

BLINCOW'S TR.  
v.  
ALLAN & CO.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1830.  
March 18.

BLINCOW'S TRUSTEE v. ALLAN & COMPANY.

THIS was an action of reduction of a bond, and the indorsation to certain bills, and of repetition of the sums contained in them, on the ground that they were granted on the eve of bankruptcy as a preference to the defenders over the other creditors.

Finding that funds were not paid to bankers in the ordinary course of trade, but to give them an undue preference.

DEFENCE.—One defence was, that the bills were discounted in the ordinary course of trade.

ISSUE.

“ It being admitted that the estate of William Blincow and Company, silk-warehousemen in Edinburgh, was sequestrated on the 30th day of May 1827, and that the pursuer is trustee on the said estate, and that the defenders were the bankers with whom the said William Blincow and Company transacted their business:—

“ It being also admitted that, on the 28th

BLINCOW'S TR.  
v.  
ALLAN & Co.

“ day of September 1825, the said William  
“ Blincow as principal, and his brothers, John  
“ and Valentine Blincow, as cautioners, granted  
“ a bond in the English form for the penal  
“ sum of L. 5000, the condition of the said  
“ bond being for the payment of L. 2500 by  
“ three equal instalments, and that the third  
“ instalment of the said bond, amounting to  
“ L. 833, 6s. 8d. became due on the 14th day  
“ of October 1827 :—

“ It being also admitted that, on the 4th  
“ day of May 1827, being within sixty days of  
“ the said sequestration, a cheque or order,  
“ dated 12th May 1827, by William Blincow  
“ and Company, for the sum of L. 838, 13s. 4d.  
“ was presented to the defenders, and the pro-  
“ ceeds applied in payment of the third instal-  
“ ment of the said bond :—

“ Whether, in terms of the interlocutor of  
“ the First Division of the Court of Session,  
“ dated 12th June 1829, the funds against  
“ which the said cheque was presented, were  
“ not paid to the defenders in the fair and or-  
“ dinary course of trade, but were deposited  
“ with the view, and for the purpose of afford-  
“ ing to the defenders an undue preference  
“ over the other creditors of the said William  
“ Blincow and Company ?”

*Skene* opened for the pursuer, and said, The bills were indorsed to the defenders by the bankrupt, within sixty days of his bankruptcy, in payment of the third instalment of a bond, several months before that instalment was due, and thus gave an undue preference to the defenders over the other creditors. It is not necessary to prove that the fraud was known to the defenders, provided it was the intention of the bankrupt; and the circumstances show that the bills could not have been discounted with the hope of carrying on his business, or with any fair view.

*Jeffrey*, opened for the defenders.—We do not differ as to the facts or the intention of the party, but as to the inference to be drawn from it. The general rule is, that preferences to creditors within sixty days of bankruptcy are void; but there are many exceptions to this rule. Such as the delivery of bills, cash, or goods, in the ordinary course of trade. The defenders were not parties to the preference, and the pursuer must prove that it was *not* in the ordinary course of trade. If the funds were put in properly, the defenders might at common law retain them in security. His intending illegally to draw it out and pay it as a preference to the defenders, cannot affect their

BLINCOW'S TR.  
v.  
ALLAN & CO.

BLINCOW'S TR.  
*v.*  
 ALLAN & Co.

right to retain. The intention was not to favour the defenders, but his brother, who was an obligant in the bond.

LORD CHIEF COMMISSIONER.—When attention is paid to the manner in which this case comes before us, it will be found to be a question of fact to be made out in evidence. There is no doubt that a bankrupt may give one party a preference when the intention was to favour another. This person seems to have wished to favour his brother, but in his attempt to do so, he may, by the lien a banker has on funds in his hands, have given the defenders a preference while honourably carrying on their business. This is a perfectly honest case on the part of the defenders, and it is necessary to attend to the manner in which it comes here.

The question for you is, whether the sum was paid in with the view and purpose of meeting the instalment of the bond, and of giving an undue preference? One strong circumstance bearing on this question is, that the bankrupt allowed diligence to be done against him for L. 140, without drawing out L. 132, which he had in the bank. If this sum was necessary to make up the instalment of the bond, is it probable or not, that it was left there for the pur-

pose of making up the sum?—Were the payments made in the ordinary course of business, when the person went to the sanctuary in the course of a few days? or were they pressed forward to meet the claim on his brother? The cheque drawing out the sum is dated the same day the money was deposited, and though the cheque is reduced, it is not taken away as an adminicle of evidence.

If you are of opinion that the sums were paid in to meet the cheque, then you will find for the pursuer, but if not, for the defenders; and in either case, you will re-echo the issue which is taken from the interlocutor of the Court of Session.

Verdict—“ Find that the funds against  
 “ which the cheque was presented were not paid  
 “ to the defenders in the fair and ordinary  
 “ course of trade, but were deposited with the  
 “ view, and for the purpose, of affording to the  
 “ defenders an undue preference over the other  
 “ creditors of William Blincow and Company.”

*Skene and Wilson, for the Pursuer.*

*Jeffrey, D. F., Cockburn, and Sandford, for the Defenders.*

(Agents, *John Patison, Jun. w. s.* and *Allan and Bruce, w. s.*)

BLINCOW'S TR.  
 v.  
 ALLAN & CO.