petitioner under the supervision order will have the means of readily bringing it before the Court.

It appears to me therefore that we should grant the supervision order craved, and remit to a Lord Ordinary that, we should refuse the application for an additional liquidator, and direct the expenses of this petition to be expenses in the liquidation.

LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Order the voluntary winding-up of Adam, Sons, & Company (Limited), resolved on by the extraordinary resolution of 23rd May 1896, to be continued, but subject to the supervision of the Court in terms of the Companies Acts 1862 to 1890; further, direct all subsequent proceedings in the winding-up to be taken before Lord Stormonth Darling; remit to him accordingly: Find both parties entitled to expenses, and direct the same to be expenses in the liquidation; remit to the Auditor to tax the same, and to report to the said Lord Ordinary; *quoad ultra*, refuse the petition, and decern."

Counsel for the Petitioner—Salvesen—Horne. Agents—Wallace & Pennell, W.S.

Counsel for the Respondents—Lorimer. Agent—W. J. Haig Scott, S.S.C.

Thursday, July 2.

FIRST DIVISION.

[Sheriff of Aberdeen.

COOK *v.* SINCLAIR AND COMPANY.

Bankruptcy—Process—Voluntary Trustee—Action for Delivery of Bill of Exchange Assigned by Bankrupt within Sixty Days of Bankruptcy—Act 1696, *c.* 5—*Bankruptcy Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 10.

A debtor within sixty days of bankruptcy indorsed to one of his creditors a bill of exchange in payment of a prior debt. The bill was subsequently indorsed for value to a third party. Thereafter another creditor, who had been appointed trustee for creditors under a voluntary trust-deed, which gave him no power to reduce illegal preferences, raised an action in the Sheriff Court against the assignee of the bill for delivery, and failing delivery for payment of the contents of the bill.

Held that the action was incompetent, the pursuer having no title *qua* trustee, and not being entitled *qua* creditor to demand delivery or payment to himself.

Observations (*per* Lord M'Laren) on procedure under the Act 1696, cap. 5, as controlled by sec. 10 of the Bankruptcy Act 1856.

This was an action raised in the Sheriff Court by Alexander Skene Cook as trustee acting for behoof of the creditors of Marshall Thomson, chemist, Ballater, and as an individual creditor, against William Sinclair & Company, druggists, Aberdeen. No power to reduce illegal preferences had been given to the pursuer by the trust-deed appointing him trustee. The pursuer craved the Court to ordain the defenders "first, to deliver to the pursuer two bills for £100 each dated 16th October 1894, at twelve months' date, granted by Alexander Hadden to Marshall Thomson . . . and endorsed and delivered by the said Marshall Thomson to the said defenders on or about 17th October 1894; and failing their doing so within such period as the Court shall appoint, to ordain the defenders to pay to the pursuers the sum of £200 sterling with the legal interest thereof from the date of citation hereon till payment;" and secondly, to pay to him the sum of £8, 1s. 6d. as interest upon the two bills.

The pursuer averred that he was a creditor of Marshall Thomson to the extent of £12, and represented creditors to the extent of £600, and that Marshall Thomson became notour bankrupt on 24th November 1894; and pleaded that the endorsation and delivery of the two bills in question having been done by the debtor voluntarily within sixty days of notour bankruptcy in satisfaction or further security of a debt due to the defenders, was voidable at the pursuer's instance so far as it was to his prejudice as trustee for behoof of creditors and as an individual.

The defenders averred that the bills had been endorsed to them for value, and had been in turn endorsed by them to a third party for value received. They pleaded—"(1) No title to sue; (2) The action is incompetent."

The Sheriff-Substitute (DUNCAN ROBERTSON) on 11th July 1895 sustained the plea of incompetency.

Note.—"The pursuer in this case is trustee for behoof of the creditors of Marshall Thomson, chemist, Ballater, in virtue of a trust-deed granted in his favour on 9th November 1894. That trust-deed does not give the trustee any power to reduce illegal preferences. Pursuer also avers that he is a personal creditor of Marshall Thomson to the extent of £11, 4s. In this action he asks that the defender should be ordained to deliver to him two bills for £100 each dated 16th October 1894, at twelve months' date, granted by Alexander Hadden, chemist, Ballater, to Marshall Thomson, and alleged to be delivered by Marshall Thomson to the defenders Sinclair & Company, wholesale druggists, Aberdeen, and failing defenders doing so, to pay the contents of said bills, and also to repay the sum of £8, 1s. 6d. paid by Marshall Thomson to defenders on 23rd October 1894, being interest or discount on said bills. Marshall Thomson became notour bankrupt on 24th November 1894, and pursuer here says the bills were so endorsed to defenders in satisfaction or further security to them of a draft due by Marshall Thomson within

sixty days of bankruptcy, and so to the prejudice of the pursuer and other prior creditors.

"It is pleaded in defence that the bills having been endorsed to, and negotiated in *bona fide*, and for value, by the defenders, the pursuer should not get decree, but a preliminary plea or pleas are stated of no title and incompetency.

"It seems clear on authority—*Fleming's Trustees* v. *M'Hardy*, 19 R. 542—that the trustee as trustee under the trust-deed has no title to sue, no power being given to him in the deed. It seems equally certain that *qua* creditor he has a right to call the transaction in question, but the point seems to me here to be whether he can combine the two characters in the instance of his summons and cure the defect in his title as trustee by alleging the character of personal creditor. In my opinion it is inadvisable he should be allowed to do so. I do not think the action could go on with the instance as it stands, and I think it would be equally inadvisable, if not incompetent, to dismiss the action so far as at the instance of Mr Cook as trustee, and go on with it at his instance as an individual.

"I, of course, reserve his right to bring an action solely at his individual instance as a creditor if he should desire to do so."

The Sheriff (CRAWFORD) on 16th August recalled this judgment, and repelled the defenders' first two pleas so far as they applied to the pursuer's title *qua* creditor, but sustained them *qua* trustee.

A proof was subsequently allowed on the averments, and the Sheriff on 26th February 1896 pronounced the following interlocutor—"Finds (1) that Marshal Thomson, designed in the petition, became notour bankrupt on or about 24th November 1894; (2) that the two bills in question were indorsed by him voluntarily to the defenders in satisfaction of a prior debt and within sixty days before his bankruptcy; (3) that the said indorsation constituted an illegal preference under the Act 1696, cap. 5; (4) that at the date when the said preference was granted, the pursuer was a creditor of the bankrupt to the amount of £11, 4s.; (5) that the pursuer is trustee for behoof of the creditors of the bankrupt by virtue of the trust-deed libelled; (6) that it is averred by the defenders, and not disputed, that they have indorsed the said bills to a third party for value: Therefore decerns and ordains the defenders to pay to the pursuer as trustee foresaid the sum of £11, 4s. with interest as concluded for, being the amount of the debt due to him as a creditor of the bankrupt, to be held by him in trust, first for payment of any dividend or dividends upon the said debt to which he may be found entitled, and to the extent of the balance, if any, for behoof of the bankrupt's other creditors: Finds the pursuer entitled to expenses," &c.

Note.—"The facts of the case, the bankruptcy, the preference, and the pursuer's title as a prior creditor are not disputed. But it is maintained that there is no remedy competent to him under this petition. The difficulty about the proper form of decree, so far as it is real, does not in my view arise from the two capacities, easily separable, in which the pursuer has raised his action, but from a different cause. The prayer of the petition for payment of the value of the bills (failing delivery which is now out of their power) is not expressly restricted to his capacity as trustee, and may fairly cover a prayer for payment of whatever he is entitled to claim as an individual. But as he is a creditor on a bankrupt estate, it is difficult to ascertain how much that is. The pursuer's remedy would have been more simple had reduction been competent, but it is expedient and in conformity with the intention of the statutes that creditors on small estates should have in substance the same means of redress in the Sheriff Court as in the Court of Session. Therefore it would be wrong to be deterred by a technical difficulty which does not seem to be insuperable. The decree which I have given will, I think, meet the justice of the case."

The defender appealed to the Court of Session.

Argued for appellants—(1) The pursuer had no title to sue. He was clearly not entitled to do so as a trustee, having no authority under his trust-deed, and being out of the process as a trustee he was not entitled to get decree for the amount of his debt as creditor. (2) The action was incompetent. Clearly the original remedy was a reduction, which would throw the funds of the bankrupt open to the creditor's diligence. There was no precedent for such a direct action as this.

Argued for respondent—He had a title to sue as a creditor, and to ask the Sheriff to hand over the money due to him in trust to distribute to the other creditors, and to thus secure a specific security for his own dividend. This in point of fact had been done by the Sheriff. He might have given judgment for the whole amount claimed to be dealt with in this way, but the effect of his doing so for £11 would be to reduce the whole illegal preference, and would therefore benefit the whole body of creditors. The method adopted here of raising the question was the only practicable one. An action of reduction would not have been competent, since the bills had been endorsed to a *bona fide* third person.

At advising—

LORD M'LAREN—The ground of action in this case is that a bankrupt trader within sixty days preceding his bankruptcy assigned a bill of exchange in satisfaction of a prior debt. The action is instituted in the Sheriff Court of Aberdeenshire, and in it the pursuer, who is a voluntary trustee for creditors and also a creditor in his own right, claims delivery of the bill. It appears that the bill has been assigned for value, and in the judgment appealed from, the Sheriff, while rejecting the title of the voluntary trustee to sue on behalf of creditors, has sustained the title of the pursuer as an individual creditor, and decerned in his favour for the amount of his debt, subject to the condition that the sum shall be

held by the pursuer as trustee for distribution.

To a right understanding of the conditions of the case it is necessary to consider the effect of the Statute of 1696 upon the funds of the bankrupt which are alienated contrary to its provisions. I think it is consistent with the language of the statute and the decisions following upon it, that preferences of the character described are annulled when challenged by a creditor who was entitled to participate in the distribution of the debtor's estate at the time of the alienation, but this and no more is the remedy given by the Act of Parliament. The effect of the nullity is simply to restore the alienated subject to the position in which it was before the alienation. It becomes assets of the bankrupt's estate, and may be attached by the diligence of the creditor who has established the nullity, and also by other creditors whose claims are prior in time to the alienation. The reduction of a fraudulent alienation does not give the creditor any right against the assignee to require payment or delivery of the subject to himself. Such a proceeding would amount to establishing a new preference in place of the one which was cut down, and would be entirely contrary to the spirit and purpose of the statute. I do not doubt the competency of combining with the action of reduction a conclusion directed against the bankrupt for payment of the creditor's claim, but the decree obtained under such a conclusion would only enable the creditor to use diligence against the fund. If his claim were already constituted he might at once proceed to use diligence against the fund which he had restored to the estate; other creditors entitled to the benefit of the reduction might do the same, and the equality of distribution which is the principle of all bankruptcy legislation would then be secured by virtue of other statutes establishing *pari passu* preferences amongst arresters and adjudging creditors. The action before us contains no conclusion against the bankrupt for payment of the pursuer's claim, and accordingly, if this were a competent action for enforcing the nullity established by the Act of 1696, the only decree which the pursuer could obtain would be a decree annulling the indorsation of the bill in question, and restoring the pursuer and all other creditors in the same position against the injury which had been done to them by the withdrawal of this part of their debtor's estate.

But I am unable to concur in the opinion of the Sheriff that this is a competent action even to the limited effect which I have explained. The tenth section of the Bankruptcy Act 1856 provides that "deeds made void by this Act, and all alienations of property by a party insolvent or notour bankrupt which are voidable by statute or at common law may be set aside either by way of action or exception." The effect of this provision is that if the title of the alienee is pleaded in defence to an action otherwise competent, the Act of Parliament or the rule of the common law may be pleaded in reply. For example, if goods are alienated by a fraudulent contract but are undelivered in the hands of the bankrupt, the Act of 1696 may be pleaded in answer to the defence that the bankrupt or anyone holding in his right is under contract to deliver to the favoured creditor. Or again, the Act may be pleaded in defence to an action for delivery at the instance of the favoured creditor. But in the circumstances of the present case the challenging creditor has no action against the indorsee of the bill for payment or delivery of the bill to himself, nor has he any action to compel payment to a voluntary trustee unless such trustee represents the whole body of the creditors interested, in which case only a trustee duly authorised to reduce preferences might be entitled to claim the fund. The creditor's right is to have the indorsation reduced, in order that his diligence may not be impeded, and this right can only be made effectual by an action of reduction in the Court of Session. I am therefore of opinion that the appeal should be sustained and the action dismissed as incompetent.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court sustained the appeal and dismissed the action as incompetent.

Counsel for the Pursuer—Craigie. Agents—Philip, Laing, & Company.

Counsel for the Defenders—W. Campbell—Abel. Agent—Andrew Urquhart, S.S.C.

Friday, July 3

FIRST DIVISION.

POWELL *v.* LONG.

(*Ante*, p. 380—February 25, 1896.)

Process—Caution for Expenses—Bankrupt Pursuer—Damages for Slander.

In an action of damages for slander by an undischarged bankrupt, the Court, after issues had been adjusted, *ordained* the pursuer to find caution for expenses.

In this case the First Division on February 25th 1896 adjusted issues for the trial (see *ante*, p. 380). The pursuer was an undischarged English bankrupt.

On 26th June the defender made a motion that the pursuer should be ordained to find caution for expenses before proceeding with the action. He averred that the pursuer had incurred considerable debts in Glasgow, and had gone away leaving no address. The Court ordered intimation of the motion to be made to the pursuer. This was accordingly done by registered letters addressed to the pursuer's last known address, but the letters were returned unopened. On 3rd July the defender renewed