[28*th August* 1833.]

No. 4.

J. PATTISON junior (Blincow's Trustee), Appellant.—*Solicitor General* (*Campbell*)—*Wilson.*

A. ALLAN and COMPANY, Respondent.—*Lord Advocate* (*Jeffrey*)—*Sandford.*

Bankruptcy — *Stat.* 1696, *c.* 5.—1. A party who acceded to a composition contract on condition that all the creditors to a certain amount should also accede within a limited time, held (affirming the judgment of the Court of Session) not bound, the conditions not being complied with. 2. Issue sent to be tried by a jury, whether certain payments, and indorsations of bills, by a debtor, within sixty days of his bankruptcy, to a banker, were made in the ordinary course of trade.

Process.—1. Observations on the form of preparing records. 2. A supplementary action of reduction, having reference to a transaction falling under the act 1696, c. 5., but not libelling the act, and containing no reductive conclusions, dismissed as inept.

1st Division.

Lords Newton and Moncreiff.

WILLIAM and Henry Blincow, silk merchants in Glasgow, were in the custom of doing business with Allan and Company, bankers in Edinburgh. In July 1825 the Blincows stopped payment, and offered a composition of 5*s.* in the pound, provided every creditor whose debt exceeded 20*l.* should agree to it within a month. Allan and Co. were creditors for 500*l.*, and acceded to the proposition; but it was alleged that the concurrence of all the other creditors had not been obtained, and

that the Blincows settled with them in the best way they could. On the 22d of August 1825 William Blincow applied to Allan and Company for the loan of 2,000*l.*, for which, as well as for the old debt of 500*l.*, he offered to grant a bond, with his two brothers, Valentine and Robert, as cautioners. To this request Allan and Co. agreed; and on the 28th of September a bond was executed for the loan of 2,000*l.*, and the prior debt of 500*l.*, payable by three instalments of 833*l.* 6*s.* 8*d.* each; the first being payable on the 4th of October 1826, the second on the 4th of April 1827, and the last on the 4th of October of the same year.

William Blincow thereafter began business as a silk merchant in Edinburgh, under the firm of William Blincow and Co., but of which he was the sole partner. He opened two accounts with Allan and Co., the one being relative to the bond, and the other an ordinary account current. On this latter account he operated by putting the cash and the bills which he received in the course of his trade into the hands of Allan and Co., (who gave him credit for the amount, less the discount of the bills,) and by drawing out money by cheques.

When the first instalment on the bond became due, on the 4th of October 1826, it was paid by a sum of 833*l.* 6*s.* 8*d.* being transferred from the account current to the bond account. Early in 1827 Allan and Co. having declined discounting Blincow's bills to the extent which he wished without a guarantee, his brother Valentine bound himself, on the 25th of February, to see them paid to the extent of 500*l.*

The second instalment fell due on the 4th of April 1826, but was not paid; and on the 25th of that month

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Allan and Co. obtained from Blincow's two brothers an obligation "to pay you regularly any bills you may "discount from this date for William Blincow and Co. "that may be dishonoured, or only part paid by the "acceptors of them, and all expenses that may be "incurred." On the following day (being the 26th) Wm. Blincow drew upon Allan and Co. for 494*l.* 12*s.* 6*d.*; and a bill was returned dishonoured for 152*l.* 14*s.* These two sums (making 647*l.* 6*s.* 6*d.*) were put to his debit in the account current. On the 27th he indorsed bills to Allan and Co. to the amount of 1,001*l.* 15*s.*, which, after deducting discount, left a sum of 979*l.* 12*s.* 8*d.*, which was put to his credit in the account current. He again indorsed bills to them upon the 30th, so that upon that day there stood a balance in his favour of 811*l.* 14*s.* 9*d.* in the account current. On the 5th of May he transmitted to them from Aberdeen an order for 200*l.*, to be placed to his credit in the account current; and wrote to them that he should "feel obliged by your writing off the second instalment "of my bond, due to you April the 4th, and debit "my account current with the amount." This letter was received on the 7th; and on the same day a cheque for a sum equal to the instalment (being 833*l.* 6*s.* 8*d.*, and 45*l.* 8*s.* 4*d.* of interest) was presented to Allan and Co. by his brother Valentine, and the amount was transferred from the account current to the credit of the bond account. A balance still stood in Blincow's favour on the account current; and on the 12th of May he discounted bills with Allan and Co. to the extent of 221*l.* 4*s.* 8*d.*, and paid in cash 342*l.* 8*s.* 10*d.*, which, with an acceptance by him in favour of his brother Valentine for 155*l.*, and indorsed by the latter to Allan

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and Co., left at his credit 848*l.* On the same day Valentine presented a cheque by Wm. Blincow for a sum equal to the third instalment, being 833*l.* 6*s.* 8*d.*, and 5*l.* 6*s.* 8*d.* of interest; and at his request the amount was carried from the account current to the credit of the bond account, in liquidation of the instalment to become due on the 4th of October. On the 30th Wm. Blincow's estates, both in his individual and social name, were sequestrated under the bankrupt act, and the appellant Pattison was elected trustee.

An action of reduction was then brought by Pattison, first, of the bond to the extent of 375*l.* (being the difference between the old debt of 500*l.* and the composition), on the footing that Allan and Co. were bound by their accession to the composition arrangement; secondly, of the indorsation, by Wm. Blincow, of the bills and of the cheques granted by him between the 26th of April and the 7th of May 1827, whereby the second instalment had been paid, on the ground that they had been made and delivered within sixty days of the bankruptcy; and, thirdly, of the indorsations and cheque by Blincow, by which the last instalment had been paid.* These two latter conclusions were rested upon the act 1696, c. 5.; but although it was alleged that the indorsations and cheques had been given by Blincow to defraud his other creditors, and bestow a preference on Allan and Co., yet there was no allegation that Allan and Co. were either participant in the fraud, or were aware that he was in bankrupt circumstances.

* In the summons the bill of 155*l.* accepted by Blincow in favour of his brother Valentine, and indorsed by him, was erroneously described as accepted by Valentine in favour of Blincow, and indorsed by him to the respondents.

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Allan and Co. pleaded in defence, 1. That the appellant had no title to object to the bond having been granted for the debt of 500*l.*, because the condition of the accession had not been complied with, and the whole arrangement had come to an end; and, 2. That as the bills had been indorsed to and discounted with them, and the cheques granted in the ordinary course of business as bankers, and as there was no allegation that these documents had been obtained for any fraudulent purpose, they did not fall under the act 1696; and at all events Allan and Co. were entitled to retain them in security and payment of the bond debt.

The Lord Ordinary (Newton) reported the case, and at the same time issued this note:—" The Lord Ordinary " does not think the pursuer's claim for repetition of " the 375*l.* well founded. The agreement by the defen- " ders to accept of the composition was clearly con- " ditional, and the condition having failed it was not " binding upon them; they were therefore at liberty " to include their full debt in the bond they afterwards " took.

" The other question, arising from the payment of the " second and third instalments of the bond, is attended " with more difficulty, as these payments were in effect " in a great measure made by the indorsation of bills, " which were not payable for a considerable time after- " wards. Had the defenders not been the bankrupt's " ordinary bankers with whom he was in use to dis- " count his bills, there would have been little doubt " that the transaction, although in the form of a dis- " counting of the bills, and an application of the pro- " ceeds, by order of the bankrupt, to the payment of " his debt, would have been reducible, as falling under

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" the spirit of the act. It is said, however, by the
" defenders, that being his ordinary bankers they dis-
" counted the bills in question in the course of trade,
" and only applied the balance which stood in his favour
" on their running account to the payment of the
" instalments of the bond, in consequence of his order to
" that effect; that the pursuer has not averred on the
" record that they were in the knowledge of the im-
" pending bankruptcy, and is not entitled to assume in
" argument that they acted on such knowledge.

" It is not necessary, however, to the operation of
" the act 1696, that the creditor shall be proved to
" have been in the knowledge of the impending bank-
" ruptcy, or guilty of fraud in accepting of the security.
" It is enough if the debtor intends to favour him, and
" to give him a preference over his other creditors.
" Now it seems, from the circumstances, pretty obvious
" that the debtor meant to give such a preference, if
" not through favour to the defenders, at least through
" favour to his own brothers, the cautioners in the bond;
" and that one of them, Valentine Blincow, who per-
" sonally managed the transaction as to the payment
" of these instalments, was aware of his brother's situa-
" tion, and transacted the whole business for the pur-
" pose of relieving himself and the other cautioner.
" Indeed, if they were able to fulfil their engagement
" under the bond, they had the real interest, and the
" effect of the payment was to secure them a prefer-
" ence. In such circumstances, and considering that
" the third instalment of the bond was not payable for
" some months afterwards, the Lord Ordinary thinks
" it questionable if the transactions can be said to be
" so clearly in the usual course of trade as to form an

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" exception to the rule of the statute. He has there-
" fore thought it proper to report the case, that the
" opinion of the Court may be obtained."

The Court (3d December 1828) pronounced this interlocutor:—" Find that in the circumstances of the " case it was legal for the defenders, Alexander Allan " and Co., to take from William Blincow the bond " dated the 28th day of September 1825 years, com- " prehending therein the sum of 500*l.* sterling, being a " debt acknowledged to have been formerly due by " Henry Blincow; therefore sustain the same, and " assoilzie the defenders from the claim of 375*l.* sterling, " made relative thereto: Also find that the payment " on the 7th day of May 1827 of the sum of 833*l.* 6*s.* 8*d.* " sterling, and 45*l.* 8*s.* 4*d.* sterling of interest thereon, " made to account of the second instalment of the " foresaid bond, the same being part due from the 4th " day of April preceding, and in the way and manner " stated, was a legal and valid payment; therefore sus- " tain the same, and assoilzie the defenders from the " claim relative thereto, and decern: But, in the cir- " cumstances of the case, particularly the situation of " William Blincow, and the third instalment of the " bond not becoming due till the 4th day of October " 1827, find that the payment of 833*l.* 6*s.* 8*d.*, and " 5*l.* 6*s.* 8*d.* sterling of interest accruing thereon, made " on the 12th day of May 1827 years, by means of a " cheque or order, was not legal, and is to be con- " sidered as an evasion of the statute 1696; therefore " sustain the reasons of reduction quoad said payment, " and reduce and set aside the said cheque or order, " and find that the said sums are to be replaced to the " account current between the parties, in the same way

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" and manner as if the said order or cheque had never
" been granted; and decerned and declared accordingly:
" Further find that the defenders, besides being com-
" mon creditors by bond, were also the ordinary bankers
" of William Blincow and Co.; that they transacted
" their business and discounted their bills in the ordinary
" way of trade, and that such transactions do not fall
" under the sanction of the statute 1696; and there-
" fore assoilzie the defenders on that head, and decern;
" but find that they are bound to account to the
" trustee for the creditors of William Blincow and Co.
" for their intromissions in the ordinary way, reserving
" the rights of the defenders as ordinary creditors, and
" also the rights of all parties interested, as accords of
" the law: And for ascertaining the whole of said
" matters, remit to the Lord Ordinary to proceed and
" do further in the case as to his Lordship shall seem
" proper, reserving all questions of expenses until the
" final issue of the cause."*

When the case came before the Lord Ordinary the respondents maintained that they were entitled to retain the above sums referred to in the concluding part of the interlocutor, in satisfaction of the debt due to them; and his Lordship, having doubts as to the meaning of part of the interlocutor, reported the case to the Court, with this note: — "The Lord Ordinary is doubtful
" whether that part of the interlocutor of the Court
" which finds, 'that the defenders, besides being com-
" 'mon creditors by bond, were also the ordinary
" 'bankers of William Blincow and Co.; that they
" 'transacted their business and discounted their bills in

* 7 S. & D., 124.

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" ' the ordinary way of trade, and that such transac-
" ' tions do not fall under the sanction of the act 1696;
" ' and therefore assoilzie the defenders under that
" ' head, and decern,' was meant to apply not only to
" the bills lodged in their hands previously to the 12th
" of May 1827, when the cheque which has been re-
" duced was presented, and the bond delivered up, but
" also to the cash and bills delivered to the defenders
" by the bankrupt's brother, Valentine Blincow, on that
" day. If that cash and these particular bills are,
" under the interlocutor, to be held as received in the
" ordinary course of trade, and the only matter to be
" determined under the remit be, whether the defenders
" were or were not entitled to retain out of the balance
" thus in their hands what was required for payment
" of the third instalment of the bond, the Lord Ordinary
" considers it to be quite clear that they were so en-
" titled, and that the pursuers can take nothing by the
" reduction of the cheque.

" If, on the other hand, it is still open to him to consider
" whether these particular funds were or were not
" received in the ordinary course of trade, he is dis-
" posed to think it presumable, from the whole circum-
" stances of the case, that they were placed in the
" defender's hands, not in the ordinary course of trade,
" but for the express purpose of being applied, through
" the medium of the cheque, to the extinction of the
" sum in the bond; and that unless this object had
" been in view they would not have been received
" at all.

" But as the parties differ as to what they conceive
" to have been the meaning of the Court in that part
" of the interlocutor which is above quoted, and it

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" does not appear so clear in itself to the Lord Ordi-
" nary as to enable him to say which is right, he has
" thought it advisable to report the matter on cases."

The Court thereupon (12th June 1829) " remitted
" to the Lord Ordinary to inquire and decide whether
" the funds in the defender's hands, against which the
" cheque for the amount of the third instalment of the
" bond was presented, were paid to the defenders in the
" fair and ordinary course of trade, or were deposited
" with the view and for the purpose of affording to
" them an undue preference over the other creditors
" of the bankrupt."*

The Lord Ordinary then remitted the case to the Jury Court; and an issue was sent for trial to a jury,
" Whether, in terms of the interlocutor of the First
" Division of the Court of Session, dated 12th June
" 1829, the funds against which the said cheque was
" presented were not paid to the defenders in the fair
" and ordinary course of trade, but were deposited
" with the view and for the purpose of affording to
" the defenders an undue preference over the other
" creditors of the said William Blincow and Co.?"
The jury found, " in respect of the matters proved
" before them, that the funds against which the cheque
" was presented were not paid to the defenders in
" the fair and ordinary course of trade, but were de-
" posited with the view and for the purpose of afford-
" ing to the defenders an undue preference over the other
" creditors of William Blincow and Co."

At the trial it appeared that the funds against which the cheque was presented had arisen from indorsations

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* 7 S. & D., 753.

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of bills, by William Blincow, only to the extent of 354*l.* 4*s.* 5*d.*, while the rest consisted of cash payments to the amount of 342*l.* 8*s.* 10*d.*, and an indorsation by Valentine Blincow of the bill drawn by him on and accepted by the bankrupt for 155*l.*

As the summons concluded only for reduction of indorsations of bills by Wm. Blincow, and for repetition of the contents of the bills so indorsed, (which it was thought could not apply to the bill indorsed by Valentine although both parties had hitherto acted on the footing that it was correctly described), the appellant raised a supplementary summons, setting forth the state of the original action, and the verdict of the jury, as establishing that the funds against which the last cheque was presented had been deposited in the respondents hands for the purpose of creating an undue preference; that, notwithstanding, the respondents intended to object to decree being pronounced against them, " in " respect the pursuer in his libel only concludes for " delivery of bills indorsed to the defenders, or for pay- " ment of their contents, but does not conclude for " any sums of cash or money deposited by the bank- " rupt in order to meet the cheques, by means of " which the full payment of the second and third " instalments of the bond was to be made to the " defenders." The appellant therefore concluded, that in addition to the conclusions of the foresaid action, and as supplementary thereto, it should be declared, " that the pursuer was entitled to repetition of any " funds paid into the defender's hands within sixty " days of the sequestration, and not in the fair and " ordinary course of trade; that the funds against " which the third cheque was presented had been so

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" paid in, and that the defenders should be decerned to " repeat them." He concluded also, that the actions should be conjoined; but there were no reductive conclusions, either on the act 1696 or otherwise.

In defence it was maintained :—1. That as the record had been closed in the original action, and it had been terminated by a verdict, no amendment of the libel was competent, and therefore the supplementary action could not be conjoined with it; 2. That neither could the latter be sustained as an independent action, for although the transaction was challengeable only on the act 1696, yet it did not libel on that act, and there was no reductive conclusion; and 3. That it was not competent in the original action to decern for repetition of payments in cash or bills not indorsed by the bankrupt.

In the original action, the Lord Ordinary (Moncreiff), pronounced this interlocutor:—" Finds that " the funds against which the cheque was presented " were not paid to the defenders in the ordinary " course of trade, but were deposited with the view " and for the purpose of affording to the defenders " an undue preference over the other creditors of " William Blincow and Co.; that under the verdict, " as applied to the summons in this action, there are " termini liabiles for reducing the transaction by " which bills enumerated in the summons were indorsed " by William Blincow and Co. to the defenders, and " funds were thereby deposited in their hands, against " which the cheque in question was made and presented: " Finds it sufficiently ascertained that there were funds " in their hands, created by the indorsation of such " bills, to the amount of 354*l.* 4*s.* 5*d.*, and that the

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" pursuer is entitled to decree of reduction, and for " payment to that amount; reduces, decerns, and " declares accordingly, and decerns for payment of the " said sums of 354*l.* 4*s.* 5*d.*, with interest, at the usual " rate then allowed by the banks, from and after the " 14th day of May 1827, the date of presenting the " cheque granted as the amount of the third instalment " of the bond, till the date of the execution of the " summons, and thereafter at the rate of five per cent. " till paid: But in respect that there is a difficulty " in applying the interlocutors of the Court, and the " verdict of the jury, to the conclusions of the sum- " mons in this action, so as to give any decree to a " greater extent, (which difficulty the pursuer has en- " deavoured to obviate by a supplementary action " raised after the issue in this cause had been tried, and " a verdict returned,) makes avizandum to the Court, " with this process quoad ultra, and appoints the parties " to lodge, print, and box short minutes of debate, ex- " plaining their several views as to this part of the cause."

His Lordship added this note:—" The Court, by " final interlocutors, sustained the defence as to the " second instalment of the bond, but reduced the " cheques drawn for the third instalment. But a ques- " tion remained as to the right of the defenders to " retain the funds in their hands, independent of the " cheque or the payment of it. Holding this to be a " separate case, the Court ordered an issue for trying " it; and the issue, in conformity to the interlocutor, " was so expressed as to apply to the whole funds " against which the cheque was drawn. The verdict " is in the same terms. After getting this verdict, the " pursuer, on looking into his summons, thought it

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" imperfect, or at least of doubtful effect. After the " cheque had been reduced, the question was, whether " the pursuer could also, under the act 1696, reduce " the transaction by which the funds were deposited, " so as to bar the plea of retention; and having this " in view, he had concluded in his summons for reduc- " tion of the indorsations of a great number of bills " particularly enumerated. It now turned out that " a considerable part of the funds in the hands of the " defenders had not arisen from the indorsations of " these bills by Blincow and Co., in so far as a sum " of 342*l.* 8*s.* 4*d.* had been paid to the defenders in " cash, and the last bill mentioned did not exist in the " form stated, though a bill of the same amount, ac- " cepted by Blincow and Co., and drawn by Valentine " Blincow, who was no partner of the company, but " one of the cautioners in the bond, had been indorsed " by him to the defenders. But the summons con- " tains no conclusions which can be applied to the " transaction by which the funds were deposited, other- " wise than as they were supposed to arise from the " indorsations of the bills particularly stated by Blin- " cow and Co. To supply this defect the pursuer " raised a supplementary action, and moved that it " should be conjoined with this action. The Lord " Ordinary has seen difficulty in conjoining a new " summons with an action which has already termi- " nated in a verdict, and also thinks it impossible to " make the summons in the original action effective " to the extent of the terms of the verdict, without " holding it to apply in a manner contrary to the ad- " mitted state of the fact. He has therefore thought " it advisable to give decree, as far as the summons

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"clearly admits of, and quoad ultra to report the case, in "order that the Court may determine the effect of the "verdict. If the Court should find the difficulty in-"superable in this process, it will remain to be considered "how far the case can be extricated under the supple-"mentary action. There may be more doubt as to the "application of the original summons to the bill for 155*l.* "than as to the cash payment; but, there being "great difficulty in that also, the Lord Ordinary has "thought it necessary to leave the point open."

In the supplementary action the Lord Ordinary at the same time ordered minutes of debate for the information of the Court as to the state of the cause, particularly as to the conjunction of the processes.

His Lordship added this note:—"In a note to an "interlocutor of the same date in the original process, "the Lord Ordinary has adverted to the difficulties "arising from the form of the summons in the original "action, and the objection to conjoining them after "verdict. If this supplementary summons should be "considered entirely by itself, in so far as its object is "not attained by the previous summons, the Court "will then have to decide in what manner it ought to "be proceeded in. It may be a question, whether the "verdict in the other cause between the same parties "might be held by the Court as conclusive evidence,— "in point of fact, excluding the necessity of further "proof,—and whether they might then consider the case "of the money which was deposited in cash, and the bill "indorsed by Valentine Blincow, as making a case of law "to be judged of on the assumption of the finding of the "jury in point of fact. This may be attended with "difficulty. But supposing that difficulty to be overcome,

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" there would still be this separate difficulty in point of " form, that the supplementary action contains no re- " ductive conclusion; and this being a challenge depend- " ing entirely on the act 1696, it may be impossible to " reach the act of paying or depositing the money within " the sixty days, without such a reductive conclusion."

Against the interlocutor in the original action the respondents reclaimed, stating that two of the bills falling under the first summons had been eventually dishonoured to the extent of 118*l.* 19*s.*, and that the decree by the Lord Ordinary for the sum of 354*l.* 4*s.* 5*d.* rested upon the erroneous supposition that these bills had been paid.

To this it was answered, that as the allegation that the bills had been dishonoured was not res noviter veniens, it could not now be competently stated.

The Court " sustained the objection to the supple- " mentary summons, that it contains no reductive con- " clusion, dismissed the same, and decern, reserving " to the pursuer to bring a new action of reduction and " repetition, if otherwise competent;" but " remitted " to the Lord Ordinary to hear parties on the defen- " der's claim for deduction of the sum of 118*l.* 19*s.*, " upon which they have not been heard before his " Lordship; quoad ultra adhered to the interlocutor " reclaimed against, and refused the desire of the note, " and decerned, and allowed decree to go out, and be " extracted, ad interim, for the sum decerned and found " due in the Lord Ordinary's interlocutor, under de- " duction of the foresaid sum of 118*l.* 19*s.*, and cor- " responding interest; reserving all questions of ex- " penses incurred in the Court of Session."*

* 9 S. & D., 317.

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Under this remit the appellant proposed to resume the discussion as to the bill for 155*l.*, which was objected to by the respondents on the ground that the interlocutor exhausted the cause, except as to the 118*l.* 19*s.* The appellant answered, that no judgment had been pronounced by the Lord Ordinary in regard to the bill for 155*l.*; that the interlocutor of the Court did not decide the question as to it, and therefore it must be held as embraced in the remit. The Lord Ordinary assoilzied the respondents from the claim of 118*l.* 19*s.*; " and, in respect that the interlocutor of the Court con- " tains no remit as to any other matter, refused to allow " any further discussion or investigation relative to the " bill of 155*l.* mentioned in the summons and plead- " ings, as demanded by the pursuer; and the Lord " Ordinary, considering the merits of the case to " be exhausted by the interlocutor of the Court, " and this judgment on the remit, and having " heard parties procurators on the question of ex- " penses reserved by all the interlocutors, makes " avizandum."

The appellant reclaimed, contending that the question relative to the 155*l.* bill remained still to be disposed of; and the Court (19th May 1831) remitted to the Lord Ordinary to hear parties in regard to it.* Under this remit the Lord Ordinary found (1st June 1831), that the appellant was " not entitled to repe- " tition of the amount of the bill for 155*l.* as libelled " in the present action; reserving his claim for said sum " in any other action which he may be advised to raise,

* 9 S. & D., 599.

" and to the defenders their objections thereto as " accords."

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Pattison then appealed.

Appellant.—1. The repondents acted unlawfully in stipulating, as a consideration for their advancing the sum of 2,000*l.*, that the bankrupt should grant bond to them for the sum of 2,500*l.*, so as to include the old debt of 500*l.* due by the estate of William and Henry Blincow, and which the respondents had agreed to discharge on payment of a composition. The bond, therefore, ought to be reduced to the extent of 500*l.*, or at all events to the extent of 375*l.*, being the excess above the stipulated composition; and payment thereof having been obtained by the respondents from the estate of William Blincow and Co., who were not the proper debtors, the appellant, as trustee on that estate, is entitled to repetition for behoof of the creditors.*

2. The second instalment of the bond having been past due when it was paid, on the 7th of May 1827 (which was within twenty-three days of the sequestration of William Blincow and Co.'s estate), and the indorsations of the bills, and the cheques presented against the proceeds thereof, being all made and granted within sixty days of the sequestration, by means of which the payment was accomplished, are reducible under the act 1696, as conferring an undue preference in securing payment to the respondents of their prior debt; and they are therefore

* Junner v. Caddell, 15th Feb. 1822, 1 S. & D. p. 325, new ed. 301; Arrol v. Montgomery, 24th Feb. 1826, 4 S. & D. p. 499, new ed. p. 504.

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liable to the appellant in repetition of the second instalment of the bond, and interest thereof.*

3. It being now finally established by the verdict of the jury in regard to the third instalment, "that the "funds against which the cheque was presented were "not paid to the defenders in the fair and ordinary "course of trade, but were deposited with the view and "for the purpose of affording to the defenders an undue "preference over the other creditors of William Blin-"cow and Co's.," the appellant was entitled to decree for repetition of the full amount of the undue preference; or at all events, if it should be held that the conclusions of the action are too limited to authorize decree being pronounced for any sums, except the contents of the bills libelled in the summons, this defect was remedied by the supplementary action, which ought to have been conjoined with the original one, after which decree should have been pronounced in the conjoined actions for the full amount of the third instalments.

The objection that the supplementary summons contains no reductive conclusion is unfounded, because the object of it was to supply an alleged defect in the original action by introducing a declaratory conclusion to have it found that the appellant was entitled to repetition from the respondents of any funds deposited in their hands by the bankrupt within sixty days of the sequestration, not in the fair and ordinary course of trade, but for the purpose of affording them an undue preference over the other creditors. Such a conclusion was proper, because the summons in the original action only concluded for repetition of funds created by the indorsation

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* Spier v. Dunlop, 30th May 1827, 5 S. & D. 729. (new ed. 680.)

and discounting of bills; whereas it turned out that a part of the funds, by means of which the second and third instalments of the bond were provided for and paid within sixty days of bankruptcy, consisted of payments or deposits in cash made in order to replace part of the bill proceeds that had been applied to other purposes, —the substituted deposits being made in time to meet the cheques granted for the respective amounts of the two instalments. For this purpose no additional reductive conclusions were necessary in the supplementary action, those in the original action being sufficiently broad and extensive. Indeed the act 1696 contemplates the necessity only of a process of declarator of bankruptcy and repetition of the preference granted, more especially when it is accomplished not by means of formal deeds of alienation, but where, as in the present case, no deed or written contract exists which would fall to be reduced in order to pave the way for the claim of repetition of the amount of the undue preference.

Neither is there any foundation for the objection that the supplementary action cannot be conjoined with the original one, in respect the record had been closed, and proof led before the supplementary summons was raised. At all events, if it be incompetent to conjoin them the appellant is entitled to obtain decree in the supplementary action for payment of such sums paid to or deposited in cash by the bankrupt with the respondents, not reached by the first action, as have been or may be still shown to have been so deposited for the purpose of giving the respondents an undue preference over the other creditors of the bankrupt.

Respondents.—1. The summons, in so far as it con-

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cludes for reduction of the bond to the extent of 375*l.*, is not founded on the act 1696, c. 5., but on fraud at common law. The appellant assumes that the composition of five shillings per pound offered by William and Henry Blincow was, in so far as their creditors were concerned, unconditional; and then he deduces the plea in law, that by having acceded to the offer the missive which was subscribed by the mandatories of the respondents is binding on them until set aside by a process of reduction. But the offer which was made by William and Henry Blincow was coupled with this condition, " that every creditor whose debt ex- " ceeds 20*l.* shall accept the same within one month," and the appellant admits that all the creditors whose debts exceeded 20*l.* did not accept the offered composition within a month from the time when the offer was made; and therefore the plea by which it is alleged the respondents were bound by that offer is groundless. Besides, the appellant has no title to sue for repetition of the difference between the amount of the composition offered by William and Henry Blincow and the amount of that debt itself. He does not in any way represent the creditors of William and Henry Blincow; he is the trustee of the creditors of William Blincow alone, and their debts were contracted subsequently to the bond.

2. The payment of the second instalment of the bond is challenged exclusively as being contrary to the statute 1696. The bond is not alleged to be tainted with fraud, or to be anywise objectionable at common law; and the justice of the debt for which it was granted has never been disputed. But the respondents, besides being creditors to the amount of the bond by William

Blincow, were also his ordinary bankers, and transacted all his ordinary cash matters; and it is not alleged on the record that the bills presented by Blincow to the respondents were not truly discounted for his behoof in the ordinary course of trade, or that on the 7th of May 1827, when the second instalment of the bond was paid, the respondents had the slightest idea that Blincow was insolvent or in bankrupt circumstances.

If the act 1696 were to be held to apply to this case there is scarcely a transaction between bankers and their customers against which it would not strike. Where the debt is past due, if the payment be made by cash, or by means of drafts or indorsations of bills, without fraud or previous knowledge of impending bankruptcy, the act has been held not to apply; and, on the other hand, if the debt be merely contingent, as in a cautionary obligation, or if the creditor be not entitled at the time to demand payment, then, if in such circumstances money is impressed into his hands, it is not an extinction of the debt, but a provision in security of it, or a means of afterwards obtaining payment.*

But the second instalment of the bond was past due on the 7th of May 1827, when an order on the account current was presented for the amount, and the debt to that extent discharged; and on the 14th there was a balance in Blincow's favour, in account with the respondents, of 848*l.* 0*s.* 11*d.* Now, it is the same thing whether the payment was by a draft or by means of

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* Dickson, Langdale, and Co. v. Cowan, 7 S. & D., 132, Scales, 11th June 1829, 7 S. & D., 749.

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cash, for the one falls as much under the exception to the statute 1696 as the other.*

3. The interlocutor of the Court, which found that the appellant could not under the conclusion of his summons obtain decreet for the sum of 342*l.* 8*s.* 10*d.* which had been paid to the respondents in cash, and not by the indorsations of the bills libelled on, or from their proceeds, and that the defect in the original summons could not be remedied by conjoining the supplementary action, is well founded. To have given decree against the respondents under the first summons for repetition of payments received by them in cash would have been ultra petita, and contrary to the grounds in law and fact on which the appellant's case was laid.

Neither was this made competent by the supplementary action, because as a proof had been led and concluded, and judgment pronounced in part disposing of the cause, it could not be conjoined with the original action. It is equally unavailing as a separate and distinct action, because the written evidence of the payments made in cash by Blincow into his account current is not called for, and no payment of money exceeding in amount 100*l.* Scots can be proved otherwise than by written evidence. Besides, the statute 1696 is not libelled on, as the law which alone confers on the appellant any title and interest to sue for the reduction of the alleged payments by Blincow to the respondents. And, lastly, the summons contains

* Jamieson v. Ferrier, 23d Jan. 1810, Bell, vol. ii. pp. 217, 219; Watson v. Young, 1st March 1826, 4 S. D. p. 507. new ed. 515; Ferrier v. Newton, 2d June 1808, F. C.; Stewart v. Sir Wm. Forbes and Co., 1st March 1791, Mor. 1142.

no conclusion even for declarator of the bankruptcy of William Blincow, nor any conclusion for reducing the payments in cash made by him within sixty days of his bankruptcy to the respondents as in violation of the statute 1696.

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LORD CHANCELLOR.—My Lords, this was an action brought by the trustee under the sequestration of Messrs. William Blincow and Company, and of William Blincow, a partner in that house, against Messrs. Alexander Allan and Company, bankers in Edinburgh, and the individual partners in that house, the principal object of which action was to obtain repayment of certain sums which had been paid, as it was alleged, by the bankrupts, in contemplation of bankruptcy, out of the usual course of business, and for the purpose of giving a preference to one creditor over others. There was a supplementary suit; and the three points which are chiefly for the consideration of your Lordships, raised at the bar, are, first, the sum of 500*l.* which was claimed to be repaid in the action, but from which claim the Court assoilzied the defender,—that 500*l.* being the first instalment upon a bond of 2,500*l.* granted by Blincow to Messrs. Allan, or at least 375*l.*, part of that 500*l.*; the 500*l.* having been an old debt of William and Henry Blincow to the firm of Allan and Company, and that 500*l.* having been included in the sum for which the bond was given. Under the circumstances which I have already alluded to, the Court below assoilzied the defender from this conclusion of the summons, and in my opinion, justly and well decided in so assoilzieing him. The condition of the offer of composition was, that every creditor whose debt exceeded 20*l.* should

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come in and accede to that composition within the period of one month,—a most important condition, and not an unusual condition in such arrangements for composition. But it is clear that no such thing was done, —that, in the language of the Scotch law, the condition was never so purified,—that the obligation had never attached, which was the matter of condition. It is clear that all the creditors, or any thing like all the creditors, to the amount of 20*l.* and upwards, did not come in within a month,—did not come in within the time for which the bond was given; that is not only clear from the figures in the case, but is in truth expressly admitted by the appellant, in the course of the proceedings in the cause. It is therefore clear that the parties were not under restriction, and that they were entitled to include, on the one side, that debt of 500*l.*, being an old debt. My Lords, I may further observe, that the whole question, although in a case not without difficulty on various points, was very fully considered, and elaborately discussed, with his usual acuteness and discrimination, by a learned Judge, whose loss the Court of Session has now to deplore—I mean Lord Newton; and notwithstanding there were some matters on which a difference of opinion existed between that learned Judge and the Division before whom the case was discussed at various times, yet no difference appears to have existed between that learned Judge and the Court below which pronounced the interlocutor. I have therefore no hesitation whatever in advising your Lordships, on the ground I have shortly stated, to affirm that part of the interlocutor complained of.

We now come, therefore, to the next point, which refers to the repayment of the second instalment on

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the bond of 2,500*l*.—an instalment of 833*l*. 6*s*. 8*d*. principal, together with 45*l*. 8*s*. 4*d*. for interest, being the second separate instalment; for the third is now out of the question, at least as far as regards the repayment,—the Court, having held that that was clearly in contemplation of bankruptcy, and by way of giving preference to a creditor, and that it was out of the ordinary course of business, and therefore decreed repetition—a repayment of that third instalment,—and from this decree no appeal has been prosecuted. The only question then remaining is that which relates to the second instalment of 833*l*. 6*s*. 8*d*. For disposing of this question it will be necessary to go a little into the pleadings in this case, because it is very much upon the frame of these pleadings that a difference of opinion arises between myself and the Court below, in respect of these matters; and upon which point I am about to recommend to your Lordships to reverse this part of the interlocutor, and to remit, with directions to the Court below. The third head of the revised condescendence sets forth the allegations of the pursuers with respect to this sum,—that it was "in the knowledge of the insol-
"vency, and in contemplation of the impending public
"bankruptcy and sequestration of the estates of the said
"William Blincow and Company, and William Blin-
"cow, that they made and granted to and in favour of
"the defenders, in security, and in the view of giving
"them a preference for payment of their said prior debt,
"by help of the cheques after mentioned, indorsations
"by the social firm of William Blincow and Company,
"to the eighteen bills first enumerated in the summons,
"amounting to the sum of 1,001*l*. 15*s*.; and thereafter,
"on the 30th day of the same month, William Blincow

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" did also, with the same view, grant indorsations in the " said social firm to the eight bills therein next " enumerated, amounting to the sum of 276*l.* 2*s.* 9*d.*; " and lastly, with the same view, he granted indorsations " in favour of the defenders to the four bills last therein " enumerated." It thus states in the next head, which is the fourth, that William Blincow did, on the 7th of May 1827, within twenty-three days of the bankruptcy, make and grant two cheques, addressed to the defenders, and subscribed by him, under the social firm of William Blincow and Company, for 833*l.* 6*s.* 8*d.* and 45*l.* 6*s.* 8*d.* Then it is stated in the sixth head, and pleaded directly, " that the indorsations of the said thirty bills, the three " cheques for the apparent proceeds of the bills, were " made and granted by William Blincow, in order to " secure to the defenders a preference, out of the proper " estate of William Blincow and Company, for pay- " ment of their prior debt; and that before receiving " the indorsations, and crediting the bankrupts with the " proceeds of the bills, and thereafter giving up the " 2,500*l.* in exchange for the pretended cheques, the " defenders stipulated for and received an obligation " from the cautioners in the bond, guaranteeing pay- " ment of all the bills so indorsed to them by the " bankrupts; in consequence of which obligation, " Valentine Blincow has since been called upon, and " has paid some of the bills which were not retired " when due." Now, here were allegations of the utmost importance to the point raised, upon the first part of the pleadings—I mean that which is both pleaded and raised in the summons, and which sets forth, or ought to be set forth, distinctly, the ground of objection —the impending bankruptcy—the knowledge of the

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bankruptcy—the subsisting insolvency—the whole of the proceedings out of the ordinary course of business—the giving the preference to one creditor, or one body of creditors, over the others. On the other side, by the defender, these allegations are met by counter allegations. And my first observation upon this part of the pleadings is, that in the answers to the condescendence, instead of directly stating what averments in the condescendence the defenders deny, and what they admit, they state, first, it is true, generally,—that they admit so much; but then, with respect to all that is most material,—I mean the third and subsequent heads of this division of the condescendence, those averments which I have mentioned as most material, and have read in substance to your Lordships,—as to all those, there is no distinct statement, in the answers, of what the defenders admit, and what they deny, of these material averments. On the contrary, they state, " The remaining articles of the condescendence are denied, in so " far as they are inconsistent with the following state- " ment;" and then comes a statement nearly as long as the statement in the condescendence. Now, it is quite clear, that there cannot, by possibility, be a more inconvenient mode of proceeding than this. I will assume, for the present, that it is conceded that the pleadings should contain, not merely the averments of the fact, without the evidence, leaving the party afterwards to bring forward his evidence to prove that fact. I will assume, for the present, that it is a fit and proper mode that you should first set forth the facts you intend to rely upon, either as the ground of your claim, or as the ground of your defence; and that you should afterwards set forth all the evidence, by way of separate averment,

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—all the evidence whereby you intend to prove the facts you aver—whereby you propose to support your averment. I will assume, for the present, that this is a fit and proper mode of pleading,—not that any good pleader ever could think so, and not that I ever thought so; but because it is the inveterate practice of Scotch pleading, and because it is the mode in which pleading is carried on in Scotland. I assume, therefore, that it is the right method, and that it is fit to plead all the evidence, as well as all the facts. Yet still, I say, that a more inconvenient mode of pleading the evidence, and setting forth the statement of the evidence, cannot be well imagined, than the mode in this case followed; for what is the consequence? Instead of a clear issue being raised upon each matter that is pleaded, the affirmative of the one party being met by the negative of the other, so that the Court shall be under no difficulty in at once apprehending what the matter in dispute between the parties is, and what is the matter which the Court has to try, or put in a course of trial,—instead of that, it is necessary for the Court to compare the two statements together, and then to find out how far they are inconsistent; and having ascertained that they are in some points of view inconsistent, and in what points they are inconsistent, the Court is left, in fact, to frame an issue for itself, and to say—"The pursuer says so and so; "but the defender, without denying it, says so and so; "and in so far as what the defender says is different "from, and inconsistent with, what the pursuer says, "in so far it is to be held that the matter is in dispute, "—and thereupon must be the issue between the par-"ties, and thereupon must be the conflict." That is not what the Court ought to be called upon to do,—the

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pleadings ought to raise the issue,—the pleadings ought not to leave a doubt in the mind of those who read them that there is an affirmative allegation on the one side, and a negative allegation on the other; which would show the Court that is to try it, or send it to be tried, what is the question which is to be decided between the parties. It is perfectly clear, that in going through the whole of the facts which are meant to be set forth, (whether a general fact is intended to be proved, or the facts wherein it is meant to be said consists the proof of that general fact, or even joining both together,) some such course as this which I am about to state ought to be adopted, and not such a course as that which I complain is now adopted. First, the defender, going through the pursuer's statement of facts, one after the other, ought distinctly and clearly, upon each, to say "admitted," or "denied." If "admitted," there is an end of the question: if "denied," then it may be either a general or an entire denial, or it may be a qualified denial. If it is a general denial, the issue is at once raised—the affirmative is met by a negative: if it is a qualified denial, then the qualification must be stated. To the denial must be added the circumstances admitted, which form the exceptions to the denial, and then deducting, as it were, that which is excepted from the denial, it will distinctly appear what is left in issue between the parties. Then if, after going through the whole of the pursuer's statement in this fashion, the defender still finds that there is any thing to add beyond the mere meeting of his antagonist's averments, as in the mode of pleading now adopted, it is fit he should add that statement of his own. Such a mode of pleading keeps every thing distinct. You see all that

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is admitted on the one hand, and all that is denied on the other, and you are not left to calculate and to guess; for the statements being involved, as they are here, you are almost left to conjecture what the real points of difference in matters of fact are between the parties.

However, although this mode of pleading, which has been here adopted, is by no means unusual in a condescendence in Scotland, and although it is subject to the remark I have now made, one thing is perfectly clear, that with a little trouble, and by comparing the two statements the one with the other, you do find that there are most important averments on the one side, not within the admissions on the other, but coming within the description of being a denial of the pursuer's statement "so far as they are inconsistent with the following "statement,"—though there are matters in "the following statement" inconsistent with the pursuer's statement, in direct opposition to it, and which do raise a direct issue of fact. Thus, to go no farther than the last subdivision of that third head, "It is denied," says the defender in his answer, "that the bills were "discounted by the defenders, except in the usual "course of business. It is denied that the indorsations "were made with the view of granting them an undue "preference in security." Now, "the usual course of "business," and the "undue preference," are of the utmost possible importance, in point of fact, to the decision of the whole question between the parties, as to the second instalment. The one party says it was not in the usual course of business, and the other says it was in the usual course of business;—the one says it was with a view to giving an undue preference; the other party says it was without the view of giving such a preference.

Here, therefore, upon these two averments, there is a distinct and direct conflict between the parties. Then, the defender having denied with more or less clearness, but still substantially having denied these matters, which are more or less clearly, but still substantially averred, he thinks it necessary to add a denial of that which I cannot find to have been averred at all in the pleadings, and which, if it had been averred, I incline to think with the Court below, in point of law, would have been an irrelevant averment. He denies "that the cheques "were received by the defenders, in the knowledge of "the bankrupts insolvency." I can find no averment —I may be mistaken—but I can find no averment throughout the condescendence, of the cognizance of the defenders, Messrs. Allan, of the insolvency of the parties at the time they received the cheques; and I incline to the opinion stated in the Court below, that it is not necessary that you should prove it was within the knowledge of the party receiving those cheques which were so paid. However, so it stands upon the condescendence and answers.

Then come the pleas in law, which are stated by both sides; and if I have had much to observe upon the mode of pleading which has been adopted in the former stage—namely, that stage of which the peculiar province is to raise the issue of fact between the parties—I own I feel that I have still more right to observe upon the mode of pleading adopted in the second stage—namely, that which is to raise the issues in law between the parties. These pleas in law, as I understand, ought to consist of mere allegations of matters of law, and ought not to be mixed up with averments of matters of fact. Now, your Lordships will

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find, on both sides, such a mixture in this case of both, as makes it hardly possible for the Court to deal with the matters of law; because it is entirely indistinct, whether the parties mean to rely upon the averment of the matter of fact or not. There is an averment of fact on the one side, met with a denial on the other unico contextu, and mixed with the pleading upon matters of law. Thus, under the third head of the pleas in law for the pursuer, the pursuer sets forth, that "the indorsa-"tions of the bills libelled, and the cheques granted by "the bankrupts, on or about the 7th and 12th May "1827, within sixty days of the sequestration, for the "amount of the second and third instalments of the "2,500*l.* bond, are reducible, and fall to be reduced, "under the act of 1696, as being an indirect mode, out "of the common course of business, of giving the de-"fenders an undue preference to secure payment of "the debt due to them on the said bond." Undoubtedly it may be said, that this assumes, in order to apply the act of 1696, that the payment was out of the common course of business, for the purpose of giving an undue preference. It may be said, no doubt, that this is the pursuer's statement merely of a plea in law, or a conclusion of law, which he intends to raise, upon the assumption that he is correct in his averment of fact—that taking his averment of fact to be accurate, that conclusion in law would follow. Then, how is this met by the defender? He does not meet that plea by a denial; —he does not say, admitting the fact to be as you have averred, your conclusion, in point of law, would not follow; but he gives his own conclusion of law from the facts he himself states; and as the pursuer raises his own conclusion from his mode of stating the facts, so the

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defender raises his own conclusion from his mode of stating the facts. But if it should be remarked, that there is a sufficient justification of this mode of pleading adopted, there is one course that this does not enable the parties or the Court to adopt at all. Suppose the defender were to admit the facts as stated by the pursuer, (he denies them—but supposing he admitted the facts, or some of the facts, as stated by the pursuer,) it would not by any means follow that he might not deny his law;—that would be what we call demurring. He might say, admitting your proposition of fact, your conclusion of law does not follow, but an opposite conclusion, or a different conclusion of law follows. But here each takes his own view of the facts, and each raises his own inference of law from his own peculiar view of the facts; for the defender says, "the indorsa-"tions upon the bills sought to be reduced were granted "in the course of trade for bonâ fide considera-"tion,—the bills being regularly discounted, and the "proceeds entered to the credit of William Blincow "and Company in the account current kept between "them and the defenders. The cheques specially men-"tioned were presented to the defenders in the usual "course of business, and immediately entered to the "debit of the parties cash account." Now, in no mode whatever of viewing the subject, and upon no principle of pleading whatever, even admitting that the ground of defence, and the mode of pleading I have adverted to, might be taken to be and were a sound one,—allowing it to be sufficient that each party pleaded the law as he deemed it to arise upon his own view of the facts,—on no such ground, and by no such admission, can I justify this averment; for this is not an averment

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in law at all,—it is a separate and distinct averment of fact. "The cheques specially mentioned were presented "to the defenders in the usual course of business, and "immediately entered to the debit of the parties cash "account;" and that is not made a plea in law, which is a mere allegation of fact, by adding, as they have done, "Bell, vol. i. p. 212, Cases referred to; vol. ii. "p. 123 and 124," &c. I will answer for it, that in no page or volume of Mr. Bell will there be found an authority for this statement, that the cheques specially mentioned, and paid, and indorsed, by Messrs. Blincow to Messrs. Allan, were presented to Messrs. Allan in the usual course of business, and were immediately entered in the books of Messrs. Allan to the debit of the cash account of Messrs. Blincow. I will venture to say, there is not a word of either Allan or Blincow, or their cash account, to be found in either volume first or volume second of Mr. Bell's work. So that all this statement must apply to the preceding averment of fact, and not to the inference of law intended to be raised upon that statement. Now, let us see what that inference of law is: "The indorsations "upon the bills sought to be reduced were granted in "the course of trade, for bonâ fide considerations"—there is no authority for that in Mr. Bell, for that is matter of fact referring to the particular transactions between the Blincows and the Allans,—"the bills being "regularly discounted, and the proceeds entered to the "credit of William Blincow and Company, in the ac- "count current kept between them and the defenders. "The cheques specially mentioned, were presented to "the defenders in the usual course of business, and "immediately entered to the debit of the parties cash

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"account." That is all the rest of the third head of the pleas in law; and for that which is a pure statement of fact, from beginning to end, without a word of law in it—without any thing that can lead any body who reads it, to know what law is intended to be raised upon those facts—that is stated as the defenders third plea in law; and to give some colour to it, as matter of law, reference is made to Mr. Bell's work, and other text writers. Therefore it is quite clear, in no manner in which this can be viewed, can it be considered a matter of law.

Now, my Lords, this is not only an observation upon such an incorrect manner of pleading, and which may be made more generally than necessary upon the pleadings in this case, but it goes very far to show into how entangled a situation the present question has been got; for I do maintain, that throughout there has been no due separation of the matters of law and of fact, and that the Court has had to give its judgment, in various stages of this case, without ever having the law separated from the fact, and consequently without having the facts ascertained. The facts are not admitted, they are disputed between the parties to this hour. The Court has proceeded upon a complicated view of the subject, and must have assumed, and gratuitously assumed, the facts to have been as stated in one way or the other, or they could never have come to a decision upon the matter in dispute. I do not mean to say that the Court has not the power of deciding without a jury, but I cannot help lamenting, that when they were sending one issue to be tried on one part of the case, which was most properly sent, and most properly tried, I cannot but greatly regret that they did not send an issue between the parties as to

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the facts so material for disposing of the question touching the second instalment; namely, the undue preference, the transaction being in the ordinary course of dealing, and also the party's knowledge of the insolvent state of the bankrupts.

I have stated, that Lord Newton, with his usual discrimination, dealt with the parts of the case before him in the various stages through which it went. I will now call the attention of your Lordships to a very able note of that learned Judge, annexed to his interlocutor of the 12th November 1828, and this will illustrate the inconvenience of this mode of pleading. This was, of course, after the defences had been lodged, and the pleas in law and condescendences upon the facts had been closed. "It is said, however, by the defenders, that being his ordinary bankers, they discounted "the bills in question in the course of trade, and only "applied the balance which stood in his favour on their "running account to the payment of the instalments "of the bond, in consequence of his order to that effect; "that the pursuer has not averred in the record, that "they were in the knowledge of the impending bankruptcy,"—I have already stated to your Lordships, that I can find no such averment of fact—"and is not "entitled to assume an argument, that they acted on "such knowledge." Then his Lordship goes on,—"It "is not necessary, however, to the operation of the act "of 1696, that the creditor shall be proved to have "been in the knowledge of the impending bankruptcy, "or guilty of fraud, in accepting of the security. It is "enough if the debtor intends to favour him, and to "give a preference over his other creditors. Now it "seems," says his Lordship, "from the circumstances,

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" pretty obvious, that the debtor meant to give such a " preference, if not through favour to the defenders, at " least through favour to his own brothers." Now this may be true, no doubt; but so far from being admitted, he does not say it is admitted; he says, " it seems pretty " obvious." But so far from its being proved to be true, it is one of the subjects of denial of the defenders; it is denied, though undoubtedly it is asserted on the other side. " It is denied that the indorsations were " made with the view of granting them an undue " preference in security."—" Indeed" says his Lordship, " if they were able to fulfil their engagement " under the bond, they had the real interest; and the " effect of the payment was to secure them a prefer- " ence. In such circumstances, and considering that " the third instalment of the bond was not payable for " some months afterwards, the Lord Ordinary thinks it " questionable if the transactions can be said to be so " clearly in the usual course of trade as to form an " exception to the rule of the statute;" and for that reason, your Lordships see he reported the case to the Court. It is quite clear that Lord Newton states what the inclination of his own mind was upon the fact, but that he was stopped from coming to a decision by the state of the pleadings, and by there being no settlement of that disputed point of fact. On these issues of fact and pleas in law, the parties then proceeded to the First Division, and the First Division pronounced the interlocutor first appealed from. I need not trouble your Lordships by referring to the first branch of that interlocutor, with respect to the 500*l.* or the 375*l.*, which I have suggested you ought to affirm; but the next relates to the instalment in question; and they sustain the

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defence,—they hold it to be a legal and valid defence, "and assoilzie the defenders from the claim relative "thereto, and decern;" and then, with respect to the third instalment, they find it was not legal; and that, as I have stated to your Lordships, is not now denied. Great doubt appears to have been entertained when the cause was remitted, upon the third or last branch of the interlocutor, to the Lord Ordinary, as to what the precise meaning of the remit was; and as the parties differed, he thought it fit to report the matter upon cases, to enable him to decide, without going back to the Court, which of the parties was right in the construction put upon the meaning of the remit. Then, my Lords, the matter is sent back upon the remit, with a direction which leads the Lord Ordinary to send an issue to be tried,—that issue was tried; and upon the finding of the jury, first the Lord Ordinary pronounced a very able interlocutor on the 18th December 1830, to which are appended certain observations of great importance, and with the greatest part of which I entirely coincide; and that brings the matter again as to the branch of it that was in question before the jury before the Court, upon which they proceed to pronounce the second interlocutor appealed from, and then a further proceeding is rendered necessary by that interlocutor before the Lord Ordinary. And taking all those interlocutors together, the first, second, and third, and that of the Lord Ordinary, both as regards the question of costs and the other matters, (but which question of costs he appears to have decided with very great distinctness, and with his usual ability, in a manner with which I am perfectly satisfied,) I should therefore move your Lordships to affirm all these. But the part which I con-

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ceive cannot stand, is that finding with respect to the second instalment; and I shall therefore move your Lordships, after affirming the other interlocutors, (the last and the first interlocutors,) to reverse that declaration in the second interlocutor, and to remit to the Court, with directions to have an issue tried upon the second instalment; that issue being raised with more or less distinctness by the pleadings, and that issue substantially being, Whether or not payment was made in the way alleged by the pursuer, or in the way alleged by the defenders? If it is in the way alleged by the pursuer, there shall be a repetition of it, it being reducible under the act of 1696. If it be in the way alleged by the defenders, then it shall stand according to the second finding of the first interlocutor. But in all other respects, except in so far as any other part of these interlocutors may be liable to be varied to make them consistent with this, that they shall be affirmed.

This brings me, my Lords, to the third and last head to which I have to call your attention, and that is, the question connected with the supplemental suit. I am of opinion, in the first place, that the Court below was right, for the reasons assigned by the Lord Ordinary, in not conjoining the two actions. I am, in the next place, of opinion, though that appears to have been held doubtful by the learned Judge to whom I have referred, that the verdict in the first action is evidence between the parties to the supplemental suit,—it is a verdict between the same parties, and in truth, upon the same subject matters;—it therefore is evidence, and might have been used in the second suit. But, thirdly,

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I am of opinion that the second suit (the supplementary suit) is deficient in the necessary reductive conclusions—that there are not the necessary reductive conclusions in the libel and summons,—and that the want of these is not supplied by the words at the bottom of folio two, and at the top of folio three, of the appellant's case, "in addition to the conclusions in the foresaid "action;" and therefore those reductive conclusions being necessary, and not being found in this case, their Lordships did well in pronouncing the interlocutor in the supplemental suit, which is now the subject of appeal. In both, therefore, of these appeals, what I shall recommend to your Lordships to do is this,—to affirm the interlocutors complained of in all respects, except in so far as regards the second finding of the first interlocutor complained of, and touching that, to remit to their Lordships, with directions to have an issue tried upon the interlocutor in question.

The House of Lords, in the appeal of the original action, pronounced this judgment:—

It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed, except in so far as regards the second finding of the first interlocutor of the Court of the 3d December 1828 touching the second instalment: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland with directions to have an issue or issues tried upon the legality and validity of the payment of the said second instalment.

In the appeal of the supplementary action their Lordships pronounced this judgment:—

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It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

Andrew M'Crae—Moncreiff, Webster, and Thomson, Solicitors.