deliverance can be intimated until a dividend has been declared. The 127th section therefore cannot come into operation until the declaration of the dividend, and so there is no occasion for the trustee to proceed under the 126th section until that period also. If he were to proceed, that course would be productive of nothing but a latent deliverance, which would be entirely useless.

And when we look further at section 127 the matter is still clearer. It continues—"And if any creditor be dissatisfied with the decision of the trustee, he may appeal by a short written note to the Lord Ordinary or to the Sheriff; but if no such note be lodged with and marked by the Bill Chamber or Sheriff-Clerk (as the case may be) before the expiration of fifteen days from the date of the publication in the *Gazette* of the said notice, the decision of the trustee shall be final and conclusive so far as regards that dividend; and in case the claim have been rejected, such dividend shall be without prejudice to any new claim being afterwards made in reference to future dividends, but which new claim shall not disturb prior dividends." There again we have a form for and conditions of the appeal which the creditor is to have when his claim has been rejected. The appeal must be lodged within fifteen days after notice in the *Gazette* of the time and place of payment of the dividend—a period which can never occur in the present case, according to the appellant's construction of the statute, because there was no such *Gazette* notice published, and the right of appeal would therefore be taken away.

But in answer to that it is contended that the 169th section provides a right of appeal in every case. But that is only where there is no special provision, as in the present case, in which the right is given under the 127th section. It would not be an appeal under the 169th section if it complied with the terms of the 127th, and if it did not comply with the provisions of the 127th section it would not be admissible, because it must be taken within the fifteen days. It is therefore quite clear that until proceedings are taken under the 127th section the creditor has no intimation of the deliverance and no opportunity of appealing. Therefore any proceeding under the 126th section which is not followed out by proceedings under the 127th, and the setting in motion proceedings under the 126th without a dividend being declared, is idle and inconsequent.

I am therefore of opinion that the Sheriffs were right, and that their judgment should be adhered to.

Lord Mure—I am of the same opinion. The question is a very simple one. We are dealing with a statutory matter, and therefore what has been done can be final only if it was done in terms of the statute. At the time when this deliverance was made no dividend had been declared, and as far as I understand no deliverance has yet been declared. Now, it appears to me that what the trustee did was not a statutory proceeding at all, and that there has been no deliverance within the meaning of the provisions of the statute, because no dividend had been declared. The statute authorises a deliverance only when a dividend has been declared. The 123d section provides that the creditor shall produce his oath and grounds of debt two months before payment of the first dividend. Indeed, the whole matter of claims, it is contemplated, shall be determined with reference to a dividend to be declared. The 126th section shows how creditors and their claims are to be dealt with by the trustee with a view to the declaration of a dividend. The 127th makes the proceedings final, provided that a dividend has been declared. I entirely concur in your Lordship's construction of the statute, and need not repeat what you have said.

Now, what has the trustee done? The position of matters has, I understand, not yet reached the point at which a dividend fell to be declared. The National Bank put in their claim, as they were quite entitled to do, under the 123d section, at any time within two months of the declaration of the first dividend. I think it was within the power of the trustee to admit that claim—whether it is a good claim depends on the merits of the case, on which the Sheriff-Substitute has allowed a proof.

Lord Curriehill concurred.

Lord Deas and Lord Shand were absent.

The Court adhered.

Counsel for Appellant—Kinnear—Ure. Agents—Ellis & Blyth, W.S.

Counsel for Respondent—Pearson—Dickson. Agents—J. W. & J. Mackenzie, W.S.

Saturday, January 29.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

ATHYA *v.* CLYDESDALE BANK

Bankruptcy—Trust-Deed—Accession—Conduct of Creditor held not to amount to Accession so as to Bar him from thereafter Insisting in his Full Claim.

A person who had become insolvent granted a trust-deed for behoof of his creditors, among whom was a bank, to which he was indebted on bills current at the date of the trust-deed. The bank did not formally accede to the trust-deed, but lodged a claim with the trustee, who after notice rejected it in respect of the non-accession of the bank. Several years thereafter, but before the bills were prescribed, the bank raised an action against the debtor for their amount. He having by this time been discharged by his other creditors—*held* that the bank had not acquiesced in the trust-deed so as to bar their right of action.

On 28th August 1876 John Athya, sole partner of the firm of John Athya & Company, grain merchant, Glasgow, executed as such sole partner and as an individual a trust-deed for behoof of his creditors in favour of James Wyllie Guild as trustee. The creditors of the firm, with the exception of the Clydesdale Banking Co., to which Mr Athya was indebted to the amount of £12,185, 10s. 5d. on a number of bills granted by him, formally acceded to the trust-deed, which contained a provision that the question of the terms

on which Mr Athya should be entitled to a discharge should be determined by a committee of creditors. The bank, however, as well as the other creditors, lodged with Mr Guild, as trustee, claims on the estate of Mr Athya. Mr Guild admitted the claims of the bank, subject to the claimants formally concurring in the trust-deed in terms of the enclosed form within eight days, and failing this the trustee rejects the claim *in toto*. The form of concurrence referred to as enclosed was— "(*Place and date*).

"Gentlemen, ... hereby approve and concur in the trust-deed executed by John Athya & Co., merchants, Glasgow and Liverpool, and John Athya, sole partner thereof, in favour of James Wyllie Guild, chartered accountant."

The bank did not fill up the form, and Mr Guild rejected their claim. Mr Guild declared a dividend in 1877, and the creditors other than the bank, and one creditor who allowed the dividend effeiring to him to remain unpaid, received a dividend accordingly.

On 3d September 1880 Mr Athya, who had left Scotland and settled in Liverpool, was granted a deed of discharge. On 17th September 1880 the bank raised this action against him, concluding for £12,185, 10s. 5d., the amount due on the bills. They at the same time used arrestments in the hands of Mr Guild; and pleaded—"(4) The pursuers having never acceded to the trust executed by the defender John Athya, are entitled to decree against him as concluded for." Athya defended the action, and Mr Guild appeared and was sisted as a defender.

The defenders pleaded—(1) No jurisdiction, in respect that the defender John Athya has no domicile in Scotland, and that no funds belonging to him have been attached by arrestment. They also pleaded — (2) That the pursuers were barred in respect of having acceded to the trust. And (3) That the pursuers were barred by their actings from challenging the said trust-deed.

The Lord Ordinary repelled the defences and decerned against the defender Athya in terms of the conclusions of the summons.

Both defenders reclaimed, but Mr Guild withdrew his reclaiming-note before the case was heard in the Inner House.

Argued for Athya—The bank must be held to have acceded to the trust-deed *rebus ipsis et factis*. The trust-deed should have been cut down by sequestration if accession was not intended, whereas the trust-deed had been acted on for a considerable time within the knowledge of the bank. The conduct of the bank was at least such acquiescence as may deceive the other creditors into a line of conduct which had they been made aware of opposition they would not have pursued—2 Bell's Comm. (7th ed.) 393—and the bank was therefore barred from insisting in this action.

Counsel for the bank was not called on.

At advising—

Lord Justice-Clerk—I do not doubt that a creditor can be held to accede to a private trust-deed if he by his actings leads all concerned to suppose he is intending to do so. But the facts here fall far short of such accession. The bank did not accede to the trust-deed at all. The facts indicate that they intended a dividend to be set aside for them in case they should accede, but that they did not intend to accede to the effect of discharging their debt. I do not think, however, that what they did can be held to have misled any creditor or raised any idea that accession was intended. It would have raised a narrower question if creditors of the bank had arrested the money of the bankrupt held in the hands of Mr Guild. But it is enough for this case that they never acceded, and indeed no one was led to think they did.

Lord Young—I am of the same opinion. The bank are suing for what is *prima facie* their legal right, and I see no reason in equity why they should not have it. It would have been more satisfactory if the bank in 1876 had plainly stated what it was they intended to do, which was this—In accordance with the usual practice of banks, the bank did not accede to the trust-deed, but the position taken up was—"We do not object to the estate being ingathered and distributed, and we will not interfere; and if the other creditors are ready to join in that course, take a share of the estate, and give you, Athya, a discharge, that is for your advantage, but we do not agree to take a share and discharge our debt. Our debt shall remain good if you are ever in circumstances to pay it." It would have been better, I say, to have said that at first. Athya has now a discharge from his other creditors, but not from the bank, and they would doubtless have left the matter alone at present had they not been creditors on bills in which he was debtor, and which owing to the law of prescription are of course of a perishable nature. Now, in this action they ask only their legal right. It was quite understood that they were not acceding. I altogether assent to the doctrine of Mr Bell, that mere lying-by in circumstances which will lead those interested to infer the intention to accede will bar a creditor from afterwards saying he does not accede. But here the bank has done nothing to bar the legal right. The plea that there is no jurisdiction because so long as the trust-deed stands the funds of Athya are in the hands of Mr Guild, his trustee, is a plea I could not for a moment sustain. It is Athya's money in the hands of Athya's trustee. I therefore agree in holding that the interlocutor of the Lord Ordinary is in accordance with the legal right of the bank, and should be affirmed.

Lord Craighill concurred.

The Court adhered.

Counsel for Reclaimer—Asher—Low. Agent—D. Mackenzie, W.S.

Counsel for Clydesdale Bank — Kinnear — Readman. Agents—Morton, Neilson, & Smart, W.S.