made in circumstances which render it blameworthy, and I cannot think that Mr Reid was other than blameworthy in allowing the company to act upon the information, which he made his information, that there had been during the last year "only three small claims of 9s. or 10s."

Throughout the case I have had sympathy with the views which Lord Moncreiff has expressed, that the defenders are not in the circumstances entitled to take advantage of that blameworthy conduct and to maintain that the policy is void. But I should not, I think, be justified in setting aside the judgment of the Sheriffs, for I think that the case is not reduced to this, that no misstatement albeit blameworthy shall void the policy unless it was wilfully false and intended to deceive.

I am prepared to concur with Lord Trayner in holding that the appeal must be refused with expenses.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the pursuers' appeal against the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 5th December 1898 and 9th February 1899, Dismiss the appeal and affirm the interlocutors appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 5th December 1898: Therefore of new assoilzie the defenders from the conclusions of the action, and decern: Finds the pursuers liable in expenses in this Court, and remit the same and the expenses found due in the Inferior Court to the Auditor," &c.

Counsel for the Pursuers—Guthrie, Q.C. —A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—W. Hunter. Agent — J. Gordon Mason, S.S.C.

Friday, June 30.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

ANDERSON'S TRUSTEE *v.* JOHN SOMERVILLE & COMPANY, LIMITED.

Bankruptcy—Illegal Preference – Act 1696, *c.* 5. — *Cash Payment — Indorsation of Cheque within Sixty Days of Bankruptcy.*

The endorsation of a cheque within sixty days of bankruptcy is not a cash payment in the ordinary course of business, but an assignation, and therefore null and void under the Act 1696, c. 5.

So *held* where in payment of an unsecured debt of the bankrupt's, his law-agents endorsed a cheque in their own favour which they had received in payment of the price of property belonging to the bankrupt.

Carter v. *Johnstone*, March 5, 1886, 13 R. 698, *followed.*

Right in Security — Absolute Disposition with Back-Letter—Limitation of Security to Specified Amount.

A & Co. having made advances to C, a customer, the title to certain premises acquired by C was taken in name of B, one of the partners of A & Co., but a back-letter was granted by him to the effect that he held the disposition in security of sums due and to become due to an extent not exceeding in all the sum of £700. C thereafter required a further advance, and it was arranged that his law-agents, who also acted for A & Co. throughout the transactions now in question, should draw a bill upon C, which he was to accept and get discounted, A & Co. guaranteeing repayment of the amount (£200) to the law-agents The bill was renewed, but was ultimately dishonoured by C, and paid by the law-agents, who endorsed it to A & Co. and debited them with the amount. C when he received this accommodation agreed that in certain events his law-agents should have leave to sell the subjects, and he subsequently gave them authority to do so. A purchaser was found by A & Co. but the missives of sale were signed by C. The disposition following upon this sale was granted by B with consent of C. At the settlement a law-agent's clerk, who was acting for the purchaser and also for A & Co., paid on behalf of A & Co. the amount due in connection with the bill to C's law-agents, and at a later period of the same day, on behalf of the purchaser, handed to them a cheque for £900 in their favour and £500 in cash in payment of the price of the subjects sold, and thereafter on behalf of A & Co. received back from C's law-agents the cheque in their favour endorsed by them, which together with £45 paid in cash made up the amount of A & Co's. account against C, including the sum in the bill. A few days afterwards C was sequestrated.

In an action at the instance of C's trustee against A & Co. for recovery of the amount refunded to them out of the price in respect of the bill which they had paid—*held* (1) that A & Co. were only secured under the absolute disposition and back-letter to the extent of £700 and no more, and (2) that, the property being C's, and having been sold by him, and the price having been paid to his agents for his behoof, subject to A & Co.'s claim for £700 out of it, A & Co. had no right of retention over any part of the price after their debt so far as

secured had been satisfied, and that consequently as they had not received payment of their unsecured debt in cash, or in the ordinary course of business, they were bound to refund the sum sued for to the trustee. *Diss.* Lord Young, who held that although not secured under the disposition and back-letter to a greater extent than £700, they were entitled to sell the property, and that the real import of the transactions above detailed was that they did so, and as sellers received the price, and that they were entitled to satisfy the whole of the debt due to them by C out of it.

Opinion (*per* Lord Moncreiff) that even if A & Co. had received payment of the price as sellers they would not have been entitled to retain more than £700 out of it.

This was an action at the instance of James Craig, chartered accountant in Edinburgh, trustee upon the sequestrated estates of John Anderson, spirit merchant, Hawick, against John Somerville & Company, Limited, distillers and wine and spirit merchants, Leith, and Alexander Peggie Blyth, wine and spirit merchant there, managing director of that company, in which the pursuer concluded, *inter alia* (1) for payment of a sum of £203, 4s. 1d., of which the defenders had obtained possession a few days before Anderson's sequestration.

The pursuer averred (Conds. 2 and 3) that the defender Blyth had held an absolute disposition of Anderson's premises qualified by a relative back-bond, the effect of which was to give the defenders a security over these subjects to an extent not exceeding in all £700, for debts due to them by Anderson. (Cond. 6) That the premises were sold, the disposition being granted by Blyth with consent of Anderson, that the price came into the hands of the defenders, who in accounting therefor deducted as due to them and falling under their security a sum of £915, 17s. 4d., being (1) a sum of £712, 13s. 3d., and also a further sum of £203, 4s. 1d. (being the sum sued for). "This sum they deducted from the price, and they handed over to Thomas Purdom & Sons, who professed to Anderson to be acting for him, a sum brought out after said deduction." (Cond. 7) That the said deduction of £203, 4s. 1d. from the price was entirely illegal and unwarranted; that Anderson had never borrowed it from the defenders or their predecessors John Somerville & Co. or their partner Blyth; that they had never disbursed any such sum, but that, assuming they had done so, it did not fall within the security which was limited to £700; and that the transaction described, which took place a few days before the sequestration, was a fraud upon the creditors, and challengeable at common law and under the Act 1696, cap. 5.

The defenderaverred—(Ans. 6) "Admitted that the subjects were sold to a Mr Kerr. The subjects were sold by Anderson to him; the disposition being granted by Blyth (who was feudally vested in them) and Anderson. As stated, the price obtained was £2100, including £400 in name of goodwill. The purchase price was paid to Anderson, who paid out of it the said sum of £712, 13s. 3d., and the said sum of £200, with £3, 4s. 1d. of interest to the defenders. The said sums of £200 and £3, 4s. 1d. were paid in cash by Anderson through his agents Messrs Purdom & Sons (who acted as his agents in selling said subjects), to the defenders on 7th January 1898. The said sums were paid to the defenders in the ordinary course of business."

The pursuer pleaded—"(1) The defenders John Somerville & Company, Limited, having no right or title to retain out of the price of the said property the sum sued for, the same ought to be paid to the pursuer, as trustee for behoof of the creditors. (5) *Separatim* — The transaction referred to on record is exposed to challenge at the pursuer's instance, under the Act 1696, cap. 5."

The defenders pleaded—"(3) The said sums, of which repetition is sought, having been paid in cash, and in the ordinary course of business, and, *separatim*, being covered by the terms of said back-letter, the defenders are entitled to decree of absolvitor, with expenses."

A proof was allowed.

The following statement of the facts is in substance taken from the opinion of the Lord Ordinary (STORMONTH DARLING):—The bankrupt acquired his Hawick premises in 1894, at the price of £1750, of which £1000 was raised on a bond over the property, and the balance was advanced by the defenders. The title to the property was taken in the name of the defender Blyth, but in December 1894 he granted a back-letter by which he ackowledged that, although the disposition in his favour was *ex facie* absolute, yet it was truly granted in security of (1) a sum of £300 advanced by the defenders; (2) a sum of £200 advanced by them; and (3) any other advances which might be made to Anderson by the defenders, and all accounts for goods which had been or might be supplied to him by them, to an extent not exceeding the further sum of £200; and bound himself and his successors "on payment to the said John Somerville & Company, and me, the said Alexander Peggie Blyth, of all sums due and to become due by" Anderson "to them and me, whether for goods, cash advances, or otherwise" to reconvey the said subjects to Anderson. Then came a declaration that the registration of the back-letter in the Register of Sasines should not have the effect of limiting the security created by the disposition to the sum that might be due at the date of such registration, "but that the said disposition" should "form an absolute security for advances to be made and accounts to be incurred" . . . "after the date of such registration, as well as for advances and accounts due prior to that date, to an extent not exceeding in all the sum of £700, any law or practice to the contrary notwithstanding."

In 1896 Anderson executed certain alterations on the property for the purpose of converting it from a licensed grocer's shop into a public-house, and when these were executed he got the one licence exchanged for the other. These alterations cost over £90, which Anderson could not pay, and accordingly he applied to the defenders for a further loan. A correspondence between the defenders and Messrs Purdom of Hawick, as Anderson's agents, resulted in an arrangement by which the loan was ostensibly to be made by Messrs Purdom, who were to draw a bill on Anderson, and were to receive a guarantee for its amount from the defenders. Accordingly, on 5th March 1897 a four months' bill was drawn and accepted, and on 8th July it was renewed for two months. When the bill fell due again Anderson could not pay it and the amount in the bill was paid by Messrs Purdom to the bank who had discounted it. The bank thereupon endorsed the bill to Messrs Purdom, who in turn endorsed it to Messrs Somerville and debited them with the amount. Anderson, by letter of even date with the first bill, agreed that he should lodge his weekly drawings in Purdom's hands, and that if these had not increased by at least one-third at the end of four months, Messrs Purdom were to have full liberty to sell his property and business. This authority was renewed by a letter from Anderson, dated 1st November 1897, and the property was sold at the price of £900 for the heritage, and £400 for the goodwill, by missives dated 15th and 16th December 1897. The purchaser, a Mr Kerr, seems to have been found by the defenders, but they did not appear directly in the transaction, and the missives were signed by Kerr on the one hand and Anderson on the other. This transaction came to be settled at Hawick on 7th January 1898, between the witness Greig (head clerk to Mr Philp, S.S.C., who was the defenders' usual law-agent) and the witness John R. Purdom. Greig attended in a double capacity. Primarily he represented the purchaser Kerr, but he had also instructions from the defenders both to fulfil their guarantee to Mr Purdom and to obtain payment of their claims against Anderson. Accordingly, the transaction was divided into three parts. First, Greig, as representing the defenders, handed to Purdom £203, 4s. 1d. in bank notes, that being the amount of the bill which the defenders had guaranteed, with interest to date, and received from him the bill and the letter of guarantee. Then Greig, as representing the purchaser Kerr, paid the price to Purdom, as representing Anderson, £900 of the amount being in the form of a cheque by Kerr's agent Mr Philp in favour of Mr Purdom's firm, and the balance in bank notes. Finally, Purdom, as representing Anderson, settled the account (No. 79 of process) which contained the defenders' claim against Anderson, and amounted to £915, 17s. 4d., including the sum of £203, 4s. 1d. now in dispute. He did so by endorsing and handing back to Greig, as representing Somerville, Philp's cheque for £900, and paying the balance in cash. Before doing so he had sent a junior clerk to Anderson

to ask the latter's account. The clerk gave the authority admitted that he account to him in any even sure whether he the material figure at that time stood on son, on the other hand any such authority. expectation was, that had received out of which they held would be paid over division among his

The payment of the by Greig to Purdom o'clock noon, and be that took place and the brought out as due to to Greig by Purdom th of about three hours. Anderson's consent to sum of £915, 17s. 4d. was obtained. On the fo settlement Anderson villes was written part in pencil. In the part in ink a total of £712 due by Anderson amount of the £90 a correspondingly written in pencil. T Purdom some time This was the cond when it was sent to A alleged, for his appro announced by Purd consent had been obt account relating to th correspondingly increa in by Greig, this total the sum paid by Purd

Mr J. R. Purdom de out these transaction agent both for Somerv son, and that he had being in that position 1897 onwards. On th wrote to Purdom that Purdom & Son as "your district." He also de "Q. Did he (Anderson) rity to pay that bill as the of his other debts?—A accounts with the bill understood that was t Why was this bill to nobody else if separate —A. Because both A were of opinion that M Co. had security for terms of the back-letter mind certainly at that why I allowed Mr Philp to add that £203 to the date, was because I unders ity from Anderson to d because I considered th and entitled to deduct it Anderson's estates were 29th January 1898.

On 19th January 1899 t (STORMONTH DARLING)

Law Reports—Vol. XXXVI. [Sasserath & Co. 14th Feb. 1889.

following interlocutor:—"Sustains the fifth plea-in-law for the pursuer: Decerns against the defender conform to the first petitory conclusion of the summons: Finds it unnecessary to deal with the other conclusions of the summons: Finds the pursuer entitled to expenses," &c.

Opinion.—"In this action the trustee on the sequestrated estates of John Anderson, a spirit merchant in Hawick, seeks to recover from the defenders £203, 4s. 1d., of which they obtained possession on 7th January 1898, within a few days of sequestration. The transaction is described in the condescendence as a fraud upon the creditors, and challengeable at common law, as well as upon the Statute 1696, chapter 5. But I may say at once that the case presents no element of fraud. A good deal of evidence was led to prove that Anderson was for a long time insolvent, and that the defenders knew it. Certainly he was a man entirely without capital, and for a long time the defenders had been bolstering him up financially in a way which seems not uncommon in the spirit trade. If anything turned upon the defenders' knowledge of his affairs, I should hold that they had cause to view his solvency with extreme suspicion. But ever since the case of *Thomson* v. *Thomson*, 3 Macph. 358, followed as it was in *Coutts' Trustees* v. *Webster*, 13 R. 1112, and in other cases, it has been settled that where an insolvent debtor makes a cash payment to his creditors, fraud is not to be inferred from the mere fact that both the debtor and the creditor are aware of the insolvency.

"All that part of the case may therefore be disregarded. The real question is, whether the transaction of 7th January 1898 is challengeable under the Act 1696, chapter 5. This makes it necessary to attend very closely to what actually occurred, because in cases under that Act, where no fraud is involved, the form of the transaction may be of the utmost moment as determining whether the transaction falls on one side or other of the narrow line which divides what is allowed from what is forbidden.

[*His Lordship then stated the facts narrated supra.*]

"The substantial defence made on record, and particularly in Answer 6, is that this rather complicated operation constituted payment in cash by Anderson to the defenders, and therefore that it is not struck at by the statute. I shall deal with that in a moment. But first I must notice an argument suggested merely as an alternative in the defenders' third plea-in-law, but keenly urged by Mr William Campbell, to the effect that the defenders were fully secured by their absolute disposition, and that the back-letter did not limit their security to £700 except in the single event of the letter being recorded in the Register of Sasines. As a matter of construction that seems to me quite an inadmissible reading of the back-letter, which limits the security to £700 long before it speaks of the Register of Sasines, and is impressed with the stamp appropriate to that figure. But I admit that there is law for the proposition (though it seems to do some violence to the terms of a written contract) that though a back-bond should specify particular obligations as the limit of the security, still, so far as subsequent advances are concerned, the granter may retain the security until he is relieved of these. (See Lord Fullerton's review of the authorities in *Robertson* v. *Duff*, 2 D. 279, at pp. 291-2.) I greatly doubt whether this principle could ever be applied to a case where the back-bond actually fixes the amount of the future advances which are to be covered by the security. But plainly it has no application here, because the defenders allowed the property to be sold, and did not claim to retain any part of the price against their debt of £203, 4s. 1d. Indeed, they could not do so, for the simple reason that the price was never in their hands. It is their own distinct averment, from which they cannot escape—and it is also the result of the evidence—that the price was paid not to them but to Anderson.

"Accordingly the defenders' case must depend entirely on their making out that the final stage in the transaction, by which Purdom endorsed and handed back to Greig Philp's cheque for £900, and added thereto £45, 17s. 4d. in cash, constituted a cash payment by Anderson to them. If this was a transaction in the ordinary course of business, by which the defenders' claim was extinguished by payment, even though the result should be, after the period of constructive bankruptcy had begun, to give them a preference to which they were not otherwise entitled, the Act would not apply, and the pursuer would have no case.

"But I cannot so view it. The first difficulty in the defenders' way is created by the case of *Carter* v. *Johnstone*, 13 R. 698. A bankrupt may according to that decision make a good payment in cash by drawing a cheque on his own bank account, but he cannot do so by endorsing a cheque in which he is payee. That is truly an assignation to which the Act in terms applies, and it is not a transaction in the ordinary course of business. But there are other considerations which seem to me to deprive this transaction of that indispensable character. The defenders never had any direct claim against Anderson for the sum of £203, 4s. 1d. His creditor was Purdom, and though he knew by the end of December that the loan had been guaranteed by the defenders, it does not appear that he was told on the day of settlement that they had paid the amount to Purdom that very morning. It is said that Purdom, if he had not taken payment from the defenders, might have deducted the amount before paying over the price to Anderson. Perhaps he might, but that was not what he did. I rather think he forgot the terms of the back-letter, and supposed that it was good for all advances subsequent to its date. When asked 'Why was this bill to be paid in full, and nobody else, if sequestration was imminent?' his answer was 'Because both Anderson and myself were of opinion that Somerville & Company had security

for the amount. The terms of the back-letter were not in my mind certainly at that time. The reason why I allowed Mr Philp's clerk Mr Greig to add that £203 to the account on that date was because I understood I had authority from Anderson to do so, and secondly, because I considered they were secured and entitled to deduct it.' Now, if both Anderson and his agent were under that mistaken impression, it is very difficult, I think, to support the transaction as a cash payment in the ordinary course of business. That would be to make the debtor's understanding of a security and not the security itself the determinant of its effect. I greatly doubt whether Anderson had any opinion in the matter. I do not think that his authority for the payment, which was certainly considered necessary and was asked, was given intelligently, if given at all. Whether the same result might have been attained by other means I am not concerned to inquire. But I reach the conclusion that in the shape which it actually took the transaction was a voluntary assignation within sixty days of bankruptcy, for the satisfaction of a prior creditor in preference to other creditors, and therefore that it falls under the veto of the Act."

The defenders reclaimed, and argued—(1) It was somewhat difficult to see the principle upon which the case of *Carter* v. *Johnstone*, March 5, 1886, 13 R. 698, was decided. There seemed to be no sufficient reason why a payment made by endorsing another person's cheque should be bad, when a payment made by giving a cheque on the bankrupt's own account was good. But accepting that decision as binding, it did not apply here. The cheque which was endorsed in this case was not a cheque in favour of the bankrupt, but a cheque in favour of his law-agents, Purdoms, and it was Purdoms and not the bankrupt who endorsed it. Moreover, Anderson did not direct the account to be paid by endorsing the cheque. What he directed was payment or settlement in general terms, and Somervilles could not be prejudiced by the fact that Purdoms chose for their own convenience to endorse a cheque in their (Purdoms') favour, instead of giving them (Somervilles) a new cheque upon their (Purdoms') own bank account. As far as Anderson himself was concerned this was a cash payment, for that was what he had directed. Further, where the cheque endorsed was not a cheque in favour of the bankrupt, but a cheque in favour of his unquestionably solvent law-agent, there was no room for any of the objections to payments by way of indorsation on the eve of bankruptcy, which the Court had in view in the case of *Carter*, *cit.*, and upon which the judgment in that case to a great extent proceeded. In this case it was not possible to conceive of any illegitimate purpose which would have been served by Purdoms paying Somervilles by means of endorsing a cheque in their favour, instead of retaining that cheque, and giving Somervilles a new cheque upon their (Purdoms') own bank account, or any advantage which could have accrued to Somervilles from adopting the one method of payment rather than the other. In the case of *Ramsay* v. *Scales*, June 11, 1829, 7 S. 749, the debt for which the bill was given was not presently due. (2) If the real nature of the transaction here was looked at rather than the form which it took, it would appear that the case of *Carter* v. *Johnstone* had no bearing upon the present. The cheque here, as had been pointed out, was not in favour of Anderson but of Purdoms. The sum of £200 now in question was never the property of Anderson. It was part of the price of subjects which Anderson had authorised Purdoms to sell. Purdoms had advanced money to Anderson, and when the price of the property came lawfully into their hands they were as in a question with Anderson entitled, and as in a question with Somervilles bound, to retain the amount of their advance. If they had not done so they would have had no right to come upon Somervilles under the guarantee. What happened here was in substance and effect the same as if Purdoms had put the £200 in their pockets and had torn up the bill and the guarantee. No doubt the form which the transaction took was different. An operose and unnecessary method of settling the accounts between parties was adopted. The Lord Ordinary had held that the transaction was illegal under the Act, because, and only because, of the form which it had taken. It was only because of the form adopted that Somervilles became prior creditors of Anderson for the sum in the bill, because Purdoms might have paid themselves out of the price, and then Somervilles never would have been creditors for the sum in the bill at all. The usual case was that a transaction unexceptionable in point of form was said to be illegal because of its nature in substance and reality. A transaction which was in substance and reality unexceptionable could not be rendered illegal under the Act simply in respect of the form which it took. In this case the true nature of the transaction was a settlement which could have been arrived at simply by squaring accounts. In *Carter*, *cit.*, the indorsee of the cheques acquired right and title to the money solely in virtue of the indorsation. Here the right to the money was acquired *aliunde*. What took place upon the occasion in question was in truth and effect simply a settlement or balancing of accounts, although a circuitous way was taken to arrive at that result.

Argued for the pursuer and respondent—A payment made on the eve of bankruptcy by means of an indorsed cheque was not a cash payment, but an assignation of the bankrupt's estate, and consequently was null and void under the Act 1696, c. 5. The rule was (1) that a cash payment was good, (2) that a payment by means of the payer's own cheque on his own bank account, which was a payment in cash belonging to the payer in the custody of a banker, was to be treated as a payment in cash, but that (3) the indorsation of another person's cheque was not—*Carter* v. *Johnstone*, March 5,

1886, 13 R. 698. The reason was that such a method of payment was not the method of payment usually adopted in the ordinary course of business, whereas payment by means of a cheque drawn by the payer of a debt upon his own bank account was; and again the reason why payments in cash were recognised as exceptions to the rule was that such payments were payments in the ordinary course of business, and also because cash payments were treated as exceptional in all branches of the law. See *Nicol* v. *M'Intyre*, July 13, 1882, 9 R. 1097, *per* Lord Young at p. 1100. A cheque when it was indorsed and put into circulation was diverted from its primary purpose and converted into a bill of exchange, and it had always been held that the indorsation of a bill of exchange was struck at by the Act 1696 c. 5—*Nicol* v. *M'Intyre*, *cit.*; *Ramsay* v. *Scales*, June 11, 1829, 7 S. 749. There were therefore sound reasons for the distinction made between the drawing of a cheque on the bankrupt's own bank account and the indorsation of another cheque by the bankrupt. But whether this was so or not the matter was settled by decision. The reasons against the distinction were all stated in Lord M'Laren's first opinion in *Carter* v. *Johnstone*, *cit.*, at p. 700, and however cogent, they had been overruled by the ultimate decision in that case. It made no difference that the cheque was in favour of the bankrupt's agent, and had been indorsed by him—*Ramsay* v. *Scales*, *cit.* That case was not decided upon the ground that the debt for which the bill was given was not yet due. Nor did it matter that the same result as was attained here might have been reached in a way which would not have been struck at by the Act. See *Nicol* v. *M'Intyre*, *cit.*; *Ramsay* v. *Scales*, *cit.* *Barbour* v. *Johnstone*, May 30, 1823, 20 S. 351, and 7 S. 752, note; and *Miller* v. *Philip & Son*, February 24, 1883, 20 S.L.R. 862, were cases in which transactions somewhat similar to the present had been held illegal. In these cases the payments were made by persons other than the bankrupt. The pursuer, however, was quite willing that the substance and true nature of this transaction should be looked at and not the form. The result and the intended result of what was done here was that the defenders got payment of a prior unsecured debt. This was really a debt due to Somervilles. If in reality Purdoms had been the lenders, and Somervilles had been merely cautioners, it might have been different, but in reality this was not so. Purdoms in fact only advanced the money on behalf of Somervilles, for whom they were acting as agents in this matter, and after the bill was taken up by the Purdoms, they endorsed it to Somervilles, and debited them with the amount. This sum was paid to Purdoms by Somervilles, and the endorsed bill handed over to them some hours before Purdoms gave them the cheque endorsed, and these two transactions were quite separate. Indeed, the whole proceedings here were in pursuance of a fraudulent scheme which was illegal at common law apart from the Act 1696, c. 5. [Lord Trayner—There is no plea at common law]. As to the view that Somervilles were owners and sellers of the property and entitled to retain the amount of the debt due to them out of the price, that had never been suggested by the defenders in argument, and there was no plea to that effect.

At advising—

Lord Justice-Clerk — The trustee on the sequestrated estate of Mr Anderson, who was formerly a licensed dealer in exciseable liquors in Hawick, sues in this action Messrs Somerville & Coy., who were creditors of Anderson, to make repayment to Anderson's estate of a sum of £203, which he alleges was made over to the defenders contrary to the Act 1696, c. 5, within sixty days of bankruptcy. The averments upon the record do not satisfactorily raise the question. This may have arisen from the pursuer in the original stages of the case not being able to formulate the facts very accurately until they were more fully disclosed. But the parties have joined issue without objection on facts as brought out by the proof. If it were thought necessary, I would be for allowing the pursuer to amend his record.

The circumstances, shortly stated, are that Anderson having expended £200 on alteration of premises, the defenders arranged with Messrs Purdom, solicitors, that Messrs Purdom were to advance the money, drawing on Anderson for the amount, the defenders giving their guarantee for it. Under the arrangement Purdom had power to sell the business, if Anderson was not successful in increasing the drawings to a certain amount. Ultimately under this arrangement the property was sold.

In settling the transaction, Mr Philp, the purchaser's agent, was represented by a Mr Greig, who was also empowered by the defenders to fulfil their guarantee to Purdom, and to receive payment of their claim against Anderson. Greig handed Purdom the sum guaranteed in banknotes, the defenders thus becoming directly the creditors of Anderson for the amount. Greig paid Purdom for Anderson's behoof the price of the property, partly by cheque for £900, and partly in cash. Then Purdom, to settle between the defenders and Anderson for £945 due, which included the £200 which the defenders had paid to Purdom under their guarantee, endorsed and handed back to Greig the cheque for £900, and handed the balance in cash. It is matter of dispute whether Purdom had authority to pay this £200. Purdom recognised that he required Anderson's authority, as acting for him in the transaction, for he sent a clerk to ask Anderson whether he authorised the payment, and the clerk reported that he did. Anderson denies this, and it certainly does not appear that the clerk explained the matter to Anderson, so as to make sure that he really understood what it was that Purdom proposed to do.

The defenders maintain that this some-

what complicated procedure had the result that they received the £200 and interest as a cash payment from Anderson made in the ordinary course of business, and that it is therefore not struck at by the Act of 1696, even altough falling within the statutory period. In short, they maintain that this was a transaction in the ordinary course of business. I agree with the Lord Ordinary in thinking that this plea cannot be maintained, even assuming that Messrs Purdom had authority to act as they did, which is in my opinion not proved. It is certain in this case that unless the payment was made by a cheque of the purchasers endorsed by Purdom, it was not made at all. Was such payment a payment in cash by Anderson or equivalent to a payment in cash by him? I cannot so hold. The question has already been considered and decided. A party's own cheque has been held to be the same thing as cash, the idea, I suppose, being that such a mode of making payment is convenient and in daily practice and the most ordinary mode of payment of sums of considerable amount, avoiding the trouble and risk of sums being drawn and transferred in actual money or notes. But while this has been held, it has been as distinctly held that indorsation by the debtor of a cheque granted in his favour by another, and the handing of the endorsed cheque to a creditor is not a payment which is protected from the operation of the statute. I have not noticed the fact that the defenders held a title to the bankrupt's property for another debt, for it is not maintained that the defenders had any right of retention of this £200 in respect of their holding the property as a security. The case has been dealt with throughout as on a question of cash payment. It is plain upon the evidence that the reason why Purdom acted as he did was because he was under the impression that the debt of Anderson was a secured debt. The payment was in that view certainly not made by Purdom for Anderson as in the ordinary course of business. I come, on the whole matter, to the same conclusion as the Lord Ordinary, and move your Lordships to affirm his judgment. I do not enter upon consideration of the grounds on which this decision was given. It comes to this that the range of cash payment where the condition is not actual cash is not to be extended beyond a party's own cheque, and does not include the cheque of another endorsed by the debtor.

Lord Young—The defenders although holding a property-title to the house referred to in the pleadings, "and the goodwill of the business therein carried on," were admittedly only security-holders for specified debts to the amount of £500 and any debts which might thereafter be incurred to them by Anderson (the bankrupt), to the further amount of £200. They thus held the title as trustees for their debtor Anderson, and under the obligation expressed in the back-letter founded on, to convey the property to him on payment of his debts to them "not exceeding in all the sum of £700." I think the defenders' security was thus limited to £700, but in this sense only, that so long as they held the property of the house and the goodwill under their title Anderson had the right, on payment of his debt to them to an amount not exceeding £700, to demand a conveyance of the property to himself. After a lapse of over three years the debt to the defenders was outstanding to the amount of £700, and the debtor unable to pay it and thereby acquire the property under the back-letter. The defenders accordingly resolved to turn their security to account by selling the subject of it. In all the steps they took to this end they seem to have acted with a due regard to Anderson's interest (and besides themselves no other had any), communicating with him at every step, and acting throughout with his assent and approbation. Their right to realise in the proper and ordinary way the subject of their security, even without their debtor's consent, is not doubtful, and I do not think it has been suggested that anything which they did was objectionable or beyond what they were entitled to do in the legitimate exercise of their powers. The result was a sale towards the end of December 1897 to a Mr Kerr for practically £1400, the property being taken by the buyer subject to a burden of £1000 which was on it before the purchase by the defenders. The defenders say (answer to condescendence 6) that Anderson was the seller, and that the price was paid to him. If that were in my opinion the true result and conclusion to be drawn from what in fact took place, and the true legal position and rights of the parties thence arising I should of course form and express my judgment in the dispute before us accordingly. I am, however, on considering the evidence, and the position of the actors in the matters to which it relates, satisfied that the defenders' were the sellers, and that the price was paid to them.

It is, I think, indisputable that the defenders were the sole owners of the property, and that they alone had a title and were in a position to sell it and give a title to a purchaser. It was their right to sell the property and to receive the price, and no other had that right. Then the correspondence and the parole evidence establish that they found the purchaser (Mr Kerr) arranged the price, and how a great part, if not the whole, of the money to pay it was to be got and was got. Indeed, they themselves provided it to the amount of £700 by loan to the buyer.

The defenders had two professional agents — first, Mr Philp, a writer in Leith and their ordinary man of business; and second, Purdom & Son, writers in Hawick. The first of these (Philp) also acted as agent for the buyer (Kerr), no doubt at the defenders' request; and the second (Purdom & Son) also acted for Anderson (the bankrupt). That the defenders arranged the purchase by Kerr appears clearly enough from Purdom's evidence and the correspondence. On 7th

January 1898, when the sale was completely executed or carried through by the conveyance of the property to the purchaser, and the payment by him of the price, the debts due by the bankrupt (Anderson) to the defenders amounted to £945, 17s. 4d. The question now in dispute regards only one of these debts, the last incurred, the amount £203, 4s. 1d., and the subject of the petitory conclusion on which the Lord Ordinary has given decree. In the earliest part of 7th January 1898 this debt of £203, 4s. 1d. was owing by the bankrupt not to the defenders but to Purdom & Son. The explanation is that Purdom & Son having lent £200 to the bankrupt on the defenders' guarantee, and the bankrupt having failed to pay them, the defenders on 7th January, under their guarantee, paid them £203, 4s. 1d., being the loan with interest to that date. The fact of the loan by Purdom & Son to the bankrupt on the defenders' guarantee, the failure of the bankrupt to pay it, and the payment by the defenders on 7th January under their guarantee, seem to be indisputable and I understand undisputed facts. Accordingly on that day, when the price of the property sold was paid by the buyer, the bankrupt was owing this sum of £203, 4s. 1d. to the defenders, just as he would have owed it to Purdom & Son had they not received it as they did from the defenders as guarantors to them. In fact it was a debt to Purdom & Son in the early part of the day, and to the defenders in the later part.

I have said that the question in dispute regards only this sum of £203, 4s. 1d. The pursuer is trustee in Anderson's bankruptcy, which occurred in January 1898, and so necessarily within sixty days of the 7th of that month. The case, and the only case, he presents on record is that the price of the property "came into the hands" of the defenders; that the debt due to them, excluding this debt of £203, 4s. 1d., was only £742, 13s. 3d.; that they added this debt and thus brought out as due to them, and falling under their security, £945, 17s. 4d. "This sum they deducted from the price, and they handed over to Thomas Purdom & Son, who professed to Anderson to be acting for him, a sum brought out after said deduction." Then in condescendence 7 the case built on this foundation is completed thus—"The said deduction of £203, 4s. 1d. from the price obtained for the subjects was entirely illegal and unwarranted, and neither John Somerville & Company, nor John Somerville & Company, Limited, nor A. P. Blyth, had any right to that part of the price." The pursuer goes on to say that "the transaction described was a fraud on the creditors, and is challengeable at common law and under the Act 1696, c. 5." "In these circumstances the said defenders John Somerville & Company, Limited, are not entitled to retain the said payment."

The Lord Ordinary has decided that they are not, and has accordingly given the pursuer decree against them for the amount, his judgment being based, as the interlocutor reclaimed against bears, on the fifth plea-in-law for the pursuer, which is, that "the transaction referred to on record is exposed to challenge at the pursuer's instance under the Act 1696 c. 5."

The only "transaction" referred to on record is that the price of the property having come into the defenders' hands they retained out of it the amount of this debt of £203, 4s. 1d., which being beyond and outside their security, they were not entitled to do. The word "transaction" seems inapplicable, but whatever may be thought of the retention in question I can find nothing in the pursuer's averments on record to countenance (or suggest) the notion that it is exposed to challenge on the Act 1696, c. 5.

It appears from the opinion of the Lord Ordinary appended to his judgment that he reached the conclusion that the "transaction" violated the Act 1696, c. 5, because, and only because, the price of the property to the extent of £900 came into the defenders' hands through the medium of a cheque by Philp, the buyer's agent, payable to the order of Purdom & Son, indorsed to and cashed by the defenders. There is no mention of this fact on record, and I am not surprised, as I think it immaterial. It is, however, a fact, and if thought material I should assent to its being taken notice of, and if thought needful added to the record as a ground of action not hitherto put forward, at least in proper and ordinary form.

I have tried, but unsuccessfully, to find some reason for the complicated manner in which what seems a very plain and simple piece of business was carried through. What I call a simple piece of business is this, that the defenders should get from the buyer the price of the property which they had sold to him in legitimately turning their security to account, and after deducting from it the debt due to themselves hand over the balance to Purdom & Son or any other proper custodian, or consign it in bank, to be held on behalf of Anderson or whomsoever it might concern. If they thought that Purdom & Son, who were Anderson's agents as well as their own, were the most proper persons to whom to hand the balance, I should have thought the obviously proper course was to leave them to pay themselves out of this balance Anderson's debt to them of £203, 4s. 1d., the defenders' guarantee for which would thus have been terminated in the most simple and obvious manner. The question we have now to consider and decide would not then have arisen, for the defenders would not and could not then have made any deduction from the price which came into their hands beyond the sum of £742, 13s. 3d. which the pursuer admits their right to deduct. Purdom & Son's debt of £203, 4s. 1d. against Anderson, if not paid by the defenders as guarantors, is not disputed, and their right to payment by retention out of any funds of Anderson's lawfully in their hands is not and cannot be questioned.

The whole price was got in Leith on 7th January—£130 from the buyer, and the rest

from lenders to him—the defenders being, as I have said, lenders of it to the amount of £700. Why the defenders did not simply return the amount of this loan made by them to the buyer to enable him to pay the price, and impute it as a payment to themselves of so much of the price, I cannot conceive. Had they done so their debt against Anderson at that date, all but £42, 13s. 3d., would have been extinguished, and their own man of business Mr Philp, on that day, and before Mr Greig, his clerk, left for Hawick, had in his hand cash supplied to him by the buyer to meet the price sufficient to pay that sum twenty times over. That the defenders were entitled to receive £742, 13s. 3d. out of the price is, I think, clear, and certainly is not questioned by the pursuer in this action. Had this course been taken, Mr Philp would on the morning of 7th January have had in his hands cash furnished to him by the buyer to the amount of exactly £987, 6s. 9d., together with a discharge by the defenders of the price of house and goodwill to the extent of their whole interest in it or claim upon it, viz., £742, 13s. 3d. It was, of course, proper to ascertain exactly what the purchaser had to pay for stock purchased by him, licence-duty, taxes, and his share of business expenses of sale and conveyancing, and possibly for this purpose it was proper to send Mr Greig to Hawick to arrange these matters with Purdom & Son as agents for Anderson, for Anderson and the purchaser (Kerr) were alone interested in them. The whole of these details were (irrespective altogether of any question arising in this case) satisfactorily and indeed conclusively settled on 7th January, and with this result, that of the price of the house and goodwill (£1400) which was paid to and left in the hands of Purdom & Son, and in the result held by them for the bankrupt Anderson, there was on 7th January 1897 enough to pay two or three times over Anderson's debt to them of £203, 4s. 1d., and which, had it not in the course of the day been paid by the defenders as sureties, they would undoubtedly have been entitled to pay themselves out of any money in their hands claimable from them by Anderson. But the contention of the pursuer, if I understand it, is that, assuming the defenders' rights to have been as I have represented, and that they might have so acted as to enable them to obtain full payment of their debt out of the price, they nevertheless so acted or authorised others so to act for them as to make the whole price the property and estate of Anderson, and that a portion of it, consisting of a cheque for £900 by the buyer's agent (Philp) to the order of Purdom & Son was indorsed and handed to the defenders in violation of the Act 1696, c. 5.

What, then, are the facts upon the legal import and effect of which the pursuer relies to support the contention that the whole price (£1400), and notably the cheque for £900, became the property and estate of Anderson, and was so on 7th January, when Greig got Purdom & Son to indorse the cheque for £900, and received from them £45, 17s. 4d. in cash to carry (along with the cheque) to the defenders in Leith?

Mr Greig states that on 7th January he carried in his pocket to Hawick £830 in bank notes, and a cheque to Purdom & Son or order for £900. With respect to the notes, he explains that the object in carrying cash to settle transactions out of Edinburgh is to save charges on bank remittances, and that the sum he took in notes "was larger than it would otherwise have been, because we did not know how much the stock-in-trade would amount to."

With respect to the cheque, he explains that it is usual to have the whole amount in cash, "but I think there was some difficulty in getting the amount the night before from the bank." Regarding the instructions he had from the defenders he says—"I received instructions from Messrs Somerville & Company to obtain payment of their claim against Mr Anderson. These instructions were given at the time I was getting a portion of the price which they were advancing. Messrs Somerville handed me a note of their account." Again, he says—"I got the £700 from the Messrs Somerville as their share of the advance." He also says, "When I had a note of Somervilles' (the defenders') account handed to me my intention was to get payment of Somervilles' account that day. He (meaning the managing partner of the defenders' company) understood that I was acting for him to get that."

With respect to what passed between Greig and Purdom, the evidence of the latter is perhaps the clearest. Taking that of both, it comes, I think, exactly to this—that Greig informed Purdom that his instructions were that he should, out of the £1400 which he had handed to him, receive back and pay to the defenders £945, 17s. 4d. as the sum which they were entitled to receive and retain out of the price of the house and goodwill, *i.e.*, out of the £1400. Mr Purdom distinctly explains that in the books of Purdom & Son all that was received by them on account of the price was in their books put to the credit of the defenders, and that none of it was put to the credit of Anderson until the claims of the defenders and others were satisfied, and a balance of £462, 2s. 1d. was brought out as the remainder due to Anderson, which was put to Anderson's credit after the sequestration. These facts seem to be very strikingly inconsistent with the notion that this £1400 (bank notes or cheque) was made the property and estate of Anderson on 7th January by anything done that day. It cannot, I think, be plausibly suggested that Anderson himself or any other might reasonably regard the whole £1400 (notes or cheque) as his property and estate. I have said notes or cheque—failing to appreciate a possible view that the notes did not, but that the cheque did, become his property and estate. I do, indeed, fail to appreciate that view. Had the whole (cheque and notes together) remained in Purdom & Son's hands for any length of time, it would and must have been as trustees for those interested therein according to their legal and equitable rights,

and not as the property and estate of Anderson. The idea that on 7th January it was the legal right of Anderson to demand the whole £1400 from Purdom & Son seems to me extravagant. But if it was his property in the hands of Purdom & Son as and only as his agents, he was entitled to have it, and Purdom & Son could not have withheld it from him. Nor is it, in my opinion, possible to distinguish between the notes and the cheque, and to hold that the cheque was his property, and that the notes were not. It may be that Purdom & Son ought not to have indorsed the cheque and returned it to Greig to be taken to the defenders in satisfaction *pro tanto* of their right in the price in payment of which it was given by the buyer. I have explained the grounds on which I think they acted properly in doing so. But if this view is thought to be erroneous, I venture to ask those who think so whether Purdom & Son would have acted rightly and according to their duty had they indorsed the cheque and delivered it to Anderson as his estate and property? I think the answer must be negative, and the answer is destructive of the pursuer's fifth plea-in-law, on which alone the Lord Ordinary's judgment proceeds.

I assume that on 7th January the whole price (£1400) was in the hands of Purdom & Son on the order or with the assent of the defenders and Anderson, who alone were interested therein, and with the duty of satisfying their respective legal claims. On this assumption the responsibility of Purdom & Son is clear. If out of that price they gave the defenders £203, 4s. 1d. in excess of their legal claims, and so retained a sum insufficient by that amount to answer the legal claims of Anderson, they are responsible to the pursuer as trustee on Anderson's estate, and I certainly should not suggest any objection to the avoidence of circuity by making the claim directly against the defenders, who admittedly got the £203, 4s. 1d. But if the defenders were entitled to get this £203, 4s. 1d. out of the price, I can see nothing wrong on the part of Purdom & Son in their mode of sending it. The cheque was payable in Leith, and Purdom & Son acted reasonably, and, I should say, in ordinary course of business (if that were necessary), when they made the defenders to whom it was their duty to pay the amount in Leith the payees by indorsation, just as plainly as it would have been had the cheque been, as it might, for the exact amount of their claim.

I have expressed my disapprobation of the unmeaningly circuitous manner in which a very simple piece of business was carried through. To me, indeed, it seemed so amazingly out of the plain common way that I felt it my duty to consider carefully whether something off the straight and unduly favourable to the defenders was not aimed at by their men of business. The result has been to satisfy me that nothing was intended or done to procure for the defenders more than they were, in my opinion, legally entitled to—that is to say, payment out of the price of the subject of their security of the whole debt certainly and admittedly due to them.

It is perhaps superfluous to point out that in considering a challenge on the Act 1696, c. 5, of a disposition and assignation or other deed in favour of a creditor of the granter, the justice and validity of the creditor's debt is assumed, the only possible objection being to the time and manner of giving him satisfaction in security for it. An objection to the debt itself in whole or in part, if there be any, must rest on some other ground. We must, therefore, in considering the judgment reclaimed against, which is based exclusively on the Act, assume the justice and validity of the defender's debt, for which they demanded and got the indorsed cheque in question—that is, of the whole debt, amounting to £945, 17s. 4d. If part of it was admittedly good, and another not, but matter of dispute, the Act 1696, c. 5, could afford no aid in determining the controversy, and it would in no imaginable case (at least imaginable by me) be possible to hold, under the Act 1696, c. 5, that a disposition and assignation or other deed granted by a debtor within sixty days of bankruptcy was sustainable in satisfaction or security of part of a creditor's debt, and void as to another part.

Lord Trayner—The Lord Ordinary has decided this case in favour of the pursuer on the ground that the transaction under which the defenders became possessed of the £203 for which decree is now sought was a transaction struck at by the Act 1696, cap. 5, and therefore void.

It is no doubt the fact that the pursuer's statements on record, on which his fifth plea-in-law—the plea which the Lord Ordinary has sustained—is based, are very meagre, and if the defenders had thought right at an earlier stage of the case to take an objection to the relevancy of these statements a good deal might have been said in favour of the objection. The defect could of course have been remedied, and could be remedied now if necessary. But I think we have got past that stage, and that there is neither necessity, nor would there be any advantage, to have an amendment of the record. The parties have joined issue really on the one question whether the Act 1696 applies to the transaction in question, and I say this not because the whole proof (or so much of it as is of any consequence) is directed to that question, but because the defence stated on record, and now maintained, is really nothing more than that the transaction was a cash payment in the ordinary course of business, and therefore not within the provisions of the Act. For my own part, therefore, I take the case as raising the question which the Lord Ordinary has decided, and the only question, I may add, which was argued before us. The Lord Ordinary has given a detailed account of the circumstances attending the transaction now challenged, and no further statement of these circumstances is required. The important fact in the case is, that on 7th January 1898—within sixty

days of his bankruptcy—Anderson (through his agent) indorsed and delivered to the defenders, in payment of a debt of £200 odds then due by him to them, a cheque which had been given to him by his debtor Kerr. Now, on the authority of a series of decisions, I think the Lord Ordinary has rightly held that such an indorsement by a bankrupt within sixty days of bankruptcy is an assignation within the meaning of the Act 1696, cap. 5, and therefore null and void. It follows that the defenders must repay the amount they so obtained to the pursuer for behoof of the general body of Anderson's creditors.

The defenders do not on record, and did not at the bar, maintain any right of retention of the £200 apart from their right to retain what was, according to them, a cash payment to that amount. Any such contention on their part is excluded by their own statement and by the evidence before us, as the Lord Ordinary points out. The defenders could not retain what they did not hold, and the price of the bankrupt's premises and business was never in their hands. It was paid to Anderson or Anderson's agent—not to the defenders. And it was properly so paid to Anderson, for it was the price of his estate—his estate subject to a burden, no doubt, in favour of the defenders—but his estate not the less. It has been said that the price at all events belonged to the defenders (subject to an obligation to account) because they were the sellers, and alone could be the sellers. I cannot assent to that. The feudal title to the premises was no doubt in the defenders, and they only could grant a valid formal conveyance. But the title in the defenders, although *ex facie* absolute, was only a security title, as the back-letter granted by the defenders to Anderson shows. The defenders could have been called on at any time to convey the subject to Anderson or his nominee, on being paid the amount which the security covered. The radical title was in Anderson, and that he was in fact the seller is proved by the defenders' witness Greig. It was to Anderson that the buyer made his offer; it was Anderson who accepted the offer, and Anderson was a party to the conveyance. That the price was paid to Anderson (or his law-agent, which is the same thing,) is proved by Mr Purdom and Mr Greig, and indeed is averred by the defenders. Such being the facts, I am not surprised that the defenders did not plead a right of retention in the ordinary sense.

The point was raised whether Anderson did or did not authorise his agent Mr Purdom to indorse the cheque and deliver it to the defenders. In my opinion it is not material to the result of this action what view may be taken on that matter. If Anderson authorised the indorsement, it was his indorsement, and struck at by the statute. If he did not authorise it, then Mr Purdom gave away to the defenders without authority a part of the bankrupt's estate, which the pursuer as trustee is entitled to follow and recover for behoof of the general body of creditors. The defenders could derive no title to that part of the bankrupt's estate (preferable to the title of the trustee) by the unauthorised act of Mr Purdom, who himself had no title and could give none.

Lord Moncreiff—The defence which was chiefly pressed upon us in argument was, that the sums of which repetition is sought were paid in cash and in the ordinary course of business, and that thus the payment is not exposed to challenge under the Act 1696, c. 5.

But it would be unnecessary to consider that question if we were prepared to hold that the defenders, who were *ex facie* absolute proprietors of the subjects and business which belonged to Anderson, sold the same, and having received the price, were entitled to recoup themselves for all their advances to Anderson, including the £203, 4s. 1d. now sued for.

The general rule certainly is, that a security constituted by absolute disposition with a back-bond, though granted for a debt specified in the back-bond, is good for subsequent advances, and that the holder of the security is not bound to denude until all such advances have been repaid. But there is nothing to prevent parties to such a transaction from agreeing that the security shall not be used for any other debt or any larger sum than that specified in the back-bond. In *Robertson* v. *Duff*, 2 D. 293, Lord Fullerton says—"An absolute conveyance with a back-bond, though a trust and security most favourable to the trustee, is at best but a security; and its terms, like those of any other transaction, are a fit subject of judicial inquiry. It may be made a trust, limited to any one debt the parties choose. If, for instance, the back-bond bore that it was granted only in security of one specific debt, and that the trustee was to reconvey, whether the other debts due to him by the truster were paid or not, I presume that there could be no doubt that the right of retention for those other debts would be excluded." And Lord Gillies says, page 296—"But it is quite legal and competent for the truster and trustee to stipulate that the *ex facie* absolute right shall be a security for certain specific obligations and shall not be used by the trustee as a security for others."

Now, that is what was done here, the security was expressly declared to apply to advances "to be made and accounts to be incurred after the date of such registration, as well as for advances and accounts due prior to that date, to an extent not exceeding in all the sum of £700, any law or practice to the contrary notwithstanding."

Thus, future advances are specially provided for and the security *quoad* them as well as *quoad* prior advances is expressly limited to £700 in all. Therefore even if the defenders had received the price, they would only have been entitled to retain £700.

It is further to be observed that the advance of £200 was not made by the defenders to Anderson. This advance was

made by Purdom; it was unsecured, and it was bought up by the defenders from Purdom on the very eve of Anderson's bankruptcy in the full knowledge of his insolvent condition and presumably for the purpose of obtaining a preference. Thus it may well be questioned whether the defenders are entitled to plead compensation in bankruptcy.—Ersk. iii. 4, 18; 2 Bell's Com. 123. Therefore if the defenders had obtained payment of the price I should have been prepared to sustain the first plea-in-law for the pursuer.

But I think that both on the pleadings and on the evidence the defenders are precluded from maintaining that they received the price. In answer 6 they say that the purchase price was "paid to Anderson," and "that said sums of £200 and £3, 4s. 1d. were paid in cash by Anderson through his agents Messrs Purdom & Sons (who acted as his agents in selling said subjects) to the defenders on 7th January 1898."

For some reason, which they do not disclose but which I think I can surmise, the defenders were not disposed to put themselves forward prominently as sellers, although, of course, they alone could give a formal title to the purchaser. The sale was actually effected by missives of sale between Anderson and Kerr, the purchaser. The defender Blyth himself says "We had nothing to do with selling the business."

Again, Purdom would not pay Somerville & Company the £200 without Anderson's orders, which he said he had received; and he says, "On behalf of Anderson I paid Anderson's account to Somerville & Company."

And lastly, the defenders were separately represented at the settlement by the witness Greig, who appeared for them. Greig says—"I received instructions from Messrs Somerville & Co. to obtain payment of their claim against Mr Anderson."

Thus, according to the position taken up by the defenders themselves, not merely on the pleadings but on the proof, Anderson was throughout the seller, as having the radical right to the property, although the title to the security stood in the name of the defender Blyth, and Purdom acted as Anderson's agent in paying the defenders the £700 and £203, 4s. 1d. If so, the price never was in the defenders' hands. The defenders' purpose in adopting this attitude was, I take it, that knowing the terms of the back-letter, and doubting whether the security would cover more than £700, they desired to get and thought that they had got payment of the £203, 4s. 1d. from Anderson through Purdom, in cash; hence the complicated settlement.

Passing now to the main ground of judgment, I am of opinion that the Lord Ordinary has decided rightly in holding that the indorsation in question (to the extent of £203, 4s. 1d.) is exposed to challenge under the Act 1696, c. 5. It was not suggested in argument that this question was not properly before us. It is not necessary that I should recapitulate the somewhat complicated steps in the transaction which led to the cheque in question being indorsed to the defenders by the bankrupt's agent, the witness Purdom. I am far from being satisfied that it is proved that Anderson authorised Purdom to pay to the defenders the sum of £200. But the case may be taken as if the cheque had been indorsed and delivered to the defenders by the bankrupt Anderson himself. The cheque represented part of the price of certain heritable subjects and the goodwill of a publican's business belonging to the bankrupt; and therefore was part of the bankrupt's estate.

Now, *prima facie*, the indorsation to a creditor of a cheque or bill payable to the debtor is, in the sense of the statutes, an assignation of an asset of his estate made for the satisfaction or further security of the creditor to whom it is delivered in preference to other creditors, and consequently null. The indorsation of a bill—and an indorsed cheque is simply a bill immediately payable—has never yet been sustained as an exception to the statutory rule except in cases in which that mode of payment has been shown to be justified by the necessities of ordinary life, such as making a remittance to a person abroad, or a transaction in course of trade.

If the debtor pays by means of his own cheque, it is held as equivalent to payment in cash, but this is because that is the common way in which debts are discharged, the banker being regarded merely as the custodier of his customer's money. But it is not a recognised or usual mode of payment for a solvent debtor to indorse cheques payable to himself and deliver them to his creditor in payment of his debt. The usual course for a solvent person who receives a cheque in payment of a debt due to himself is to pay it into bank and to pay his own creditors either in cash or with his own cheque. If the payee of a cheque indorses it and delivers it to his creditor, it can, I assume, be cashed as readily as the debtor's own cheque; and it is hard to see why both modes of payment should not equally be regarded as equivalent to cash. But it is sufficient to say that the distinction has been drawn in a series of decisions on the scope of the Act 1696, cap. 5, the tendency of which has been not to extend the exceptions to the statutory rule.

No case has been cited, and I know of none, in which payment by means of an indorsed cheque has been sustained as equivalent to a payment in cash. On the other hand, *Carter* v. *Johnston*, 13 R. 698, is an express decision of the Court to the contrary. That case followed on a series of decisions under which payment by indorsed bills of exchange when used for payment of creditors not at a distance were held not to be payments in cash. I need only refer to the cases of *Nicol* v. *M'Intyre*, 9 R. 1097, and *Horsbrugh* v. *Ramsay & Company*, 12 R. 1171. It may be noted that in the latter case the payments were held to be struck at even although it were proved that the bankrupt had been in the habit for some time of paying his creditors by means of indorsed bills.

Neither is this proved to be a transaction in the ordinary course of trade. On the contrary, the net result of the whole transaction was that out of the proceeds of the sale of the bankrupt's property the defenders received payment not merely of their secured debt of £700, but, notwithstanding the restriction in the back-letter, of the full amount of their subsequent advance of £200 which was not secured.

I am therefore for adhering to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuer—Sym—A. S. D. Thomson. Agent—A. W. Ketchen, S.S.C.

Counsel for the Defenders — Campbell, Q.C.—Craigie. Agent—James Philp, S.S.C.

Wednesday, July 5.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

MARSHALL *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence—Remoteness of Injury—Statutory Operations by Railway Company—Failure to Fill up Aperture in Wall—Damage by Theft.

A railway company in the course of statutory operations made an opening in a wall surrounding a cellar, which they omitted to fill up again. In consequence of this a man in the employment of the company, who had observed that the opening had not been filled up, entered the cellar by it and stole goods belonging to the proprietor.

Held that as theft was one of the ordinary risks against which the company were bound to protect a proprietor when opening up his premises, they were liable in damages for the loss sustained through their failure to restore the premises to their original condition.

The Glasgow Central Railway Company were incorporated by the Act 51 and 52 Vict. c. 194, and were authorised, *inter alia*, to make a railway under Argyle Street, Glasgow. In terms of the Caledonian Railway Act 1889 (52 Vict. c. 12), sec. 50, the whole undertaking of the Glasgow Central Railway Company was vested in the Caledonian Railway Company. An action was raised in the Glasgow Sheriff Court against the last-named company by Mr Alexander Marshall, plane and saw maker, 277 Argyle Street, concluding for payment of £300 as damages, which the pursuer alleged he had sustained by the fault of the defenders. The premises occupied by the pursuer consisted of a shop on the street floor and a cellar under it. The cellar was lighted by a window opening into an area under the pavement surrounded by a kerb wall, and with an iron grating above it. The pursuer averred that in the course of executing the works authorised by the above-mentioned Act, the defenders in July 1893 had without notice to him removed part of the sub-soil round the area, and taken down the kerb wall, thus removing the protection afforded thereby to his premises, and had failed to make any adequate arrangements for the protection thereof during their operations; that they had allowed their workmen to enter the cellar, though the pursuer had remonstrated with their foremen. "(Cond. 5). The defenders afterwards pretended to rebuild the said wall, but culpably, recklessly, and unnecessarily left an opening therein which was sufficiently large to allow of a person getting from their underground railway into the pursuer's said cellar."

The pursuer further averred that in consequence of the reckless and culpable manner in which the defenders had conducted their operations, and of their culpable failure to provide for the safety of his premises, a man named John M'Guire and others in the defenders' employment had entered the pursuer's cellar by means of the said opening, and had stolen goods to the value of the sum sued for.

The defenders averred that they had statutory powers to carry on the operations, and that they had been carried on with all due precautions, and that the pursuer's loss was due to his own negligence.

They pleaded, *inter alia* — "(9) In any event, the loss and damage condescended on not being the immediate or natural result of the defenders' operations, the defenders should be assoilzied."

After sundry procedure the Sheriff-Substitute (STRAHAN) allowed the parties a proof.

The Sheriff-Substitute on 11th July 1898 pronounced the following interlocutor:—"Finds that the pursuer is a hardware merchant carrying on business at 227 Argyle Street, Glasgow, and that his premises there consist of a shop on the street floor and a cellar under, which is lighted by a window fronting a small area underneath the pavement, and that this area has over it an iron grating and is surrounded by a kerb wall: Finds that in the course of the formation of the Central Railway the defenders required to underpin the said premises, and to enable that to be done they removed the pavement in front of the said premises, along with the said area wall and the surrounding subsoil: Finds that in rebuilding the said area wall an opening was left therein which was sufficient to admit of a person getting from the underground works of the defenders into the pursuer's premises: Finds that on various occasions between the months of May and October 1895 a man named John M'Guire, who was employed at the said works, entered the pursuer's premises through the said opening, and stole and carried away large quantities of goods belonging to the pursuer of the value of at least £300: Finds that the opening through which the said premises were entered as aforesaid was left in the said wall through the fault or negligence of the defenders or those for whom they are responsible, and that they are