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

his application that the pursuer should be ordained to find caution.

LORD PRESIDENT -The pursuer is an undischarged English bankrupt, and the question is, whether he should be allowed to proceed in the action without finding caution. It is necessary for the determination of that question to consider the circumstances of the case and the nature of the action. On a recent occasion we had to give careful consideration to the quality of this action of damages for slander, and we were not favourably impressed with its *bona fides*, as intended for the vindication of the pursuer's character from the charges which had been made against him. Taking advantage of his technical right to sue on certain isolated charges, he did not face up to the real attack made upon his character. I mention this in consequence of our obligation to consider the nature of the pursuer's claims in his action. We are also aware of the recent occasions when, on questions as to the time for trying this action, the pursuer has evinced no eagerness to meet the jury. We are now told that he has left Glasgow in debt, and without leaving an address.

Accordingly, in the whole circumstances, I think this is a case in which we should ordain the pursuer to find caution within eight days.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court ordered caution to be found by the pursuer within eight days.

Counsel for the Defender—Crabb Watt. Agents—Cuthbert & Marchbank, S.S.C.

Friday, July 3.

FIRST DIVISION.

[Edinburgh Dean of Guild Court.

LORD SALTOUN *v.* EDINBURGH MERCHANT COMPANY.

Dean of Guild—Process—Record—Petition for Warrant—Written Objections Lodged for First Time on Appeal—Competency—Remit.

In a petition for a warrant to a Dean of Guild Court, the corporation of the burgh, which was called as respondent, was represented before the Dean of Guild by the Burgh Engineer, who stated verbal objections to the petition, but lodged no written answers. The Dean of Guild having refused the petition, the petitioners appealed, and the corporation proposed to lodge in the Court of Session written answers embodying their verbal objections. The petitioners objected to the answers being received at this stage, maintaining that they ought to have been lodged in the Dean of Guild Court.

The Court *allowed* the answers to be received, but *remitted* the cause to the Dean of Guild, holding that the questions raised in the answers fell within the jurisdiction of the Dean of Guild, and that the petitioner was entitled to have a judgment upon them in the Dean of Guild Court.

A petition was presented in the Edinburgh Dean of Guild Court by Lord Saltoun and others for warrant to construct a room over a portion of the flat roof of the present building forming the lobby connecting 74 Queen Street with the hall at the rear. In the course of the proceedings the Burgh Engineer appeared on behalf of the Corporation of Edinburgh, and made verbal objections to the petition.

The Dean of Guild refused warrant in respect that all the open space presently existing was required for the proper lighting and ventilation of the premises.

The petitioners appealed to the Court of Session.

Answers to the petition were then submitted on behalf of the Corporation of Edinburgh, in which it was contended that the appeal ought to be dismissed, as the area on which it was proposed to construct the buildings was already sufficiently covered, and the proposed buildings would diminish the space which, in the discretion of the Dean of Guild Court, was required for the purposes of the light and ventilation of the street tenement belonging to the petitioners.

The petitioners objected to the answers being received at this stage.

Argued for petitioners — The answers should have been lodged in the Dean of Guild Court, so as to enable them to be dealt with there. They raised questions within the jurisdiction of the Dean of Guild, upon which the petitioners were entitled to have his judgment before coming here. It would be inflicting unnecessary expense upon them to allow the answers to be received at this stage. Accordingly the case should be remitted to the Dean of Guild Court to make up a record.

Argued for respondents—The course proposed was one in conformity with the practice of the Court—*Stewart* v. *Marshall*, July 20, 1894, 21 R. 1117. The same course had been followed in *Glasgow Coal Exchange Company* v. *Glasgow City & District Railway Company*, July 20, 1883, 10 R. 1283, at 1287.

LORD PRESIDENT—I should be sorry to do anything to impose upon the town expense and trouble to add to the formal procedure in Dean of Guild applications, and probably in the greater number of cases it is unnecessary. But we must consider the rights of proprietors, and according to the showing of the town, what has been done here is that the town, having an answer to the application in the Dean of Guild Court, withholds it, and the opposite party comes to this Court. If we order a record to be made up here, two very undesirable things will happen—first, we will not have the advantage of a judgment from the Dean of