under the Court of Session Act of 1850, sec. 40. There is no other Act with which I am acquainted under which the defender could have made this motion. Under that statute this motion is competent only when the issues are finally fixed, and where there can be no more discussion about their terms. This notion is so consistent both with the practice and theory of our Jury Court that it is hardly possible to doubt it for a moment. Before the Act of 1850 no notice of trial could be given even by the pursuer until the issues were engrossed on parchment, and lodged in the Jury Office. Before that the issues went through much procedure, which is now varied or abolished. They had first to be approved by an interlocutor of the Lord Ordinary, against which either party might apply by motion to the Inner House. If that motion was not made within the ten days the issues were held settled and fixed; they were then engrossed, and signed by the Lord Ordinary. If the motion was made, the engrossing and signing were delayed until the matter was disposed of by the Court. But until that was done no farther steps whatever could be taken in the cause; diligence could not be granted, and a great many motions could not be made. After it, all motions were made in the Inner House. The engrossing of the issues was therefore a particular turning point in the case, and was the one thing above all others which required to be done before the time and place of the trial could be fixed. The Act of 1850 introduced much change, for it dispensed with the engrossing of the issues, and provided that approval by interlocutor of the Lord Ordinary or of the Court should be equivalent to engrossing. It did not matter whether it was the interlocutor of the Lord Ordinary acquiesced in by the parties, or the order of the Inner House, on motion made to them, but it was only after one or other of these methods that the 40th section authorised the parties to take a new step altogether, and move the Lord Ordinary to fix the time and place of the trial. Now, the statute makes it abundantly clear that this step was to be just as incompetent before final approval of the issues as it had been before their engrossment. The thing sent to trial is nothing else than the issues as fixed. The office of the judge and jury is to try, and return an answer to the issues as fixed and sent to them. Before the issues are fixed there is nothing which can be sent to trial. Now, what is the alteration introduced by the new statute of 1868. It seems to me to be a very serious one, and very much like a return to the practice of 1841, whereby either party had been entitled to move the Court to alter the issues as adjusted by the Lord Ordinary. Well, then, what is the course of proceeding here. On the 7th March the Lord Ordinary pronounces an interlocutor approving the pursuer's issue, and without a counter issue, and that interlocutor being pronounced, there is then a motion made under sec. 40 of the Act 1850, for it could be under no other, that the Lord Ordinary should fix the day of trial. That clearly implies that the issues were settled. The motion to fix the trial was quite incompetent except on that understanding, and what is more, the defender having made that motion cannot now turn round and repudiate it, and say that she made an incompetent motion. The Lord Ordinary reported the case to us, and we fixed the trial for next May. The defender is now, therefore, precluded by the state of the judicial record from making the motion which is now before us. I feel myself obliged to come to this conclusion, though I am always sorry to oppose technical difficulties in the way of any party seeking to relieve himself of the effects of a mistake, but here to take any other course would be to upset the whole theory of our procedure in this matter. I, however, the less regret this necessity in the present instance as I think it remains quite open for the defender at the trial to raise the question of privilege, which I understand is what she now wishes to put in issue.

Of course the same objection is applicable to the reclaiming note, though there is no objection to its timeousness. It is just an attempt in another way to take advantage of sec. 28 of the Act 1868, and bring under review the step upon the finality, on which the defender's whole after procedure rests.

The other Judges concurred.

The Court accordingly refused the motion, and adhered to the Lord Ordinary's interlocutor.

Agents for the Pursuer—Pattison & Rhind, W.S.
Agents for the Defender—Millar, Allardice, & Robson, W.S.

Friday, March 17.

SPECIAL CASE FOR JAMES HUTTON (ANDERSON & CO.'S TRUSTEE) AND MESSRS J. & B. FLEMING.

Retention—Bleachers' Lien—Special Contract of Lien—Bankrupt—Statute 1696, *c.* 5. Where bleachers, not content to rest upon the ordinary bleachers' lien at common law, gave notice on their receive-notes that all goods received by them were to be subject to a lien, not only for work done thereon but also for the general balance of their accounts, including not only open accounts but also acceptances and promissory notes, whether past due or current; and where manufacturers had dealt with them regularly on this footing for several years,—*Held* that a valid contract was constituted between the parties by this notice, and that this contract subsisted so long as the business relations of the parties remained unaltered, and that it would be an over refined subtlety to suppose that a fresh contract was entered into on each new delivery of goods to the bleachers. *Held*, farther, that this contract of lien must be construed in accordance with the dealings of the parties, and that, looking to them, it was clearly only intended to cover all sums due on the year's account, whether on open account, or on acceptances and promissory notes, past due or current, and not to go farther back, as might be inferred from its terms, and as such was a reasonable and perfectly legitimate contract between the parties. *Held*, lastly, that it was not struck at by the Act 1696, c. 5, provided the goods to which it was attempted to make it apply had been sent to the bleachers in the ordinary course of business.

Question, Whether the ordinary bleachers' lien at common law would cover bills and acceptances taken for balance on account within the year, as well as balance on open account?

The following is the statement of facts contained in the Special Case laid before the Court:—"James Hutton, accountant in Glasgow, one of the parties

in this case, is trustee upon the sequestrated estates of J. W. Anderson & Company, merchants and manufacturers in Glasgow and Belfast; J. J. & B. Fleming, the other parties in the case, are bleachers at Newlandsfield, Pollockshaws, near Glasgow. The estates of J. W. Anderson & Company, and of Anderson & Gray, were sequestrated under the Bankruptcy Acts on 14th October 1869. The bankrupts were in the habit of employing Messrs Fleming to bleach and finish their goods; and the manner in which business was transacted between the parties during their connection in business, being for upwards of twelve years, was as follows—Messrs Fleming sent to Glasgow daily for the purpose of taking delivery from merchants and manufacturers of goods intended to be bleached at Newlandsfield, and they received goods from the bankrupts in this way almost daily. Along with each parcel of goods thus delivered, the bankrupts handed to Messrs Fleming a dated receive-note setting forth the kind and quantity of the goods delivered, the receipt of them by Messrs Fleming, and the purpose for which they were delivered. On the other hand, Messrs Fleming returned bleached or finished goods to the bankrupts almost daily, and with each separate parcel they sent a dated receive-note, setting forth the kind and quantity of goods therewith returned, and having upon it the following printed memorandum or note:—'*N.B.* All goods received by us are subject to a lien, not only for the work done thereon, but also for the general balance of our accounts, including not only open accounts, but also acceptances and promissory-notes, whether past due or current. We do not hold ourselves responsible for loss on goods occasioned by being kept in our works past specified date, or injury done fancy colours, except sent by themselves, and mentioned as such in receive-note. No allowance for damages, except when shown, and amount agreed upon.' There was no obligation on the part of the bankrupts to employ Messrs Fleming in bleaching or finishing goods, or to give them any security for their charges for so doing; and, on the other hand, there was no obligation on Messrs Fleming to bleach or finish the bankrupts' goods without security. The bankrupts, in the ordinary course of business between themselves and Messrs Fleming, sent goods to Messrs Fleming between the 2d and 25th September 1869, that is, within sixty days of their bankruptcy. Some of those goods were returned to the bankrupts between these dates, accompanied as usual by receive-notes issued by Messrs Fleming, as aforesaid. The remainder of the said goods was in the hands of Messrs Fleming at the date of sequestration. All the goods that had been sent prior to 2d September were returned to the bankrupts, except 11½ dozen shirts, sent by the bankrupts to be bleached on 28th August. Messrs Fleming maintain that, in these circumstances, they have a general lien over the goods in their hands at the date of sequestration, not only for the charges for bleaching those particular goods, but also for the charges for bleaching the other goods they received in September 1869, and for their prior accounts for bleaching, consisting of those for which the foresaid acceptances were granted, and of the August open account. Mr Hutton, as trustee foresaid, while admitting that in such circumstances, Messrs Fleming have a general lien in a question with the bankrupts, maintains that it is not effectual over goods received by them from the bankrupts within sixty days of sequestration, for more than the price of work done on the goods. Mr Hutton, the trustee, has offered to pay Messrs Fleming the amount of their account for bleaching the said goods remaining in Messrs Flemings' hands at the date of the sequestration, but he declines to pay either the charges for bleaching the other goods received and returned in September, or the bills and prior bleaching account, leaving Messrs Fleming to rank for these in the sequestration."

Upon this statement of facts the following question was submitted to the Court:—

"Whether, in a question with the said James Hutton, trustee as foresaid, the lien claimed by the parties of the second part is, in so far as it is maintained as a lien to cover prior accounts and bills, remaining due by the bankrupts at the date of their sequestration, a voluntary security for a prior debt, within the meaning of the statute 1696, c. 5, and therefore ineffectual?"

Solicitor-General (A. R. Clark) for Anderson's Trustee (with him Scott and Harper), maintained that the bleacher could not at common law retain in virtue of his lien after he has taken a bill for the price. Necessarily, therefore, here the bleachers must found entirely upon the special agreement. Now, admitting that the agreement is a valid contract between the bleachers and the bankrupt, it is a question whether it is one which subsists where other creditors come in. The effect of affirming such a proposition would be to give to them a preference accorded to no other class of creditors or traders.

The question, whether a security taken in this way is good against other creditors under the Act 1696, c. 5, where the goods have been delivered within sixty days of bankruptcy, depends much upon the view that is taken of the agreement itself, as to whether it is antecedent or not to the sixty days? If it were held to be antecedent to the sixty days, the bleachers may plead that they only got specific performance of an antecedent obligation, and are not therefore under the Act of 1696. They maintained, however, for the trustee that a fresh agreement was made on delivery of each fresh parcel of goods, and that the date of each agreement is the date of such delivery, and that consequently the Act 1696, c. 5, did apply. They referred to Bell's Com. (M'Laren's ed.) ii, 101-4; *Dunbar's Creditors*, Hume, 107; *Handyside*, Hume, 651 (Lord President's opinion); Smith's Mercantile Law, 7th ed. 558-61; *Rose* v. *Falconer*, June 26, 1868, 6 Macph. 960; *Anderson* v. *Walker*, March 29, 1842, 4 D. 1180; *Taylor* v. *Farrie*, 8 March 1855, 17 D. 639.

Shand and Maclean for the second parties, Messrs Fleming,—That there was no purpose or intention to create a preference, but that it had arisen in the ordinary course of dealing and under a legitimate agreement, and therefore the Act 1696, c. 5, did not apply. The goods were sent in the ordinary course of trade, and the question therefore was, Whether, under the circumstances, a preference was created? Now there are many securities which are not preferences within the terms of the Act, and this is just one of them. The law has recognised a special lien in every case, but has not extended the general lien so universally. It has, however, been recognised as quite legitimate to stipulate for it in many cases, and it is necessary, or at least advantageous, for the exigencies of many businesses that it should

be so. On the other hand, the law has recognised a general lien in some instances, as in the case of bankers and factors, whose lien really rests upon usage recognised by law. This point has not indeed been reached in the case of bleachers, but the legality of stipulating for such a general lien is beyond doubt; *Harper* v. *Faulds*, 27th January 1791; *Rushforth*, 6 East. 518 and 7 East. 224; Smith's Mercantile Law, p. 562-3. These authorities show that the validity of a general lien has been established where it is a condition or stipulation of employment, or a result of usage.

In the present case the agreement itself is beyond question, and the mere fact that it was made to cover bills makes no difference. It may be that an ordinary lien is waived by taking a bill, but the essence of the agreement here was, that the bleachers should not be held as giving up their lien, even though they did take bills; *Gairdner* v. *Milne & Co.*, February 13, 1858, 20 D. 565.

Farther, there are exceptions to the operation of the Act of 1696, as in the case of bankers and factors already mentioned, and the principle upon which these exist is this:—In the course of dealing between bankers and their customers, or between factors and their clients, the banker or factor goes on paying out and taking in money even up to the date of insolvency; and it is just because of this going on that the law holds that his getting any security within the sixty days is not a preference in terms of 1696, c. 5. The case of the bleacher is just the same. He parts with each parcel of goods and gives up his lien over them in the ordinary course of dealing, in the natural expectation of more goods coming in to replace them; and so, upon the principle above mentioned, the Act does not apply to them, provided the goods are sent in the natural course of business, and not with any intention of creating a preference.

Lastly, it is a fallacy to suppose that each new delivery of goods creates a fresh agreement applicable to those goods only. On the contrary, the agreement is one which subsists so long as the parties continue their course of dealing with one another unaltered.

On all these grounds they submitted that here the Act could not be held to apply.

At advising—

Lord President—The bankrupts, Messrs J. W. Anderson & Co., were in the habit of employing the Messrs Fleming, the second parties to this case, to bleach their goods for them, and this course of dealing had subsisted between them for nearly twelve years prior to the date of their bankruptcy. During all this time the course of dealing between these parties had been quite uniform, and was in all respects apparently very much the course usual in the trade—that is to say, in the special branch of the trade in which manufacturers and bleachers deal with one another. The manufacturers send parcels of goods from time to time, as they find it convenient; the bleachers again return each parcel as soon as it has undergone the necessary processes for which it has been sent. Now in such circumstances it is not at all wonderful that certain unusual rights should arise by reason of the usage of trade. Accordingly it is quite established in our law that the bleacher has in a case like this a lien of a peculiar kind. He has first a lien over each parcel of goods sent to him for the price of work done on that parcel. But he has also a farther lien over each parcel of goods for the balance of his whole account for work done within the year. In short, he has a lien over all goods in his hands as a security for the payment of the balance of that year's account. This is settled by the early cases of *Hunter* and *M'Culloch*, both in the year 1794, and also in that of *Dunbar's Creditors*. There is also another case which, though not deciding the question directly, contains a very able statement of his view of the law on this question by Lord President Campbell. I mean the case of *Handyside*, reported in Hume, p. 651. Now, independently of any special conditions or stipulations, it appears to me that Messrs Fleming would be legally entitled to retain any goods in their hands as a security for the price of bleaching all goods in the year preceding the bankruptcy. But there is, in addition to the common law lien, a special contract constituted here by way of notice. That is to say, on the back of their receive-note there is a *nota bene* in the following terms—(*His Lordship read the note above quoted*). Now I do not entertain any doubt—and I do not suppose your Lordships do either—that a contract between parties in the same relative position as these can validly be established by notice, and that such contract, if not in itself unlawful, must receive effect. The question then is, What is the construction which the terms of this contract must receive, and what are the limits of its application? Now this contract, taken in its natural sense, would establish a lien for the general balance due on account, never mind how far outstanding, and also for any acceptances or promissory-notes, whether past due or current, granted at any time in the course of business between the parties. Now such a contract as this between two parties in this position would not only be a most unreasonable, but also a most illegal contract, and one that the Court could not sustain. But I am of opinion that nothing of this sort was in the contemplation of parties. On the contrary, I think that their intention was to make an agreement both fair and rational. The bleachers stipulate for a lien for the balance of their account, meaning thereby, according to the ordinary usage of trade, the balance of the year's account remaining unsettled. The only peculiarity of the stipulation between the parties is, that it stipulates that though acceptances have been taken for the amount of accounts due, the lien shall cover these acceptances also as well as the general balance or open account. Now, whether the common law lien would cover acceptance so taken from time to time throughout the year, I am not prepared to say; but all doubt upon that subject was intended to be removed by the agreement which we are seeking to construe. The manufacturers, then, became bankrupt in September 1869, and at that time they were owing the bleachers considerable sums on account of work done during the year then current, but not beyond the year. A great variety of goods had been sent by them to the bleachers, and most of them had been returned finished, but there remained in the hands of the bleachers certain goods sent there during the end of August and the month of September, that is to say, within the sixty days preceding bankruptcy, and these the bleachers claim to retain in security of the whole sums due to them on the account for the year. But they had several times during the year received from the bankrupt acceptances for the amount of their open account, sometimes monthly, sometimes every two

months. All these acceptances were current at the date of the bankruptcy, and the question comes to be, Whether they were entitled to retain the goods to cover these acceptances in terms of their agreement with the bankrupt, or whether the trustee is right in his contention that such an agreement as affecting goods delivered within sixty days of bankruptcy is struck at by the Act 1696? Now, independently of bankruptcy, I do not think that there is the slightest doubt that under this agreement the bleachers were entitled to retain as against other creditors. The agreement was a perfectly lawful one in ordinary circumstances. But the question under the Act 1696, c. 5, is of a different description, and depends entirely upon the meaning and intention of that statute. It was intended and enacted for the purpose of preventing frauds being perpetrated by bankrupts and persons on the eve of bankruptcy, and for that purpose it laid down an absolute rule, and declared that if certain things were done by the bankrupt they should not receive effect; and therefore the question is, Whether the delivery of goods in this case within sixty days of bankruptcy is of the nature of the things struck at by the statute. Now, a good deal of argument has been adduced before us to show that the agreement between these parties must be taken to be of the date of each fresh delivery, so far as it affects that parcel of goods. I do not think that the solution of that question clears up the case at all; but, at the same time, I am of opinion that that is not a fair construction of the dealing of the parties here. I think that there is a general agreement established between them, that however long they may continue to deal with one another, the bleachers shall have the lien, at least until some specific alteration be made. Upon this footing they operated for a space of twelve years, and every parcel of goods passing from one to the other has been subject to it during that time. It is a legal subtlety, and rather a useless one, to represent that a fresh agreement was made with each parcel of goods received, and to affect that parcel only. But while, as I consider the agreement between the parties subsisted so long as these relations otherwise remained unaltered, still the manufacturers were in no way bound to send goods or employ the bleachers, or the bleachers, on the other hand, to accept the work sent them. In short, the delivery and receipt of a parcel of goods remained as voluntary an act as it was before the existence of the contract of lien.

Now it is not said that there was anything unusual about the deliveries in September. There was no greater amount of goods sent during that month than was usual. It is not said that deliveries were made in that particular month with a view to bankruptcy. On the contrary, the business of the bankrupts and their dealings with the bleachers just followed its usual and natural course. We must take it, therefore, to be absolutely the fact that the goods were not sent for the purpose of bringing them under the operation of the agreement, or of giving an additional security, or for any purpose not connected with the ordinary course of business of the parties. The sending of these goods was a necessary act in the prosecution of the bankrupts' business. Now it appears to me that an act of this kind does not fall under the operation of the Act 1696, c. 5. That statute has been so construed in this Court as to extend a little beyond the natural meaning of its terms. Everything done or given by a bankrupt in security of a prior debt, or that has the effect of securing a prior debt, has been adjudged to fall under the operations of that Act. But certain exceptions have been made, and one of these known exceptions is a transaction in the ordinary course of business between the bankrupt and any other party. It would be a very unfortunate thing for the trade of this country if such exception did not exist. For if the Act of 1696 were allowed to extend to all the dealings of traders, it would disturb their business relations to a most calamitous degree. A man may go on trading in the honest belief of his own solvency, and that even up to the date of bankruptcy, and his ordinary transactions will not be held to fall under the operation of this statute. The law is fixed, both in expediency and equity, that they shall not do so. This principle is nowhere better stated than in Bell's Com. ii, 220. Now, adopting that rule, and applying it to the present case, I cannot say that what was done here was anything else than a prudent, necessary, and suitable arrangement in the circumstances and business of the parties. There was no collusion between them. No improper intention is alleged. And there is no indication that at the time the goods were sent the manufacturers were contemplating bankruptcy, or seeking to do any act which could fall under the statute 1696, c. 5.

I am therefore for answering the question put to us in the negative.

Lord Deas—Laying the bankruptcy out of the question, the bleachers had at common law a lien for the amount of the year's account. There is a little more difficulty with regard to the amount contained in the bills and promissory notes as to whether these bills are to be regarded as taken in settlement of the open account, and therefore as superseding the lien. This would raise a difficulty if there were nothing but the common law to look to, and the question would be, Whether it were sufficiently clear, from the course of trade and dealings between the parties, that these bills were to supersede the lien? But we have here what is practically an engagement that the lien shall include the bills. Unless this is the outcome of the stipulation made by the bleachers, there is nothing in it beyond what the common law already gives. Now there is nothing in this agreement which it was unlawful to stipulate, and nothing but what the course of dealing between the parties might have established, if it had made it sufficiently clear. The agreement made by the course of dealing between these parties, following upon the notice of the bleachers, was, I consider, a general agreement to last while these relations remain unchanged. The argument that each time goods were sent a new agreement was made affecting these goods, and these only, is, I think, unsound. I am clear that it is an over-subtlety which cannot be listened to. It cannot be reasonably said that a new agreement was made each time goods were sent. The goods were not sent for the purpose of creating a lien at all; they were sent in the ordinary course of trade, and the act which would have interfered had they been sent for the purpose of creating a lien does not come into operation when the lien arises from a lawful agreement entered into and acted upon in the ordinary course of business between the parties. I shall add no more, except that I entirely agree with what your Lordship in the chair has said.

Lord Ardmillan—The question here raised regards the validity and extent of a bleacher's lien, and is one of great interest; and much zeal and ability has been evinced in the argument.

I have arrived at the conclusion that, to the extent of the bleachers' account for bleaching during the year, the lien claimed is effectual, and is not struck at by the statute 1696, c. 5.

It is quite settled that a bleacher has a specific lien over particular goods sent to be bleached for the price of his labour on such goods. It is, on the other hand, quite settled that he has not a general lien for all debts, however constituted and however arising. After the decision in *Harper* v. *Faulds* (27th January 1791, Bell's Cases, 440, 475), this cannot be disputed. Between these two extremes, each of which is clear enough, such a case as the present arises. A lien is here claimed on goods sent to be bleached, and claimed, not only for the charges of bleaching these particular goods, but for the charges of bleaching goods sent in the ordinary course of dealing for that purpose during the year and remaining unpaid.

I am of opinion that, for the charges during the year for bleaching goods so sent, the bleachers had, in the circumstances of this case, a general lien at common law. Leaving out of view for the present the particular agreement in regard to acceptances and promissory notes here alleged, I am of opinion that, where there has been a course of dealing between the parties, making it manifest that the lien on each parcel of goods is renounced, or left unused, because of the continuance of the employment and the renewal of the lien, then the lien is equitably extended to cover the year's account for bleaching.

This is the opinion of Mr Bell, whose views are very clearly explained. His view is to my mind quite satisfactory, and it is confirmed by the decisions in the cases of *Hunter* v. *Austin*, *M'Culloch* v. *Pattison & Co.*, *Aberdeen and Smith* v. *Paterson*.

The extension of this lien to meet the balance of the year's account for bleaching goods sent during a continued course of dealing, by the same party under the same arrangements, is a just, reasonable, and equitable extension of the common law principle. Such a lien, thus extended to meet the equities of commercial transactions during a course of dealing, and in accordance with the usage and understanding of trade, is favoured by the law. In Scotland, besides the very high authority of Professor Bell, we have the authority of Lord President Campbell, Lord Justice-Clerk Macqueen, Lord Gillies, and other eminent judges. In England we have the authority of Lord Hardwicke and Lord Mansfield, clearly and strongly expressed; and, on a question of equitable right in the department of commercial jurisprudence, no higher authority can be desired.

But in this case there is said to be an agreement, and it appears that the notice which your Lordship has read was given, accepted, and acted on, so as to form an agreement between the parties. As I read it and construe it, it appears to be a fair and legitimate agreement. I do not, however, understand this agreement to extend beyond the year's account for bleaching. Nor was it pressed further in argument. So reading it, and omitting for the present the mention of "acceptances and promissory notes," I am of opinion that it is not only a fair agreement, but a legal and effectual agreement, in accordance with the equitable principles to which I have adverted. Nor do I think that any important specialty is created by the reference to acceptances. They can, of course, only be in payment of charges for bleaching during the year's operations, and I read the reference to them as merely a stipulation that the bills or notes shall not be accounted as settlements till they are paid. Only one of the bills was past due at the date of sequestration. The rest were current, and all were for work in bleaching during the year. Accordingly, up to the limit of the charges for bleaching during the course of the year, I am clearly of opinion that the lien is effectual.

But Anderson & Cay's estate was sequestrated on 14th October 1869, and the last parcel of goods had been sent to the bleacher within sixty days.

The question remains, whether the lien is liable to be cut down, in terms of the statute 1696?

In so far as the lien is viewed as resting on the common law, and not on the agreement, it is not, in my opinion, struck at by the statute. But, even taking into consideration the agreement, I do not think that the true date of the agreement, or of the creation of the lien, can be said to be at the last sending of the goods, or within sixty days of bankruptcy. The purpose of sending the goods was not to give a lien, but to get the goods bleached. The result was that, according to a previous agreement, and in the course of usual dealing, they fell under the lien. The very able and ingenious argument of the Solicitor-General was too subtle for me. It did not satisfy my mind. It was not in accordance with the rules and principles of equity on which such a question as this depends.

If there is no departure from the ordinary course of dealings—no device to defeat creditors, no disregard of the usage of trade, no anticipation of the usual time, or adoption of any secret mode of transmission—if, in short, the sending of these goods was in the usual and ordinary transaction of business, the terms and conditions of which had been long known and recognised and acted on, then I am of opinion that the last date of transmission cannot justly be held as the date of the agreement—the date of creating this lien. This is, I think, according to the opinion of Mr Bell (v. 2, p. 218–219), who repeatedly states that the great point in such questions under the Act 1696 is, "whether the transaction was in the usual and ordinary course of trade and dealing."

Now in this case that is clear, and scarcely disputed. The whole transaction complained of was according to usage and practice and course of previous dealing, and in terms of an agreement not inconsistent with the right of lien, which, without agreement, the law would have recognised. On the whole matter, I agree with your Lordships in giving effect to this lien, in so far as regards the charges for the year.

Lord Kinloch—It is necessary first to consider the legal character of the lien, on the effect of which we are called on to decide.

It is the lien of a bleacher, as to which certain legal attributes have been fixed by decisions of this Court. In the well-known case of *Harper* v. *Faulds*, decided 27th January 1791, and reported in Mr Bell's 8vo. cases, it was found that a bleacher's lien did not cover a separate debt constituted by bill, the Court apparently not considering it of importance that the bill was said to have been granted for bleaching charges of a former year. In several after cases, reported in the

notes to Bell's Commentaries, pp. 104–5, and one of them in Hume's Decisions, the Court found the bleacher's lien not merely to cover the cost of bleaching the goods sought to be retained, but the cost of all the other parcels bleached in the course of the year. I consider these decisions to settle the general law on the subject of the bleacher's lien. It belongs to plain expediency that where goods are coming in and going out daily, as they do between the manufacturer and the bleacher, the bleacher should not be compelled to retain every parcel till the cost of bleaching it is satisfied, but should have his lien for the year's account on all the parcels indiscriminately. So I think the lien has been declared to subsist by the decisions referred to.

In the present case there was farther created a special contract between the parties by a *notandum* attached to the receive-notes of the bleacher, "All goods received by us are subject to a lien, not only for the work done thereon, but also for the general balance of our accounts, including not only open accounts, but also acceptances and promissory notes, whether past due or current." Agreeably to what I have said, this contract cannot be said to be the exclusive ground of lien to the bleacher in the present case. It is not therefore necessary to consider how matters would stand where a lien was attempted to be created by an anticipative general contract, and had no other foundation on which to rest. The bleacher had his lien at law independently of contract. The main use of the contract, as it appears to me, was to take away the defence which might be stated against the application of the lien, from the fact of a bill having been granted in settlement of the bleaching account. It has been supposed, and indeed in some cases found by decision, that such a settlement destroyed the lien by substituting personal credit; and this consideration will be found to have entered into the case of *Harper* v. *Faulds*. The plea is one which may be often stated with irresistible force, though I do not think it one necessarily successful in all conceivable circumstances. But it is plainly a plea against which express stipulation may protect. The contract in the present case debarred the manufacturers from stating this plea. But this, I think, was its whole effect. It simply expressed the very rational agreement of the parties that so long as a bill granted for the bleaching account remained unpaid, the account should be held unsettled, and the lien to subsist. To this effect, I think, the contract was a lawful and competent one. But the lien was not thereby altered in its legal character, and did not the less rest for its constitution on the act of the law, not on contract merely.

The lien claimed is partly for two open accounts incurred for bleaching prior parcels of goods, and partly for bills granted in settlement of previous accounts, all of them for work done within the year 1869, on 14th October of which the manufacturer's bankruptcy took place. In itself, I think this lien is unobjectionable.

The question then arises, whether it is struck at by the Act 1696, c. 5, so far as regards goods sent to the bleacher within sixty days of sequestration. I am of opinion that this question must be answered in the negative. I do not think that in any view the sending of the goods can be considered, in the sense of the statute, a voluntary security for a prior debt. There was no special purpose to constitute such security, which I consider indispensable to the operation of the statute. The goods were sent in the ordinary course of trade, and so the case falls under the well-known statutory exception, which holds good for the simple reason that no special transaction of security is thereby gone about. It happens frequently (and, indeed, is the only case in which the question will arise) that a preference arises *ex lege* on transactions in the ordinary course of trade, as where a purchase is made by the creditor from the bankrupt in the ordinary course of business, and the creditor pleads compensation on the price, and so is paid in full. This, I think, is, on legal principle, exactly what happened in the present case. There was no special security constituted. The preference has arisen by the operation of the law in the ordinary course of trade. Therefore the statute is inapplicable.

The Court accordingly found and declared "that the lien claimed by the parties of the second part, in so far as it is maintained as a lien to cover the prior accounts and bills remaining due by the bankrupts, at the date of their sequestration, for the preceding year, is not a voluntary security for a prior debt within the meaning of the statute 1696, c. 5, and decerned."

Agent for Mr Hutton (Anderson's Trustee)—John Walls, S.S.C.

Agents for the Messrs Fleming—J. W. & J. Mackenzie, W.S.

Friday, March 17.

KIRKWOOD *v.* BRYCE.

Discharge — Payment — Proof — Parole Evidence — Competency—Illiquid Claims. A granted a probative discharge to B, in which it was narrated that it had been agreed that B should advance £45 to A out of a certain fund, and receipt for the same acknowledged. A now sued B for £30, on the averment that £15 only had been actually paid; that the discharge had been signed and delivered on the footing that the whole £45 should be instantly paid in cash, and that B had failed to pay the balance, and fraudulently retained the discharge. *Held* competent to prove this averment *prout de jure*; and the proof having shown that only £15 was paid, *held* that B had failed to prove that A had agreed that the balance should be retained in extinction of certain unconstituted debts alleged to have been due by A to B and others.

This was an appeal from the Sheriff-court of Stirlingshire. Cornelius Bryce, the father of the pursuer, died in 1847, leaving a deed of settlement by which he conveyed his whole property to his son Allan Bryce, under burden of a legacy of £145 to the pursuer in liferent and her children in fee, with the condition that the disponee might make advances to her out of the capital for her better and more comfortable support. Allan Bryce died in 1852, and was succeeded by his son the defender. The interest of the sum was paid to the pursuer for a considerable period of time. About the beginning of 1863 she applied for an advance out of capital to enable her second son to go to New Zealand. Accordingly, an advance was agreed to be made