The Court found (1) that the pursuer was entitled to expenses against Mitchell, leaving it to be seen, when the account was given in, what amount, caused by the appearance of the Railway Company, was not fairly chargeable against Mitchell. They held, (2) that as the Railway Company had been assoilzied by the jury from both joint and several liability, they would, in the ordinary case, have been entitled to their expenses against the pursuer; but looking to the whole circumstances as stated to the Court, the proper course in this case would be, to find the Railway Company entitled to their expenses only since the date of the closing of the record.

Lord Deas differed, and thought that no expenses should be given to the Railway Company.

Agent for Pursuer—Æneas Macbean, W.S.

Agent for Railway Company—James Webster, S.S.C.

Agents for Mitchell—Henry & Shiress, S.S.C.

Thursday, June 6.

LINDSAY *v.* BRYSON.

Bankruptcy—19 *and* 20 *Vict., c.* 79, §§ 90, 91—*Trustee—Examination—Documents.* Held that a trustee in a sequestration, having obtained, from a party examined as to the bankrupt's affairs, production of documents relative to the same, is bound to re-deliver the documents after the lapse of a reasonable time for inspecting them.

In the sequestration of James Trowsdale & Son, contractors at Peebles and Innerleithen, and at Stockton-on-Tees, Durham, the trustee, Thomas Steven Lindsay, under a warrant granted by the Sheriff of Edinburgh, examined various parties and recovered documents relative to the bankrupts' affairs, and on 21st January 1867 he examined, *inter alios*, William Bryson, C.E., Darlington, Engineer of the Forcett Railway Company, who produced various books and writings having reference to the line of the Forcett Railway now in course of construction. Bryson, on 14th March 1867, petitioned the Sheriff to ordain the trustee to deliver back the books and documents, reserving right to the trustee thereafter to call for copies, or excerpts, or the principals when required, alleging that the want of the books and documents caused great inconvenience to the petitioner and the railway company.

The Sheriff-substitute (Hallard) sustained the prayer of the petition, and ordained instant delivery to Bryson of the books and documents "which were produced by him at his examination, and voluntarily delivered by him to the said trustee, reserving to the trustee to apply for delivery of said documents and others, under the 91st section of the Bankrupt Statute."

The trustee presented a note of appeal to the Lord Ordinary against this deliverance.

The Lord Ordinary (Kinloch) recalled the deliverance, and remitted to the Sheriff to allow the trustee such farther opportunity as might be reasonable to examine the documents in question, or take copies of the same; and after such opportunity had been had, to ordain the documents to be delivered to the petitioner, Bryson, reserving all questions as to the right of property in the documents, and finding neither party entitled to expenses.

His Lordship added this note:—

"The Lord Ordinary cannot adopt the extreme view contended for by either party.

"He has no doubt that a party producing documents under a statutory examination in bankruptcy is entitled, by means of a summary application in the process of sequestration, to have the documents ordered to be returned to him when the purposes of the statute have been served.

"On the other hand, he is of opinion that the Sheriff, when he conducts the examination, and any commissioner who holds his delegated authority, is entitled, in the course of the examination, to order documents to be produced, and that this does not require a separate application and warrant.

"But he conceives that such production is, like the examination generally, only for the purpose of informing the mind of the trustee, and that so soon as this object is served, the party producing the documents is entitled to have them returned.

"The Lord Ordinary does not think that the statutory examination can be converted into a proceeding for determining the right of property in the documents. It is a different form of process which must be adopted for that purpose.

"The Lord Ordinary finds neither party entitled to expenses in the appeal, as the course which he has taken is not what either party contended for."

The trustee reclaimed, and asked the Court "to recal the interlocutor submitted to review; to find that the reclaimer is entitled to retain such of the documents that have been produced as belong to the bankrupts; and to remit to the Lord Ordinary with instructions to him to allow an inquiry in regard to the right of ownership of the bankrupts in the documents in question, or to ordain him to remit to the Sheriff to make such inquiry, and thereafter to ordain the Lord Ordinary to find, or to remit to the Sheriff to find, that the reclaimer is only bound to deliver up such of the documents as are not the property of the bankrupts; or to do otherwise," &c.

A. Moncrieff for reclaimer.

Watson for respondent.

The Court adhered.

The Lord President thought the Lord Ordinary was right. The 91st section of the Bankruptcy Act applied to the case, but the 90th must also be kept in view, and the object of the statutory provisions as to examinations. By the 90th section, the Sheriff "might, at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law agents, and others"—but for what purpose?—"who can give information relative to his estate." Section 91 empowered the Sheriff to "order such persons to produce, for inspection, any books of account, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same, or copies of the same, to be delivered to the trustee." But for what purpose? For inspection. It would be monstrous to hold that a person ordered to produce his business books to inform the mind of a trustee as to a bankrupt's affairs should be obliged to leave them in his possession, and have no means of recovering them out of his hands. If the law were otherwise, then that section might be wrested to most improper purposes, and made an instrument of oppression in the hands of a trustee. Bryson was examined, apparently in England, under commission, and there he produced thirty-seven documents, which it was very apparent were properly in the custody of an officer

of the railway company. If this continued custody contended for by the trustee were countenanced by the Court, was it likely that in any other case in future such a production of documents would be made? In that way the very object of the statute would be defeated, and trustees prevented from acquiring much valuable information. A party giving up such documents in that way, did so under the implied condition that he would get them back without action; and though the documents might remain with the trustee for a reasonable time, they must be restored to the party producing them as soon as possible.

The other judges concurred.

Agents for Reclaimer — Lindsay & Paterson, W.S.

Agents for Respondent—Graham & Johnston, W.S.

Friday, June 7.

SECOND DIVISION.

DOUGLAS *v.* DOUGLAS' TRUSTEES.

Trust—Interest—Accumulation of Interest—Bona fides. Circumstances in which held that trustees who had taken an erroneous view of their duty, but had acted throughout in *bona fide*, were bound to pay to the beneficiary the net proceeds of the estate, afterwards to pay interest at 4 per cent., and lastly, interest at 5 per cent. But no accumulation of interest allowed.

These were conjoined actions of multipleponding and exoneration at the instance of the trustees of the late J. M. Douglas against General Thomas M. Douglas, and of declarator at the instance of General Douglas against the trustees.

Major Archibald Douglas Monteith died in 1842, leaving a trust-disposition, in which he named his brother, James M. Douglas, his sole executor and trustee.

He left several legacies, and directed that the residue of his fortune should be vested in the purchase of lands in the county of Lanark, to be entailed on his brother and his lawful issue. On the death of Major Monteith, his brother James Monteith Douglas made up a title to the personal estate under the Major's settlement, and he made up titles to his real estate as heir-at-law. Shortly after the Major's death, and in pursuance of his purpose of purchasing lands to be entailed under his settlement, James Monteith Douglas bought the estate of Stonebyres, in Lanarkshire, for £25,600, and laid out £23,000 in the erection of a mansion-house and in draining the estate.

James M. Douglas died in 1850, leaving a trust-disposition, by which he conveyed his whole estates, heritable and moveable, including the estates which belonged to Major Monteith, to trustees.

One of the purposes of the trust was to employ the residue of the estate in the purchase of lands in Lanarkshire, to be entailed along with the estate of Stonebyres, on the series of heirs named in Major Monteith's disposition. On his death, General Monteith Douglas was the institute appointed under his trust-disposition. Mr Lindsay was appointed judicial factor on Major Monteith's estates.

The Court decided in 1859 that the trustees of James Monteith Douglas were bound to make a separation between the two trust-estates, and to administer them separately and in such a way that the amount of residue of the Major's estate might be ascertained and dealt with according to law, as applicable to the directions of entail set forth in his settlement. General Douglas executed an instrument of disentail, by which he acquired the whole of Major Monteith's estate in fee simple.

It was decided in 1864 that the estate of Stonebyres had not been purchased by James M. Douglas in conformity with the directions of Major Archibald D. Monteith, but that it was purchased in the *bona fide* belief that he was entitled to alter the directions of his brother; that the judicial factor of General Douglas, who, by disentail, had acquired right to the whole estate of Major Monteith in fee simple, was entitled to demand from the trustees a conveyance of the estate of Stonebyres, but only on condition that he paid the sums expended by James M. Douglas in improving the property; or that the judicial factor, in the event of his not electing to take the property, was entitled to payment of the price, "with any interest that may upon a just account be held to accrue thereon." The sole question now before the Court had reference to this interest.

Young and Shand for trustees of J. M. Douglas.

Lord Advocate and Adam in answer.

At advising—

Lord Benholme—The reclaiming note which we are now called upon to deal with is presented against an interlocutor of the Lord Ordinary, by which his Lordship repels the first and second objections for the trustees of J. M. Douglas, as contained in number 937 of process, and appoints the case to be enrolled with a view to farther procedure. The substance of the two objections to the report thus repelled is, that the accountant has proposed an accounting as between the objectors and General Douglas, in reference to the income or the interest due to the latter from the period of James Monteith's death in 1850 down to the present time, on the footing that on the capital of Major Monteith's estate (which has been ascertained by the accountant) interest should be allowed with or without annual accumulations. The accountant has proposed different rates of interest, and under alternative of annual accumulations or without them, leaving it to the Court to determine the rate of interest and the alternative as to accumulations.

Whilst the objectors object *in toto* to the principle of the report, and suggest various alternatives, some of which would exclude all accounting as between the parties during the foresaid period, and others point in various ways to a modification of the report, both as to the principle and as to the details, it seems unnecessary to specify these alternatives, since the interlocutor now under review repels the objections *in toto*.

The interlocutor itself does not select any of the alternative rates of interest proposed by that accountant, nor does it presently determine the question of accumulations. But the note of the Lord Ordinary intimates his opinion that both legal interest and accumulations should be given.

After the best consideration I can give to the case, I cannot concur in this. I think that justice requires that the whole period from 1850 downwards should not be dealt with on the same footing. It is to be observed that from 1850 till the decision of the Court, pronounced in 1859, by which it was determined that James Monteith had no power to deal with his brother the Major's estate, as substantially merged in his own. There was a complete uncertainty whether it would ever