clear that there is no entry of individual trustees. Therefore it appears to me that the case of *Campbell* is an authority in favour of the vassals in this case.

I think the case of *Hill* must be taken as an authority also, for although the question does not appear to have been expressly decided there was no doubt expressed in that case that a superior would be entitled to refuse an entry to and in favour of the managers of a corporation and their successors in office for behoof of the corporation, just because that would be an entry in favour of the corporation. And the same point was assumed in the case of the *Drumsheugh Baths Company*.

I am therefore of opinion that the question put to us in this case ought to be answered in the negative, and that no casualty of composition is due, inasmuch as the present vassals are still holding under the corporation of the Orphan Hospital as mid-superiors between them and the over-superior, and, that being so, the fee is full as it was when that corporation was first entered.

LORD ADAM—The second parties to this special case are proprietors of certain subjects called Quixwood. They are duly infeft and they completed their title in March 1873. The superior now comes forward and claims a casualty of composition on the ground that they are impliedly entered with him by the operation of the Conveyancing Act 1874, section 4. The superior's right to demand a composition depends on whether or not he could have brought an action of declarator of non-entry. That, again, depends on whether or not the fee is full, and to answer that question it is necessary to see what were the terms of entry of the original vassals. We find that by charter of resignation dated 27th December 1811, James, Earl of Lauderdale, disponed and confirmed the lands in question "to and in favour of the managers of the Orphan Hospital and Workhouse at Edinburgh and their successors in office, for the use and behoof of the said hospital and their disponees heritably and irredeemably." The precept of sasine directs sasine to be given to the "said managers of the Orphan Hospital and Workhouse at Edinburgh and their foresaids," and infeftment was taken in these terms. The question is whether the managers of the Orphan Hospital still hold the fee of these subjects. I have no doubt that the title might have been taken direct to the Corporation, but I am not surprised that it was taken to the managers, for I see that by the constitution of the hospital any five of them—[*quotes regulation*]. These being their duties, it was natural enough that they representing the corporation should be put into the title. However that may be, the question for us to decide is whether a destination in the terms I have mentioned is to be read as a gift to the Hospital, and whether or not the entry given is to the corporation *qua* corporation. I agree with Lord Kinnear that both on principle and authority it is so. The destination was intended to be and is in fact taken for the use and behoof of the corporation, and that being so the entry is of the corporation. It is not necessary to go over the authorities again, but they clearly show that that is the legal effect of such a destination. If that be so, then *cadit quæstio*—any further question falls, for as we know a corporation never dies. Even if this were not the correct view, there is another, namely, that if we were to read the terms of the destination as one to the managers and their successors in office the result is the same.

It matters not whether they are called trustees, the question is, whether the destination implies a perpetual succession. I think it does. When you get a destination to successors in office then so long as there are successors in office the fee remains full, and it is only when and if all die, and there comes *de facto* to be no successor that the superior's right to a composition can arise.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court answered the question in the negative.

Counsel for the First Parties—Sol.-Gen. Dickson, Q.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Guthrie—Dundas. Agents—H. & H. Tod, W.S.

Saturday, June 12.

SECOND DIVISION.

[Sheriff of Forfarshire.

STIVEN *v.* NATIONAL BANK OF SCOTLAND, LIMITED.

Sheriff—Jurisdiction—Action to Set Aside Illegal Preference—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 10—*Bankruptcy (Scotland) Act* 1857 (20 *and* 21 *Vict. cap.* 19), *sec.* 9.

An action raised in the Sheriff Court prayed the Court to find that a payment by a debtor was null and void at common law and also under the Act 1696, cap. 5, and to find the said transaction to be an illegal preference, and to set aside the same and to grant decree ordaining the defenders to repay the said sum to the pursuers.

Held (*dub.* Lord Trayner) that the action was competent.

Opinion (by Lord Young) that, under the Bankruptcy Acts 1856 and 1857, an action of reduction is not necessary in order to challenge a preference as being contrary to the Act 1696, cap. 5, or contrary to the rule of common law, and that the proper conclusion of such an action in the Sheriff Court is a

simple petitory conclusion for payment.

Bankruptcy—Trust for Creditors—Title of Trustee to Set Aside Illegal Preference.

A voluntary trust-deed granted by an insolvent to a trustee for behoof of creditors provided that the estate should be realised and all questions arising under the trust or in relation to the trust-estate should be dealt with as if sequestration had been awarded as at the date of the trust-deed, and on the footing of the provisions of the Bankruptcy Acts. Prior creditors to the extent of about £1000 acceded to the trust.

Held (*following Fleming's Trustees* v. *M'Hardy*, March 2, 1892, 19 R. 542, *diss.* Lord Young) that the trustee had no title to sue an action for the setting aside of a payment by the debtor on the ground that it was an illegal preference, and (*following Cook* v. *Sinclair & Company*, July 2, 1896, 23 R. 925) that the objection to the title was not obviated by conjoining an individual creditor as a second pursuer.

Bankruptcy—Illegal Preference—Act 1696, *cap.* 5—*Retiral of Accommodation Bill before Maturity.*

A debtor became insolvent on 13th March 1885, and notour bankrupt on 4th May following. His bankers had, prior to his insolvency, discounted a bill, accepted by a third party for the debtor's accomodation, and had placed the sum at the credit of the debtor's account. On 15th March, after insolvency and within sixty days of notour bankruptcy, the debtor paid the sum due upon the bill. The bill did not become payable till 18th April 1895.

Held that the payment to the bank was not an illegal preference within the meaning of the Act 1696, cap. 5, or a fraudulent preference at common law.

William Stiven, accountant, Dundee, "trustee under a trust-deed granted by John M'Laren, grocer, William Street, Dundee, now residing at 10 William Street there, in his favour for behoof of creditors, dated 19th March 1895," and George Willsher, wine merchant, Dundee, a prior creditor of M'Laren, raised in the Sheriff Court at Dundee an action against the National Bank of Scotland, Limited, 115 Hilltown, Dundee. The pursuers prayed the Court "to find to be null and void at common law, and also under the Act 1696, cap. 5, a transaction whereby the said John M'Laren transferred to the defenders on or about the 15th day of March 1895 a sum of £70, 10s., and to find that said transaction was an illegal preference and to set aside the same, and to grant decree against the defenders ordaining them to pay to the pursuers, or alternatively, to the said William Stiven as trustee aforesaid and as representing the creditors of the said John M'Laren the sum of £70, 10s. sterling with interest thereon at the rate of £5 per centum per annum from the said 15th day of March 1895." The £70, 10s. was the sum due on a bill dated 18th October 1894 drawn at six months' date by M'Laren upon and accepted by his father-in-law, Adam Gatherer, Laurencekirk.

The pursuer averred—"(Cond. 3) The prepayment of said bill to the defenders who knew of the insolvency and imminent bankruptcy of the said John M'Laren on the 15th day of March, was on the part of the said John M'Laren with the object of giving a preference to the defenders, and was entirely voluntary within sixty day of his notour bankruptcy, and in satisfaction or further security of the debt of the said John M'Laren to the defenders, which was not due or exigible, and it is accordingly voidable under the Act 1696, cap. 5. It was also collusive and fraudulent, and it was illegal and in prejudice of the rights of the said George Willsher and the other prior creditors who are represented by the said William Stiven."

The pursuers pleaded—"(1) The pursuers are entitled to decree as craved, because (*a*) The prepayment in question having been made by the said John M'Laren voluntarily within sixty days of his notour bankruptcy in satisfaction of a debt not then due or exigible, is voidable at the instance of the pursuers or one of them under the Act 1696, cap. 5. (*b*) The prepayment being illegal and fraudulent and not in the course of business but after suspension of payment, and in prejudice of the rights of the said George Willsher and of other prior creditors represented by the said William Stiven, is voidable at common law."

The defenders pleaded—"(1) No title to sue. . . . (3) The drawer and acceptor of the bill being conjunctly and severally liable for the sum in the bill, the defenders were entitled to take payment from either of the obligants when tendered. (4) The transaction in question being payment of a debt for value received in the ordinary course of business, and not a voluntary deed granted either for the satisfaction or further security of the defenders, is not reducible under the Statute 1696, cap. 5. (5) There being no fraud or collusion on the part of the defenders, the payment made to them is not reducible at common law."

A proof was led, which disclosed the following facts:—In October 1894 John M'Laren's account with the defenders at their branch office at Hilltown, Dundee, was overdrawn to the extent of £555, 14s. 4d., and David Scott Peebles, the defenders' agent at the branch bank, called upon him to reduce his indebtedness. M'Laren thereupon discounted with the defenders a bill for £70, 10s. drawn by him upon and accepted by his father-in-law, Adam Gatherer, Laurencekirk, dated 18th October 1894, and payable six months after date.

On the date when the bill was discounted, or at all events before it was retired as after mentioned, M'Laren informed Scott that the bill had been accepted by Gatherer as an accommodation bill and not for value.

On 13th March 1895 M'Laren was insolvent

and issued a circular calling a meeting of his creditors to be held on 19th March thereafter.

On 15th March M'Laren retired the bill, there being yet twenty-seven days of the currency to run, by paying in cash to the defenders at their said branch office the full amount of the bill, less 1s. 5d., being the rebate to which he was entitled on account of retiring the bill before maturity. The bill was then delivered to him. No notice had been given to the defenders or Scott of the circular calling the meeting of creditors, and neither the defenders nor Scott were aware that M'Laren was bankrupt or had reasonable grounds for thinking that he was insolvent.

On 19th March the meeting of M'Laren's creditors was held, and the pursuer Stiven was appointed trustee. A trust-deed of that date was granted to Stiven by M'Laren for behoof of his creditors. The deed provided that the estate should be realised and declared, "that so far as possible all rankings and every question and difference arising under this Trust or in relation to the Trust Estates shall . . . be settled as if sequestration of my estates under the existing Bankrupt Statute or Statutes for Scotland for the time being had been awarded as at the date hereof and on the footing of the provisions contained in said Statutes." Creditors to the extent of about £1000 prior to the payment to the bank on 15th March acceded to the trust.

On 27th April M'Laren was charged at the instance of the pursuer Willsher upon an extract registered protest dated 27th April of a bill for £35 dated 28th January 1895, drawn by Willsher upon and accepted by M'Laren and payable two months after date.

The charge expired on 4th May, on which date M'Laren became notour bankrupt.

Thereafter the pursuers raised the present action.

On 4th July 1896 the Sheriff-Substitute (CAMPBELL SMITH) pronounced the following interlocutor:—"Finds, in respect of the evidence led, (1) that at 18th October 1894, the date of the bill in question, and for some time previously, the account of John M'Laren, drawer of said bill, with the defenders' branch bank in Hilltown, Dundee, was overdrawn to the extent of £555, 14s. 4d., and that he had been called upon to reduce his said indebtedness; (2) that he gave effect to said call, as matter of form, by obtaining his father-in-law's acceptance to said bill, by discounting it with the defenders, and allowing them to retain the proceeds minus interest (at five per cent., as the bill was non-commercial); (3) that at the time the bill was discounted he informed the bank agent that he had given no value for said bill, that his father-in-law was not to be bothered about it, and that he himself would pay and uplift it before it fell due; (4) that the payment before maturity was in accordance with his agreement with the defenders at the time when, as matter of form, they discounted said bill, and, as matter of fact, applied the proceeds to reduction of an overdraft beyond the limit permitted by the defenders' central authority in Edinburgh; (5) finds it not proved that the payment in cash now sought to be set aside was contrary to the Act 1696, cap. 5, or that it was fraudulent at common law; (6) finds, *separatim*, that the leading pursuer took the estate of the truster *tantum et tale* as he possessed it, that he is possessed of no rights in it, that did not belong to John M'Laren, and that John M'Laren could have had no title to sue the present action: Therefore assoilzies the defenders from the conclusions of the action."

The pursuers appealed to the Sheriff (COMRIE THOMSON), who on 17th December 1896 dismissed the appeal and adhered to the interlocutor appealed against. There was appended to his interlocutor the following note:—

Note.—"I have arrived, not without difficulty, at the same result as the Sheriff-Substitute. The elements involved in such questions as the present are brought out in a well-known passage in Bell's Com. ii. 205—'Wherever the transaction is in the ordinary course of dealing, and requisite or suitable to the fair purpose of the debtor proceeding with his trade, and unaccompanied by indications of collusion or notice of insolvency, it is not challengeable, although the effect may be to give a preference to one creditor over the rest.' In a recent case (*Coutts' Trustee* v. *Webster* (1886), 13 R. 1112) Lord Young observed 'that a man, though he knows that he is insolvent, and cannot pay all his creditors, may, nevertheless, prefer any of them whom he pleases and pay their debts in full, provided their debts are due, and due in actual money. He is at liberty to do this, though he is not at liberty to give them any pledge in security of their debts.' It seems plain that M'Laren might have paid the £70, 10s. into his current bank account direct, and so reduced his adverse balance. To this the pursuer could not object, but had he done so there was nothing to prevent the bank from holding the money so paid in against the running bill. The bill was discounted in the ordinary course of business for the accommodation of M'Laren. If he found himself in a position before the expiry of the full currency of the bill to acquire it from the bank (he being, as was admitted in argument, the true creditor as in a question with the acceptor), I see no reason why he should not replace the accommodation, and so take up the bill in his own right. By doing so M'Laren's creditors were not prejudiced because on the assumption (which I understood was also admitted) that the bill formed a good claim by M'Laren against the acceptor (Gatherer) but for a plea of compensation which the latter might set up, the pursuer would have recovered it from Gatherer, but with such questions the bank had no concern. When the defenders discounted the bill they practically bought it. When the contents of the bill are paid before expiry, it is bought back again, the bank making a rebate or

allowance off their original discount in proportion to the unexpired currency of the bill. Such a transaction is in the ordinary way of banking business, and I do not think that it can be said that the defenders took payment by way of deposit as security."

The pursuers appealed, and argued—1. *On merits*—(*a*) Under Act 1696, c. 5, all preferences granted to a creditor within sixty days of notour bankruptcy were null and void, and the bank in getting payment of this sum from M'Laren got an undue preference *quoad* M'Laren's creditors. There were only three exceptions to this rule—(1) Cash payments; (2) transactions in ordinary course of business; and (3) *nova debita*. The *onus* lay upon the bank to show that the present transaction fell under one of these exceptions, and that *onus* they had not discharged. The present transaction did not fall under any of these exceptions. It was not a cash payment or in ordinary course of business. The contract was one to pay a specific sum at a specific date. The debt was not due till the bill matured. In ordinary course of business the bill would have been paid when it fell due. The true test of the question whether this was done in the ordinary course of business was to ask—Could the creditor have demanded payment at the time the money was paid? If he could not, as in the present case he could not, the payment was not in the ordinary course of business—Bell's Com. (7th ed.), 201, 204; Thomson on Bills, 246; *Speir* v. *Dunlop*, May 30, 1827, 5 S. 729; *Blincow's Trustee* v. *A. Allan & Company*, December 3, 1828, 7 S. 124; *Mitchell* v. *Rodger*, June 26, 1834, 12 S. 802; *Guild* v. *Orr Ewing & Company*, January 16, 1858, 20 D. 392, opinion of Lord President M'Neil, 397; *Rose* v. *Falconer*, June 26, 1868, 6 Macph. 960; *Tamplin* v. *Diggins*, 1809, 2 Campbell 311; *Morley* v. *Culverwell*, 1840, 7 M. & W. 174, opinion of Baron Park, 182. Even if it were held to be a transaction in ordinary course of business, that did not make this transaction a good one if collusion on the debtor's part to give an undue preference was proved — Bell's Com. (7th ed.), 205. (*b*) *At common law*—This was a voluntary act done by one conscious of insolvency with a view to grant a preference to one of his creditors. Fraud was proved on the part of the debtor, and complicity on the part of the creditor did not require to be proved in order to cut down the preference — Goudy on Bankruptcy (2nd ed.), 39, &c.; *M'Owan* v. *Wright*, March 10, 1853, 15 D. 494; *Guild* v. *Orr Ewing*, *supra*. 2. *On Title to sue*—The pursuer had a title to sue. The creditors had committed their interests to him to manage for them, and he was entitled to sue in any matter in which they were interested. Whether the trustee had a good title or not, the title of Willsher was good, for a prior creditor was entitled to reduce a transaction of this sort —*Cook* v. *Sinclair & Company*, July 2, 1896, 23 R. 925.

Argued for defenders—1. *On merits* (*a*) Under the Statute 1696, c. 5—This case fell within the exceptions to the rule laid down in the Act. This transaction was a cash payment in ordinary course of business. The bill was an accommodation bill, and it was natural that it should be paid off as soon as possible. The fixed date for payment was adjected to the bill solely for the benefit of the debtor, and when the time to pay was adjected in favour of the debtor, the promise to pay might be performed at any date previous to that stated in the bill—Forbes on Bills of Exchange, p. 142, sec. 8. The cases quoted on the other side were not in point. They were all cases in which money had been deposited in the bank in order to meet the bill when it fell due. In this case M'Laren did not say to the bank, "Hold the money in your safe till the bill falls due and then pay it off." He paid the money and took the bill away. The transaction was a *bona fide* one in ordinary course of business — *Loudon Brothers & Reid* v. *Lauder's Trustee*, December 7, 1877, 5 R. 293. The transaction might also be considered, as the Sheriff held, *a novum debitum*. It was a buying of the bill by M'Laren from the bank. The bill was a negotiable instrument. M'Laren had bought it. The trustee Stiven was therefore now the creditor in the bill, and could sue Gatherer for the sum contained therein. There had been a purchase of a valuable asset, the asset being delivered in exchange for the money paid. (*b*) *At common law*—No fraud had been proved on the part of M'Laren, or any intention of giving an undue preference to the bank. 2. *On title to sue*—The sixth finding of the Sheriff-Substitute was right, and the plea against title was good. The trustee in a voluntary trust for creditors had no title to sue, inasmuch as he took the estate *tantum et tale* with the trustee, who had himself made the payment—*Fleming's Trs.* v. *M'Hardy*, March 2, 1892, 19 R. 542. The other pursuer, Willsher, had no title to recover payment—*Cook* v. *Sinclair & Company*, *supra*.

After the case was taken to avizandum it was restored to the roll for further hearing on account of a difficulty suggested by Lord Trayner as to whether the action was competent.

On this point the pursuers argued—The action was competent. This was not such an action of reduction as was incompetent in the Sheriff Court. It was an action with petitory conclusions for restoration to the *status quo ante*; it was not an action to reduce a deed with its penal consequences for non-appearance. The action was competent under section 10 of the Bankruptcy Act 1856 (19 and 20 Vict. c. 79), and section 9 of the Bankruptcy Act 1857 (20 and 21 Vict. c. 19). As far as the action was one of declarator, it was also competent in terms of the Sheriff Court Act 1877, sec. 8, sub-sec. 2.

The defender, while arguing that so far as reduction and declaratory conclusions of the action were concerned, the action was incompetent, admitted that in view of the decision in *Moroney & Company* v. *Muir & Sons*, November 5, 1867, 6 Macph. 7, they could not maintain that the action was incompetent *quoad* the petitory conclusions if the title to sue was upheld.

LORD YOUNG—[*After stating the facts*]—There is no objection upon record to the competency of the action. There is an objection to the title to sue. The case was argued before us upon its merits, and when we had the case at avizandum we thought it fitting that there should be an opportunity given to the parties to discuss the question of the competency of the action at the instance of those parties in the Sheriff Court, and the case was accordingly put out for hearing upon that matter, and I think it will be necessary for us to express our opinion upon it, for if the action is incompetent of course there are no merits which can be dealt with.

I am of opinion that there is a title to sue, and I am of opinion that the action is competent. The ground upon which a doubt occurred as to the competency was that this is an action of reduction and that a reduction of this kind is not competent in the Sheriff Court, and that as to an action for payment, the trustee under a voluntary trust for creditors, although the creditors accede, takes *tantum et tale* with the truster, and that he cannot sue an action on the ground that this payment, which M'Laren could not have challenged, he having made it himself, was contrary either to the Act of 1696 or contrary to the common law. My opinion is against that contention. I think, in the first place, that a reduction is not necessary in order to challenge a preference as being contrary to the Act of 1696, cap. 5, or contrary to the rules of the common law. It is enough to have an action in which it may be shown that the preference complained of was a preference given contrary to the provisions of the statute, or contrary to the rules of the common law. There is no deed to be reduced; there is no fact to be established except that the circumstances were such that the Act of 1696 applies to the payment, and that it was contrary to the provisions of the Act, or that the payment was fraudulent and a violation of the rules of the common law. I see no objection to the facts necessary to establish either of these propositions—there being no deed in the way which requires to be removed—being established without the necessity of a reduction. Indeed, there is nothing here to reduce but only an averment of facts which require to be established, showing, as the pursuer contends, that the payment which he complains of and seeks restoration against was a violation of the statute or of the rules of the common law. Even if there had been a deed to be set aside or a deed standing in the way, I think it is now quite established under recent legislation and in practice that in the Sheriff Court the Sheriff can inquire as to the propriety of granting a deed under circumstances averred and established, and as to whether or not it should be disregarded, without the necessity of a reduction to set it aside and declare it to be null and void, extinguishing the deed and putting it out of existence. I think there is abundance of authority for that. But there is no deed here, and there is therefore nothing to be established in the case at the instance of the trustee for creditors whose debts were due prior in date to the payment, restoration of which he seeks, except facts which show that money was paid to the defenders in the case contrary to the statutory rule or contrary to the common law rule, and that he ought to have the money for distribution among the creditors. The consent of the whole creditors would not be necessary; in a matter of competency it is sufficient that any prior creditors are parties to the action. If the Sheriff Substitute was of opinion that the trustee had no title as representing prior creditors, I entirely differ from him. I think that a trustee who represents prior creditors who have committed their estate, or the estate which is liable to them for the payment of their debts, to his management for their behoof, has a title to sue in any matter of this kind in which they are interested. He suing for behoof of the creditors who had assented to the trust would have a title to bring an action against any debtor to the estate. It is not a voluntary trust revocable by the truster, for it is assented to by the creditors and exists for their behoof and has been acted upon. They have omitted a proceeding which they might otherwise have taken for their behoof, but if there were any technical difficulty through that (I am of opinion that there is none) it would in my judgment be obviated by one of the prior creditors individually being also a pursuer in the action.

Therefore, being of opinion that the action is competent, as the parties originally assumed it to be, stating and pleading nothing to the contrary, we have to consider whether the judgment of the Sheriff on the merits is or is not well founded, and that question is just, whether upon the facts as established—for there has been a proof—we can affirm Cond. 3. I am of opinion that we cannot. In any challenge of a proceeding of this kind I think we must look to the truth and substance of the matter, and I think that the substance of the matter is that this accommodation bill, which the bank's customer got his father-in-law to accept, was neither more nor less than a security to the bank for the payment of the balance of his account due to them. It did not pay that balance. If the bill had run on to maturity, and had been paid, then it would have paid the balance to the amount of it; but if not paid, it paid nothing, and was in substance merely a security in the hands of the bank. I have noticed the fact that, as matter of book entry, it was entered in the bank as discounted to M'Laren, and the amount put to the credit of his account. Well, I think that is provisional, and would not interfere with the substance of the thing. It was not meant, and I think could not legitimately be held in practice that the bank was in any different position from this, that they had M'Laren as their debtor for £70, 10s. with an accommodation bill accepted by his father-in-law in security of the debt. I may just observe in passing that if M'Laren had gone to the bank and paid

£70, 10s. towards the extinction of the debt due by him on his account, there could have been no possible challenge of that under the Statute of 1696 or at common law, and when he goes to the bank and says that his father-in-law desires to have back that accommodation bill, and states that he is willing to pay the £70, 10s. on the bill being given to him, I think he was in the exercise of his right. I do not inquire how he got the money; he may have got it in a manner which was not in the exercise of right, but he was possessed of the money, and he was entitled to go to the bank and say, "I want that bill given up, and here is the amount, the whole amount of it." And the bank were entitled—I do not consider whether they were bound, although I rather incline to think that they only acted legitimately, and would not have acted legitimately if they had acted otherwise—to give up the bill on payment of the whole amount, even six weeks before they could have enforced payment of the bill. I think there is a great deal in the Sheriff's view that this was merely a purchasing of that bill by M'Laren for cash for the full value of it. I think that is the substance of it, and that in that there is nothing contrary to the Act of 1696, and nothing fraudulent at common law which would entitle us to set aside the transaction, or rather I should say, entitle prior creditors, or their trustee legitimately acting for them, to have restoration of the money so paid.

I am therefore of opinion here upon the facts as averred, and upon the evidence on which these facts rest, which must be judged of by us in this concluded case, that no case has been made out entitling the pursuer to have this payment set aside or the prayer of this petition granted. The way to have set aside a payment of this kind is to have the money restored. I think the term reduction is not very applicable to it except in the familiar enough sense of reduction—restoration. There is nothing to reduce; there is only restoration of the money, which is payment of the money. And that is the conclusion here; the summons seeks for decree against the defenders, ordaining them to pay to pursuers, or alternatively to William Stiven, as representing the creditors of the said John M'Laren, the sum of £70, 10s. with interest from a certain date. The facts upon which that conclusion rested must be established to the satisfaction of the Court before the payment prayed for can be ordered. I am of opinion that the facts entitling them to that order or decree for payment have not been established, and that therefore the judgment of the Sheriff should be affirmed, this appeal being refused with expenses.

I should like to say that I think there is no declarator here, and no declarator is necessary. There is a conclusion in the petition, a superfluous conclusion in my opinion—to find that the payment was contrary to the statute, and contrary to the common law. I think a finding to that effect is just a finding in law, and that the proper conclusion in the prayer is the latter part of it, to conclude for payment to the pursuers of the sum mentioned. In an interlocutor proceeding on a proof the Sheriff would have to find in point of fact so-and-so, and find in point of law that the payment was in violation of the statute and against the common law. I think that is no declarator in the proper sense, but merely a finding in point of law.

LORD TRAYNER—The doubts which I expressed in the course of the debate as to the competency of this action as laid have not been removed, but as I understand none of your Lordships share in my doubts, but, on the contrary, are of opinion that this action is competent, I do not think it necessary to say anything on that subject. On the question of title to sue, I do not concur in the views expressed by Lord Young. I agree with the Sheriff-Substitute that the pursuer Stiven had no title to sue this action as laid, and that the pursuer Willsher had no title to sue or insist in the petitory conclusions. These questions I think are decided by the cases of *Fleming's Trustees* (9 R. 542), and *Cook* (23 R. 925).

On the merits of the action I agree with the result at which the Sheriffs have arrived. It is not proved, in my opinion, that at the time when the bill in question was retired, the defenders or their agent Mr Scott knew that M'Laren was insolvent, or had reasonable ground for believing him to be so. At that date the balance on his account with the defenders was at his credit. I regard the payment made to the defenders on 15th March 1895 as a cash payment of a debt due although not then exigible, but a payment at the same time which the defenders were not entitled to refuse. I think it is (as a general rule) the right of every debtor to pay off his obligation and insist upon a discharge of it before the date on which the creditor could exact payment or performance, provided the period fixed for performance has not been so fixed in the interest of the creditor. Here the date of payment on the bill was a date fixed in the interest of the debtor, and of him alone, and the benefit thus conceived in his favour he was entitled to renounce. Accordingly I think M'Laren, who was an obligant on the bill in question to the defenders, was entitled before the expiry of its currency to take it up, and the defenders could not refuse to take payment and deliver up the bill. I am satisfied also that the defenders in receiving payment from their debtor, and delivering up the bill before it had matured, was acting in the ordinary course of their business. Such a transaction (although not so frequent as the retiring of bills on their due date) is quite well-known and not infrequent—so well-known and recognised that banks have a fixed rate of rebate which is paid to the debtor retiring his bill before maturity. I would be slow to impose on bankers the duty, in every case where a debtor proposes to pay his bill before maturity, of inquiry into the circumstance of their debtor before they accepted payment, with the risk that if they did not do so the transaction might be held to be an illegal preference. In this case I think there

was a cash payment made by a debtor to his creditor in the ordinary course of business, and such a payment is not struck at by the Act 1696, c. 5. I think further that there is no room for the suggestion that this transaction was a fraud at common law.

LORD MONCREIFF—I am not prepared to hold that the petition is incompetent. It is true that the trustee, being a trustee under a private trust-deed, who has not obtained the consent of all the creditors, has no title to sue—*Fleming's Trustees* v. *MacHardy*, 19 R. 542; and it is also true that here the private creditor has no title to demand payment to himself or to the trustee of the sum sued for—*Cook*, 23 R. 925. But *quoad ultra* the pursuer Willsher, the private creditor, has a good title to insist on the remaining conclusion of the action, provided that conclusion is competent and separable, and not merely ancillary to and dependent upon the petitory conclusion.

Now, admittedly reduction is not competent in the Sheriff Court, and until 1877 actions of declarator were also incompetent in the Sheriff Court. But I do not read the first part of the prayer of the petition as a conclusion for reduction. Reduction is not necessary; there is no deed to be reduced, and the prayer consists merely of what is in substance a declarator that the transaction in question amounts to an illegal preference, and a prayer that it should be set aside. This, I think, is competent in the Sheriff Court under section 10 of the Bankruptcy Act of 1856, and section 9 of the Bankruptcy Act of 1857; and sec. 8 (2) of the Sheriff Court Act of 1877. In regard to the latter statute, it is true that the creditor is not entitled to payment of the whole sum sued for, but he has an interest in that sum, and the statute says that actions of declarator shall be competent in the Sheriff Court for the purpose of determining any question of property in moveables where the value does not exceed £1000. It may be that the pursuer, the private creditor, might have to institute further proceedings before he could make his right good, but I think that he was entitled to sue the action to the effect of having the preference declared null.

The only defenders called in this action are the National Bank of Scotland, and the only transaction which is sought to be reduced is a payment of £70, 10s. made to them on 15th March 1895 for the purpose of retiring a bill due five weeks later, viz., 21st April 1895, on which his name appeared as drawer, and that of his father-in-law, Gatherer, as acceptor. Clearly this was a bill drawn for the accommodation of M'Laren.

The result of the authorities is that payment by anticipation by a person insolvent of a debt not yet exigible may or may not, according to circumstances, be reducible under the Act 1696, c. 5, or at common law. *Primâ facie*, a payment so made indicates an intention to give the creditor a preference. But this presumption, such as it is, can be redargued, and if it can be shown that the payment was made in the ordinary course of trade, or of the dealings between the parties, it will stand.

If this had been simply a payment of a debt due to the bank, there is a considerable body of evidence to show that M'Laren was insolvent when he made it, and knew himself to be so; that the payment was not made in the ordinary course of dealing; and that it was made for the protection of Gatherer, the acceptor on the bill. But in order to the reduction of such a transaction, it must be shown that the creditor has received a preference, and on this point I think the pursuers' case against the bank fails. The bank did not merely receive payment of a debt and discharge it; they held a document of debt upon which Gatherer's name appeared as acceptor, and this document they gave up to M'Laren in return for the sum in the bill. Now, it is not proved that Gatherer was not good for the money; and if he was good for it the bank gained nothing by the transaction. The preference, if preference there was, was one in favour not of the bank, but of Gatherer, who is not a party to this action.

Given another good name on the bill and ignorance on the part of the holder of the drawers' insolvency, such a transaction cannot be set aside *quoad* the holder—*Mitchell* v. *Rodger*, 1834, 12 Sh. 802.

If, however, it were proved that the Bank were aware of M'Laren's insolvency, and were parties to a transaction by which Gatherer was benefited at the expense of M'Laren's other creditors, the transaction could not stand. On this point I confess I have felt some difficulty. There are passages in Mr Scott's own evidence and in his letters, which the appellant's counsel relied on with some force, as indicating that Mr Scott knew or should have known that M'Laren was insolvent; and the question is whether it is proved that this knowledge amounted to certainty or merely to suspicion. On the whole I do not think it is proved that he knew that M'Laren was insolvent, and therefore the bank must be assoilzied.

LORD JUSTICE-CLERK—In regard to the title to sue I agree with the opinions of Lord Trayner and Lord Moncreiff. If the case had to be decided on its merits I would agree with the opinions of all your Lordships.

The Court pronounced the following interlocutor:—

"Recal the interlocutors appealed against: Find in fact (1) that in or about the month of October 1894 the now deceased John M'Laren discounted with the defenders, at their branch office, Hilltown, Dundee, a bill for £70, 10s. drawn by him upon and accepted by Adam Gatherer, Laurencekirk, dated 18th October 1894, and payable six months after date; (2) that the said John M'Laren, at the date when the said bill was discounted, or at all events some time before said bill was

retired as after mentioned, informed David Peebles Scott, the defender's agent at their said branch office, that said bill had been accepted by the said Adam Gatherer as an accommodation bill, and not for value; (3) that on 13th March 1895 the said John M'Laren was insolvent, and issued a circular calling a meeting of his creditors to be held on 19th March thereafter, and that he was rendered notour bankrupt on 4th May 1895; (4) that on 15th March the said John M'Laren retired the foresaid bill, there being yet thirty-seven days of its currency to run, by paying in cash to the defenders at their said branch office the full amount of said bill less the amount of 1s. 5d., being the rebate to which he was entitled on account of retiring said bill before maturity, and that said bill was then delivered to him; (5) that when said bill was retired as aforesaid no notice had been given to the defenders or their agent, Mr Scott, of the circular which had been issued calling a meeting of M'Laren's creditors, and that neither the defenders nor their agent Mr Scott were aware that M'Laren was insolvent, nor had reasonable grounds for thinking that he was insolvent; (6) that the retiring of a bill before maturity either by the drawer or acceptor thereof by payment of its contents, is well known in banking business and of not infrequent occurrence, and is a transaction within the ordinary course of a banker's business: Find in law (1) that the pursuer William Stiven, as trustee under a voluntary trust-deed granted by the said John M'Laren, has no title to sue this action; (2) that the pursuer George Willsher, as an individual creditor of the said John M'Laren, has no title to sue or insist in this action to the effect of obtaining decree in terms of the petitory conclusions of the petition; (3) that the payment of £70, 10s. to the defenders by the said John M'Laren as aforesaid was not an illegal preference within the meaning of the Act 1696, cap. 5, and that such payment was not a fraudulent preference at common law: Therefore assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Pursuers—Kincaid Mackenzie—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—John Wilson. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, June 16.

FIRST DIVISION.

WINGATE & COMPANY *v.* INLAND REVENUE.

Revenue—Income Tax—Company Resident Abroad Exercising Trade in Scotland—Form of Assessment—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 41—*Income Tax Act* 1853 (16 *and* 17 *Vict. c.* 34), *Schedule D.*

A shipping company, which was formed "for the purpose of carrying on trade," and was the owner of one ship, was incorporated and registered in Norway, where the registered office of the company was situated and the books of the company kept. The whole of the contracts of affreightment were effected by Messrs W. & Company of Glasgow who kept the accounts—which they transmitted to Norway for the purpose of making up the books — intromitted with the whole funds, and paid over dividends to the shareholders on behalf of the management. Ninety-three of the shares of the company were held by shareholders resident in Scotland, and two by the managers in Norway. Messrs W. & Company were assessed under Schedule D of the Income-Tax Acts in respect of the profits made by the ship, the form of assessment being "Messrs W. & Company for barque 'Chanaral.'" *Held* (1) that the company was resident abroad but exercised its trade in Glasgow, and accordingly was assessable, through Messrs W. & Company as its agents, under sec. 41 of the Income-Tax Act 1842; (2) that the form of assessment was not invalid, it being unnecessary to designate Messrs W. & Company expressly as agents.

At a meeting of the Income-Tax Commissioners for the city of Glasgow held at Glasgow on 12th November 1896, Messrs James Wingate & Company of Glasgow appealed against an assessment made upon them under Schedule D of the Income Tax Acts for the year ending 5th April 1896 in the sum of £505 in respect of the profits of the barque "Chanaral." The assessment bore to be upon "James Wingate & Company, North Court Royal Exchange, for barque 'Chanaral,' Income-Tax, Schedule D, £505—Amount payable £16, 16s. 8d." The Commissioners having refused the appeal, Messrs Wingate & Company required them to state a case. The following facts were stated in the case:—"(1) The barque 'Chanaral' is owned by a limited liability company registered in Christiania formed in 1894, and is not on the register of any port in the United Kingdom. . . . (3) The share list is kept in Christiania, whence all share certificates are issued; but these are not valid until confirmed by the signature of James Wingate & Company, who own twenty-three of the ninety-five shares into