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

for that purpose. A discharge was executed and duly subscribed by Mrs Kirkwood and her two sons, and also by her husband, though his right of administration was expressly excluded by the deed of settlement. The discharge narrates the terms of the original deed, states that the pursuers' son William was in delicate health, and was, on that account, going abroad, and that it has been agreed that £45 shall be advanced out of the capital sum of £145, acknowledges receipt of the same, and discharges the defender.

Mrs Kirkwood now brought an action against the defender, concluding for payment of £30, on the allegation that, though £45 was agreed to be paid, only £15 had in fact been paid.

The Sheriff-Substitute (BELL) dismissed the action, on the ground that it was virtually a reduction of the discharge, and incompetent in the Sheriff-court.

On appeal, the Sheriff (BLACKBURN) recalled the interlocutor of the Sheriff-Substitute *hoc statu*, and allowed parties a proof of their averments touching the facts and circumstances surrounding the execution and delivery of the discharge.

The defender appealed.

FRASER and CRICHTON for him.

ORR PATERSON for Mrs Kirkwood.

After some discussion, the pursuer was allowed, on payment of an amount of modified expenses, to amend her averment in regard to the delivery of the discharge. As amended, it was to the effect that the discharge had been prepared by the defender's agent, Mr Smith; that it had been signed on the footing that the sum of £45 should be instantly paid; that the defender stated that he had only £15 in hand, but promised that he would hand over the balance to Mr Joseph Gartshore, her brother-in-law, to pay to her; that the discharge was accordingly left with the defender's agent, but that the defender failed to pay the said balance, and thus fraudulently obtained, and retains, possession of the discharge.

Proof was then allowed as by the Sheriff. When the case came again before the Court, as their Lordships expressed an opinion that the pursuer, having only a liferent in the legacy, could not sue for any part of the capital, the pursuer asked and obtained leave to insert an alternative conclusion for arrears of interest on £30 from January 1865 to the date of citation, and a conclusion for payment of the interest which should in future accrue on the sum of £130.

The Court, on resuming consideration of the proof, were of opinion that there was other evidence that should have been taken, particularly that of the clerk who wrote the deed of discharge, and that of Alexander Kirkwood, the pursuer's surviving son, one of the subscribers thereto. The evidence of these parties was accordingly taken before Lord Deas. The result of the whole proof was to show that only £15 had been actually paid, and that the balance had been retained to meet certain debts alleged to be due by Mrs Kirkwood to the defender, Mr Joseph Gartshore, and the agent, Mr Adam Smith.

At advising—

LORD DEAS (after a narrative of the facts)—Mrs Kirkwood had no right to get any part of the principal, even with consent of the disponee, except for her better support. She had no right to get any part of the principal sum to be paid to third parties, far less to the party making the advance. What is stated on the face of the deed is a sum sufficient to enable William to go to New Zealand. It now appears that only £15 was actually advanced. It further appears that £15 was sufficient for the purpose of sending out the son, and he was sent out. That being so, the pursuer had no right to get any more, and the discharge is really a discharge by the children. They were the fiars; she had no right to an advance except for her better support—a purpose not in view at all in this transaction. She brings this action upon the allegation that £15 only had been paid, and concludes for the balance of £45, on the footing that £45 had been the sum agreed on, with interest. The summons contained no separate conclusion for the interest on £130, but this is now amended, and the question comes to be, whether the pursuer is entitled to interest on £130 or on £100. If anything be clear in this case, it is that no more than £15 was advanced. On what grounds, then, is the defender entitled to say that £45 shall be held to have been paid? The Sheriff allowed a proof. It was well to know what actually took place at the granting of the discharge. Though great effect is to be given to an acknowledgment of a payment of money in a probative deed, yet as one event must precede the other, it would be strange that if one party got the deed into his possession, no inquiry could be made as to the payment of the money. The case for the defender is that only £15 was paid, but that there was an agreement that £10 more should be held as paid, and applied in extinction of a payment made to her by the father of the defender. The latter had continued to pay interest to her on the whole sum, though now he says that she got £10 to account of principal. Mr Gartshore, the pursuer's brother-in-law, says that there was an old debt of £12 due by her to him. That, on the face of it, appears to have been a loan to her husband, whose right was excluded. Mr Smith's business account of £10 is not an account chargeable against her. She was never consulted about it, nor got the slightest benefit from it. Now, even supposing that this lady had the power to stipulate that these sums should be held as paid, the burden lies upon the defender to prove the constitution of these old debts. But she had no power to agree to hold part of the advance in extinction of these debts; and if she had, it is certainly not proved that she did agree. There is much confusion in the evidence on the other side. On the whole matter, I am of opinion (1) that the constitution of these counter-claims could only be proved by writ or oath; (2) that they are not pleadable against the children; (3) that even if it is competent to admit parole evidence, that they are not proved.

LORD ARDMILLAN—It is clearly proved that nothing more than £15 was paid. Whatever more is said to have been paid is not even alleged to have been paid to the pursuer, but to have been retained to meet unconstituted debts alleged to have been due by her. I have no doubt that where the payment of money and the granting of a discharge are *unico contextu*, it is legitimate to inquire whether what was said to have been done was really done. For example, a person who goes to a shop and gets an account receipted on tendering payment, is guilty of theft if he runs off with the account without making payment. This discharge was signed on the faith of getting £45 at the time. The Court has allowed a proof, and the result is clear.

LORD KINLOCH—I am of the same opinion. It

is clearly established that the appellant Bryce agreed, for a special family purpose, to pay £45 out of the legacy of £145 left by his father to the respondent Mrs Kirkwood in liferent, and her children in fee. A deed of discharge, acknowledging receipt of this sum, was signed by Mrs Kirkwood, her husband, and her children, and handed to the appellant, of course on the footing of the sum of £45 being paid in return. It is clearly established that only £15 out of the £45 were paid, and therefore £30 remain due, unless it be established by the appellant that some equivalent to this sum was taken, or in some way or other the right to receive it was effectually discharged. What is said is, that Mrs Kirkwood was owing an old debt of £10 to the appellant; another sum of £10 for law expenses to Mr Adam Smith, writer in Falkirk; and a further sum of £10 or £12 to her brother-in-law, Joseph Gartshore; and that by arrangement this sum of £30 was retained by the appellant to answer these sums. Nothing short of the clearest proof would suffice to establish this case, which is essentially at variance with the agreement on the footing of which the deed was presumptively signed, that the whole £45 were to be paid down in cash. It would be necessary also that the arrangement should be proved to have been engaged in with the assent of the fiars, to whom the sum of £30 belonged, and not to Mrs Kirkwood, who had no right to dispose of it. Giving effect to the evidence which has been led on both sides, I am of opinion that the appellant has failed to make good the case which it was incumbent on him to establish, having neither proved by sufficient evidence the alleged debts, nor the alleged arrangement to pay them. The sum of £30 must be therefore held to remain due by him. The pursuer is not entitled to recover the capital sum as it is not her property, but that of the fiars. But she is entitled to payment of the interest of this sum, as well as of the balance of £100 of the legacy, from the period when interest was last paid. And to this extent she is entitled to decree under the conclusions of her amended summons.

The LORD PRESIDENT—I concur. My only difficulty was about the record. We are in no way contravening the rule that it is incompetent to contradict a probative deed by parole evidence.

The Court decerned in terms of the alternative conclusion of the summons, and found the defender liable in expenses.

Agents for Pursuer—J. & A. Peddie, W.S.
Agents for Defender—Waddell & M'Intosh, W.S.

Friday, March 17.

SPECIAL CASE FOR SIR JAMES LUMSDEN AND OTHERS, (WILSON'S TRUSTEES), ETC.

Trust—Realisation of Funds — Fiar and Liferenter —Business Profits. Circumstances in which it was *held* that the liferentrices were entitled to the full business profits of a portion of the residue of the trust-estate, which the trustees had, under a power conferred on them, left invested in a business concern, although one of the clauses of the agreement of copartnery required that 7 per cent interest should be paid upon all sums at the credit of partners before any division of profits took place; and in which it was held *e contra* that the fiars were not entitled to have the balance of profit over and above the 7 per cent invested as capital of the estate.

This was a Special Case, in which Sir James Lumsden and others, trustees of Hugh Wilson, engraver in Glasgow, were the parties of the first part; Margaret Kay Wilson and Mrs Janet Wilson or Haig, two of his daughters, parties of the second part; and the said trustees as tutors and curators of the children of Mrs Eliza Wilson or M'Leod, his third and remaining daughter, parties of the third part.

Mr Wilson, the truster, died on 27th June 1869. His trust-disposition and settlement, dated 2d March 1858, contained the following provision for the disposal of the residue of his estate:—"In the third place, and with regard to the residue of my said means and estate, I direct and appoint my said trustees to hold and apply, pay and convey the same to and for behoof of my three daughters, Margaret Kay Wilson, Mrs Janet Sarah Wilson or Haig, spouse of the Reverend Thomas Haig, presently of Beauharnois, Canada, and Mrs Eliza Wilson or M'Leod, spouse of Donald M'Leod, presently in Melbourne, equally among them, share and share alike, in liferent, for their respective liferent uses and enjoyment thereof allenarly, during all the days and years of their lives after my decease, and to and for behoof of their respective children in fee, the children of each daughter succeeding, equally among them, share and share alike, to the share of the said residue liferented by their respective parent, payable and divisible, the said residue, to and among the said children upon their respectively attaining the age of twenty-one after the decease of their respective mothers."

Mr Wilson had long been, and was up to the time of his death, in business as an engraver in Glasgow. At the time he executed this trust-disposition he was carrying on his business alone. On 2d April 1867, while he was still alone in the business, he executed a codicil to the above mentioned trust-disposition, which contained the following clause:—"I empower my said trustees to carry on my business, or to dispose of or wind up the same, as to them may seem most advisable; and with the view of facilitating a sale of my business on the most advantageous terms for the estate, if my trustees should consider a sale thereof to be judicious, I empower my trustees to lend to the purchaser such sum out of the proceeds of my estate, for such period and on such terms as they may consider reasonable."

Shortly after executing this codicil Mr Wilson took Mr Andrew Woodrow, his manager, into partnership. The deed of copartnery (which was to last for five years from 1st July 1867) contained the following clause:—"In the event of the death of the first party (Mr Wilson) during the currency of the partnership, the second party (Mr Woodrow) shall, if required by the trustees or representatives of the first party, continue to carry on the business, for behoof of himself and the representatives of the first party, till the termination of the financial year then current, upon the terms with respect to division of profit and loss before written, and thereafter till the termination of the said period of five years, during which latter period the trustees or