* 1872.—The Sheriff-Substitute having considered the closed record and productions, and heard parties' procurators; Finds that the petitioners have not set forth facts relevant or sufficient to support the prayer of the petition, therefore dismisses the petition, and decerns; Finds the respondent entitled to expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and report."

The petitioners then appealed to the Sheriff (CRICHTON) who adhered to the judgment of the Sheriff-Substitute.

The petitioners appealed to the Court of Session.

RHIND for them.

At advising—

LORD PRESIDENT—This petition is utterly absurd, for the contract, in as far as the parties are concerned, has been executed. The only matter between them is, that the price which is due has not been paid, and for this an action might be raised. The builders are entitled to extra pay for additional work, and the employers, on the other hand, are entitled to deduct for work contracted for, but not executed. This is a mere matter of calculation, which the architect is a fitting person to make, but it has nothing to do with the submission, and even if it had, why should the petitioners ask the Court to order delivery of the contract?

The other Judges concurred.

The Court refused the appeal, with expenses.

Agents for Petitioners—Menzies & Cameron, S.S.C.

Agents for Respondents—Duncan & Black, W.S.

Tuesday, May 28.

MACKENZIE AND OTHERS, PETITIONERS.

Trust—Appointment of New Trustee—Trusts (Scotland) Act, 1867, 30 *and* 31 *Vict. c.* 97.

Held that the provisions of the Trusts (Scotland) Act, 1867, are not applicable to the case of paid trustees.

This was a petition at the instance of a majority of the creditors of the late firm of Mackenzie & Duncan, engineers in Bathgate, with concurrence of the surviving partner, and the representatives of the deceased one, praying the Court to appoint a trustee under the 12th section of the Trusts Act, 1867, which provides that "when trustees cannot be assumed under any trust-deed," the Court may, upon the application of any party having interest in the trust-estate, "appoint a trustee or trustees under such trust-deed, with all the powers incident to that office."

The trust-deed here was one for behoof of creditors, and provided for suitable remuneration to the trustee. It did not provide for the election or assumption of any new trustee, and the original trustee having died without having completed the winding-up of the estate, the present petition was brought before Lord Ormidale, who reported the case to the First Division, the question being whether the Act of 1867 included paid trustees.

R. V. CAMPBELL for the petitioners.

The Court had considerable difficulty in deciding the question, from the vague terms of the Act. These were comprehensive enough to include all trusts whatsoever, but it was undoubted that the previous Trust Acts referred only to "gratuitous trustees," and here these words were defined without being once used in the rest of the statute. On the whole, however, its other provisions seemed inconsistent with the idea of extending its operation to paid trustees.

The following is Lord Kinloch's opinion:—

LORD KINLOCH—The trust-deed under which this petition asks the Court to appoint a new trustee, is a trust-deed granted in connection with the affairs of a copartnery, and granted in favour of a trustee for creditors, who is to receive a remuneration for his trouble. I am of opinion that this trust-deed does not fall within the purview of "The Trusts (Scotland) Act, 1867," and that therefore the petition should be refused.

The Acts 24 and 25 Vict. c. 84, and 26 and 27 Vict. c. 115, by which various powers and privileges were conferred on trustees, are clearly confined to the case of gratuitous trusts, for so they are declared, in so many words, to be. The Acts do not limit their provisions to *mortis causa* deeds; but it is plain that these were mainly in the view of the Legislature. It is in these that gratuitous trustees are chiefly found. And the whole powers and privileges conferred are such as are peculiarly appropriate to the case of *mortis causa* deeds.

The after Act of 1867, which is that now relied on, begins with an additional definition, *inter alia*, of the words "gratuitous trustees." Such a definition would be altogether idle and out of place if the intention of the statute was to bring all trusts whatever within its operation, whether gratuitous or not. In the second section it is provided —"In all *such* trusts the trustees shall have power to do the following acts, when such acts are not at variance with the terms or purposes of the trust." A power is then given to appoint paid factors and law-agents, to discharge trustees who have resigned, and to do certain other things. In section 3 the statute uses an apparently more general phrase, and says—"It shall be competent to the Court of Session, on the petition of the trustees under *any* trust-deed, to grant authority to the trustees to do any of the following acts." Power is then given to sell, feu and let, borrow money on, or excamb the trust-estate. A variety of clauses follow, all prefaced with the same general introduction; amongst which is the 12th, now founded

on, giving power to the Court to appoint new trustees.

The question now arises, whether these clauses are to be taken in their rigid literality—be held applicable to all trusts whatever—or whether they are to be restrained to the case of gratuitous trusts, such as were provided for by the two previous statutes, and, I clearly think, are exclusively provided for by the 2d section of the Act 1867. I am of opinion that the latter is the sound conclusion. I think the general phrase "any trust" is to be construed as referring to any trust of the same general description with those previously referred to. Fairly interpreting the statute, I think that no other construction can be put on it. The whole of the provisions are such as are fairly applicable to the case of gratuitous trusts, and these alone. I have particularly noticed those referring to the "beneficiaries" under the trust—so expressly called. I cannot fancy the Legislature having in view the case of trusts for creditors, such as is here involved. Still less can I suppose it intending to apply its provisions, without any discrimination, to that large body of varying trust-deeds which would be comprehended under the term "any trust-deed," taken absolutely. I think the whole arrangements of the statute are different from what they would have been had it been contemplated to apply its provisions to all trusts whatever of any kind. The petitioners have not satisfied me that this unlimited construction is to be given to the Act. I hold, on the contrary, that it was exclusively intended to follow out into further ramifications the provisions of the two prior statutes as to gratuitous trust-deeds. I cannot therefore apply its provisions to the trust-deed now in question.

The Court accordingly directed the Lord Ordinary to refuse the petition as incompetent.

Agent for Petitioners—A. Kirk Mackie, S.S.C.

Tuesday, May 28.

CARLIN *v.* PATERSON.

Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 79), § 143. A discharged bankrupt *held* barred from challenging heritable securities held by a creditor in the sequestration (who had sold the subjects during the process of sequestration), in respect that in the offer of composition the securities were not stated as objected to, nor notice in writing given to the original holder, or to the person to whom he had sold the subjects.

This was an action at the instance of James Carlin, sometime cab proprietor in Glasgow, against William B. Paterson, writer in Glasgow, concluding for reduction of certain bonds and dispositions in security, which purported to have been granted at various dates in the year 1869 by the pursuer in favour of the defender, over certain subjects in Glasgow then belonging to the pursuer. The grounds of reduction were that the bonds were not subscribed by the pursuer, and not his writ; and further, that they were obtained by fraud.

On 6th April 1870 Carlin applied for and obtained sequestration under the Bankruptcy Act. In the state of affairs given up by Carlin, he stated the heritable subjects before mentioned among his assets, "less heritable securities which are disputed." At that time he was engaged in defending an action of maills and duties at the instance of Paterson, in which decree was pronounced against him (Carlin) on 10th June 1870.

On 23d June, Paterson exercised the power of sale contained in the bonds, and sold the subjects by public roup. The bonds were given up to the purchaser. The price obtained was sufficient to pay the debt due to him, with interest, and there was a small balance over, which was disposed of by a multiplepoinding.

On 12th September 1870 Carlin made an offer of composition of 2s. 6d. per £, which was accepted by the creditors on 23d September. In the offer of composition he made no mention of the securities held by Paterson.

The Lord Ordinary (MURE) pronounced the following interlocutor:—

"2*d February* 1872.— . . . Finds that in the offer of composition upon which the pursuer was discharged the securities in question were not stated as objected to by him, and that no notice in writing was given by the pursuer to the defender, or to the party to whom the property over which the securities were granted had, without objection, been sold during the sequestration, of the pursuer's intention to object to the securities: Finds, in these circumstances, that the pursuer is barred from now challenging the securities; therefore dismisses the action, and decerns: Finds the defender entitled to expenses."

His Lordship held that the action was excluded by sec. 143 of the Bankruptcy Act, 1856, which enacts that the bankrupt shall not be entitled "to object to any security held by any creditor, unless in the offer of composition such security shall be stated as objected to, and notice in writing given to the creditor in right thereof."

The pursuer reclaimed.

TRAYNER, for him, argued that the spirit, if not the letter, of sect. 143 of the Bankrupt Statute was complied with. Paterson and the other creditors had fair notice that the securities were disputed. Moreover, at the date of the offer of composition the property had been sold by Paterson, and his debt paid, so that the securities were not securities held by a creditor.

THOMS and M'KECHNIE, for the defender, were not called upon.

At advising—

LORD PRESIDENT—There are various provisions in the Bankrupt Statute that occasionally operate very hardly against particular interests. We had a striking example in *Pendreigh's* sequestration, May 9, 1871, 9 Macph. H. L. 49. But these provisions, necessarily conceived in universal terms, were made so stringent just because, if there were any loophole of escape, the Court might, from motives of compassion, hesitate to apply the hard rules of the statute. The expediency of these hard rules is so great that the Legislature has so framed them that, when the facts occur to which they are applicable, there is no escape from them. I assume that the pursuer's case on the merits is as strong as possible. But sect. 143 of the statute says that the bankrupt shall not be entitled "to object to any security held by any creditor, unless in the offer of composition such security shall be stated as objected to, and notice in writing given to the creditor in right thereof." It will never do to say that it is possible to admit equivalents for the requirement of the statute. It is said that the fact of the securities being disputed by the bankrupt in the original state of affairs, appears