LORD YOUNG—I do not think it is desirable to express any opinion in this case, as I understand that all your Lordships except myself are of opinion that it should go to trial. It must therefore go, and it will serve no useful purpose for me to state why I differ from that view.

LORD TRAYNER—I think the language used by the defender, and here complained of, was libellous, and that the pursuer is entitled to an issue. But as the language in question was used in the course of a judicial or *quasi* judicial proceeding, and was not plainly irrelevant or impertinent to the matter being discussed, I think the defender was privileged, at least to the extent of requiring that malice should be put in issue, and this I think should now be done.

LORD MONCREIFF—The only question is whether the word "maliciously" should be inserted in the issue. My own opinion is that it should not, because I think, on the pursuer's statement, which is what we have to deal with, no privilege is disclosed; or rather, that any privilege that attached to the occasion or to the party was lost owing to the intemperance of the words which the defender is said to have used. But I do not mean to press my own views on that matter for two reasons. In the first place, it is the general practice to insert the word "maliciously" in cases of judicial slander; and I do not desire lightly to depart from what seems to be a well established practice. But, secondly, it matters very little whether the word "maliciously" is introduced or not into the issue. Even if it is introduced, in my opinion the pursuer will have fully discharged the burden thus laid upon him if he establishes at the trial to the satisfaction of the jury the facts which he sets forth in the third article of the condescendence—that is, that the defender used the words imputed to him, that there were no circumstances to put upon them a different meaning from that which they naturally bear, and that on being called upon to withdraw them the defender reiterated the charge. I say that if these averments are proved there will be evidence upon which it will be competent for the jury to find that the defender used the words maliciously in the sense of the issue.

The issue having been amended by the insertion of the words "and maliciously," the Court approved of the issue as amended and appointed it to be the issue for the trial of the cause.

Counsel for the Pursuer and Respondent—Watt, K.C.—A. M. Anderson. Agents—Gray & Kinnison, S.S.C.

Counsel for the Defender and Reclaimer—Shaw, K.C. — Craigie — D. Anderson. Agents—Coutts & Palfrey, S.S.C.

Friday, January 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WILSON'S TRUSTEE *v.* W. & J. RAEBURN.

Bankruptcy — Effect of Bankruptcy — Act 1696, *c.* 5—*Sale Concluded within Sixty Days of Bankruptcy in pursuance of Scheme to Secure Preference—Reduction.*

A trustee in bankruptcy brought an action against (1) the purchaser of an inn and licensed business sold by the bankrupt within sixty days of bankruptcy; (2) a firm of brewers who had received payment of debts due to them out of the proceeds of the sale; and (3) two solicitors who had held a disposition of the property subject to a relative agreement entered into between the bankrupt, the brewers, and themselves. The trustee concluded (1) for reduction of the missives of sale and disposition following thereon; (2) for an accounting against the purchaser; or alternatively (3) for declarator that the brewers had obtained an illegal preference; and (4) for an accounting against the brewers. He averred that under the agreement referred to, the solicitors were to hold the disposition in security and for payment, *inter alia*, to the brewers of the price of all goods supplied to the bankrupt, the security being for a certain limited sum; that at the time when the sale was effected all the defenders knew that the seller was hopelessly insolvent; that the transaction was carried through solely to enable the brewers to get payment of their unsecured debts, and thus to gain a preference over the other creditors; that the purchaser knew this, and acted throughout in the interests of the brewers, who continued to have control over the licensed premises; that in connection with said purchase the purchaser was indebted in a considerable sum to the brewers; that the price paid was not a full price; and that the whole transaction was carried through fraudulently, and was part of a scheme participated in by all the defenders to secure the brewers a preference which they would not otherwise have obtained. Restitution of the price was not offered. The brewers pleaded in defence that the payments made to them out of the price were valid and effectual in respect that they were made in cash, and also that they were made under and in virtue of the heritable security and relative agreement above mentioned. *Held* (*aff.* Lord Kincairney, Ordinary) (1) that the pursuer had averred no relevant grounds for reduction of the sale, or for any conclusion against the purchaser, and that he was entitled to absolvitor; but (2) that the averments

with regard to the alleged preference obtained by the brewers, and the conclusions against them, and their defences thereto, could not be disposed of without inquiry.

This was an action at the instance of John Walker, C.A., trustee on the sequestrated estates of Robert Wilson, innkeeper, Melrose, against (1) W. & J. Raeburn, brewers, Edinburgh, and John Raeburn and Harold Raeburn the individual partners of that firm; (2) Matthew Richardson, wine and spirit merchant, Ship Inn, Melrose; and also against (3) Haddon & Turnbull, solicitors, Hawick, and Walter Haddon and Andrew Haddon, the individual partners of that firm.

The pursuer concluded (1) for reduction, both under the Act 1696, c. 5, and under the common law, of certain missives of sale of the Ship Inn entered into between the bankrupt as seller and the defender Richardson as buyer, and of a disposition following thereon granted by the bankrupt with consent of the defenders Walter Haddon and Andrew Haddon in favour of the defender Richardson; (2) for decree against the defender Richardson ordaining him to account for his intromissions with the stock of the Ship Inn, and for payment of the sum due on such accounting, or for payment of £2000; or (3) otherwise, and as alternative to the foregoing conclusions, for declarator that in virtue of the said sale of the Ship Inn and payment of a portion of the purchase price to them, the defenders W. & J. Raeburn and the individual partners of that firm, being creditors of the bankrupt, had obtained within sixty days of bankruptcy an undue and illegal preference over the other creditors of the bankrupt; and (4) for decree ordaining Messrs Raeburn to account for all moneys received by them in connection with the sale of the Ship Inn, and for payment of the sum found due, or alternatively for payment of £2000.

The pursuer averred that the bankrupt having in 1897 acquired the Ship Inn, Melrose, by disposition from William Bow, thereafter disponed it to the defenders Walter Haddon and Andrew Haddon; that by subsequent agreement between Wilson, the Messrs Haddon, and the defenders Messrs W. & J. Raeburn, it was arranged that the disposition in favour of Messrs Haddon should be held by them in security for the following purposes:—(*First*), after paying a sum of £1000, which had been borrowed on first bond on the property, of securing to Walter Haddon and Andrew Haddon payment of all expenses to be incurred by them in connection with the property, and the maintaining thereof; (*Second*), for securing payment of £1000, which had been advanced by Messrs Haddon & Turnbull, and for which sum a personal bond had been granted in favour of Haddon & Turnbull by Wilson, as well as by the defenders Raeburn; (*Third*), in security and for payment to the defenders Raeburn of the price of all goods to be supplied to Wilson by them; it being declared that on payment of the whole of said advances Walter Haddon and Andrew Haddon should be bound to re-convey the subjects to Wilson and his heirs and assignees, and that the security stated by the disposition and by the agreement should be for a principal sum not exceeding £2000; that by missives of sale dated 7th March 1899 Wilson agreed to sell to the defender Richardson the said Ship Inn, with the goodwill of the business, and whole fixtures, fittings, and utensils, at the price of £3150, with immediate entry; and that by disposition dated 8th and 10th March 1899, Wilson, with consent of Walter Haddon and Andrew Haddon, disponed the subjects to the defender Richardson; that the purchase-price, amounting, less sum in bond to remain, to £2150, was received by Messrs Haddon & Turnbull, and (together with an additional sum of £77 received from Wilson on 16th March 1899 for payment of expenses, and for reduction of debt due to Messrs Raeburn) was applied by them in payment of (1) interest due on bond to remain; (2) the sum due on personal bond to Walter Haddon and Andrew Haddon, amounting with interest to £1015, 9s. 11d.; (3) a sum of £1122 to account of Wilson's indebtedness to Messrs Raeburn; (4) the expenses of the sale; and (5) a further sum of £60 to Messrs Raeburn; that on 4th April 1899 Wilson was rendered notour bankrupt; and that on 23rd May his estates were sequestrated, and the pursuer appointed trustee thereon. The pursuer called upon the defenders to account for their intromissions, and to pay to the pursuer such balance as should be due thereon.

The pursuer further averred that the sale of the subjects in question was brought about by Messrs Raeburn, to whom Wilson was largely indebted both for advances made by them to enable him to purchase the inn, and also for goods supplied to the inn, which was a "tied" house to Messrs Raeburn. He further averred—"(Cond. 5) The defenders Raeburn got the defender Richardson to agree to purchase said inn. They, either by themselves or through Messrs Haddon & Turnbull, managed to get Wilson to make the offer dated 7th March 1899, which was at once accepted by the defender Richardson. . . . No part of the purchase-money was paid to the bankrupt, or was ever under his control. (Cond. 6) At the time when said sale was effected, all the defenders and their agents were well aware that Wilson was hopelessly insolvent. The transaction was carried through solely with a view to enable the defenders Raeburn to get payment of their unsecured debts, and thus to gain a preference over the other creditors. The defender Richardson knew this and acted throughout in the interests of Messrs Raeburn, who continue to have practical management and control over said inn. The pursuer, although he has applied to the defenders for an account of the nature of the transactions effected, has not been able to get full information on this subject. He has not discovered the whereabouts of the said Robert Wilson, who was absent from

his examination, and for whose apprehension a warrant was issued; but he has discovered that the defender Richardson, at the date of acquiring the property, borrowed a sum of £600 from the defenders Haddon & Turnbull, for which he granted a bond, which was recorded on 11th March 1899—the defenders John Raeburn and Harold Raeburn also joining in this bond as granters. It is not known to what extent the defender Richardson paid cash for said subjects; but it is believed and averred that in connection with said purchase he is indebted to a considerable extent to the defenders Messrs Raeburn. . . . The defenders Raeburn got payment of £1122 out of the price of said subjects, for which sum they held no security. To that extent the creditors of said Robert Wilson were prejudiced. They were further prejudiced as the price obtained for said subjects was not a full price. The licence and goodwill of the business, which belonged to the said Robert Wilson, and over which he had granted no security, were very valuable, and had any attempt been made to effect a fair sale of the subjects in open market £4000 would easily have been procured for said subjects, of which price at least £2500 would attach to the licence and goodwill. The whole transaction, however, was carried through secretly and fraudulently, and was part of a scheme participated in by all the defenders, to secure for the defenders Raeburn advantages and a preference over the other creditors of Robert Wilson which they would not otherwise have obtained."

The defenders Raeburn and Haddon lodged defences, in which they admitted the pursuer's averments as to the date upon which Wilson was rendered notour bankrupt, and as to the date upon which his estates were sequestrated. They referred to the disposition in favour of Messrs Haddon and relative agreement, and explained that by said agreement "the security to Messrs Raeburn embraced not only the price of goods supplied, but all sums that the said Robert Wilson might be due or indebted to the said W. & J. Raeburn, or to the individual partners of said firm in any manner of way." They admitted that the purchase price was applied as stated by the pursuer. They averred as follows:—"The sums mentioned in the account referred to as paid to the defenders W. & J. Raeburn and Messrs Haddon were in point of fact paid in cash to them respectively out of the price received from Mr Richardson. The said sums were due and resting-owing by Wilson to W. & J. Raeburn and Messrs Haddon respectively, and were exigible by and payable to them out of the said price under and in terms of the foresaid agreement relative to the disposition granted by Wilson to Messrs Haddon. The payment of £1122 to W. & J. Raeburn was to account of the price of goods which had been supplied by them to Wilson, and other sums due by Wilson to them at and prior to 8th March out of the said price in terms of the aforesaid agreement. Explained that the whole transaction was carried through in good faith in all respects, and that the unsecured creditors could have obtained no benefit from the property even if the bankrupt had not sold it."

The defender Matthew Richardson also lodged defences, in which he averred that the price paid by him was a full and fair price for the subjects, and that the purchase was a *bona fide* purchase. He admitted that Haddon & Turnbull had advanced to him £600, for which he had granted a bond, and also £350 upon a promissory-note, but averred that he had no further indebtedness in connection with the transaction.

The pursuer pleaded—"(1) The missives and disposition sought to be reduced having been entered into within sixty days of the notour bankruptcy of said Robert Wilson, with a view to the defenders Raeburn obtaining satisfaction or further security of their claims in preference to other creditors, are reducible under the Act 1696, c. 5. (2) *Separatim*—Said missives and disposition having been entered into within sixty days of the notour bankruptcy of said Robert Wilson, fraudulently, with a view to the defenders Raeburn obtaining a preferential payment of their claims, to the prejudice of the other creditors of said Robert Wilson, and all the defenders having been cognisant of and parties to said fraud, decree of reduction ought to be pronounced as craved. (4) Alternatively to decree of reduction being pronounced, the defenders Raeburn having by the transactions condescended on obtained a preference over the other creditors of Robert Wilson, within sixty days of bankruptcy, are bound to account to the pursuer for any preference so obtained, and decree ought to be pronounced in terms of the alternative conclusions of the summons."

The defenders Raeburn and Haddon pleaded, *inter alia*—"(2) The pursuer's averments are irrelevant. (3) The disposition in favour of Richardson having been granted in implement of a *bona fide* sale for a full price, is valid and effectual. (4) The payments to the present defenders having been justly due and exigible by them, and not constituting any undue preference in prejudice to prior creditors, and said payments having been made in good faith and paid in cash, are also valid and effectual. (5) The said payments having been due to and exigible by the defenders, and paid under and in virtue of the heritable security and relative agreement mentioned in the pleadings, are not struck at by the statute."

The defender Richardson pleaded—"(2) No relevant case."

The Lord Ordinary (KINCAIRNEY) on 20th August 1900 pronounced this interlocutor—"Finds that there are no averments on record relevant to infer the conclusions for reduction, nor any conclusion against the defender Matthew Richardson: Therefore assoilzies the defenders from the conclusions for reduction, and assoilzies the defender Matthew Richardson from the petitory conclusions directed against him, and from the whole action, and decerns;

Finds the said Matthew Richardson entitled to expenses, allows an account, &c.: *Quoad ultra* allows the parties other than the said Matthew Richardson a proof of their several averments on record, and to the pursuer a conjunct probation, and appoints the proof to proceed on a day to be afterwards fixed."

Opinion.—"The defenders have pleaded that this action is incompetent, but no argument was offered in support of that plea. I was not asked to sustain it, and I think it is not a plea which I should sustain without motion or argument. The action is, however, a very singular one.

"The pursuer is the trustee on the sequestrated estate of Robert Wilson, who was proprietor of the Ship Inn, Melrose. He was made notour bankrupt on 4th April 1899, and his estates were sequestrated on 23rd May 1899.

"The defenders called are Matthew Richardson, Messrs W. & J. Raeburn, brewers, Edinburgh, and the partners of that firm, and Messrs Haddon & Turnbull, solicitors, Hawick, and the partners of that firm. There are no petitory conclusions against Messrs Haddon.

"I see no connection between the conclusions against Matthew Richardson and the conclusions against the Messrs Raeburn. They might have been in separate actions, but both sets of conclusions are founded on the Act 1696, c. 5.

"As regards Matthew Richardson, the action concludes for a reduction of missives of sale dated 7th March 1899, and of a disposition, dated 8th and 10th March 1899, of the Ship Inn by Wilson, with consent of the Messrs Haddon, in favour of Matthew Richardson. The ground of reduction is that the disposition was executed within sixty days of Wilson's notour bankruptcy, which seems to be the case, and to be admitted.

"The other conclusions of the action are said to be alternative to that conclusion, so that they must necessarily be dropped if the disposition be reduced, and it is only if Matthew Richardson be assoilzied that these alternative conclusions can be proceeded with.

"These conclusions are for declarator that in virtue of the sale of the inn, and the payment of part of the price to the Messrs Raeburn, they, being creditors of Wilson, obtained, within sixty days of his notour bankruptcy, an illegal preference over his other creditors, and for decree for payment (after an accounting) of the sums received by them out of the price of the inn; that is the substance of the petitory conclusion.

"I am of opinion that no relevant ground is stated for reduction of the sale and disposition of the inn, and that Richardson should now be assoilzied. It is not said that Richardson was not a *bona fide* purchaser buying on his own account. It is averred that the price he paid was not a full price, and that more might have been got; but it is not said that Richardson, or he and Wilson together, used any unfair practices for the purpose of reducing the price, and of benefiting Richardson at the expense of the other creditors. There is no relevant statement to that effect. What is said is that Richardson acted in the interest of the Raeburns, and purchased the inn in order to enable the Raeburns to get payment of the debts due to them by Wilson in preference to Wilson's other creditors. Why that should invalidate the sale I do not perceive. In that view it would appear as if the conclusions of reduction were ancillary to the petitory, and introduced merely in aid of it. But, singularly enough, the case is the very reverse; for, as has been noticed, success in the conclusions of reduction would simply blot out the petitory conclusions altogether.

"Richardson is not a creditor of Wilson; the disposition of the inn was not granted for his satisfaction or security as such; and the Act 1696, c. 5, has no application to him or to his purchase. It does not afford any ground of reduction of the sale and disposition, and I see no other ground of reduction. Reduction is certainly not necessary in order to reach the petitory conclusions, for, as has been said, reduction would put an end to them.

"Further, a reduction of the disposition would be unjust in a degree which is almost absurd, for while it would deprive Richardson of the inn which he has purchased, I do not observe any proposal to restore him the price which he paid. Restitution is not suggested.

"I observe from the terms of the disposition that Richardson becomes personally liable for £1000 to a heritable creditor called Cairns, the debt to whom was allowed to continue to burden the land. Cairns is not called as a defender, and it is not absolutely clear that a reduction of the disposition would relieve Richardson of that obligation to Cairns.

"On the other hand, if the disposition were reduced this case could go no further, because the latter conclusions are alternative, and the result would be that the pursuer, as representing Wilson, would get the inn back, and would apparently be relieved of the claims of the Raeburns. These results seem to show that this part of the summons, as it is drawn, is manifestly absurd, and I think that Richardson, against whom they are directed, should be assoilzied.

"The conclusions of reduction appear, however, to be directed against all the defenders, and I think, therefore, that all the defenders should be assoilzied from the reductive conclusions, and that the defender Matthew Richardson should also be assoilzied from the petitory conclusions directed against him.

"The disposal of these conclusions in that manner leaves it open to consider the alternative conclusions against the Messrs Raeburn. But I am of opinion that these conclusions cannot be disposed of without inquiry. The Messrs Raeburn were creditors of Wilson, and payments have been made to them out of his estate in satisfaction of the debts due to them. It is averred that the sums of £1122 and £60 have been so paid. The Act 1696, c. 5, may apply to

these payments. These defenders justify these payments on two grounds—(1) as cash payments; (2) as secured to the extent of £1000, in virtue of the deed of agreement, 33 of process, constituting a trust in Walter and Andrew Haddon. These are relevant defences, and may be sufficient if they are established, but I am unable to say whether they are well founded in fact, and on these points there must, I think, be inquiry."

The pursuer reclaimed, and argued—The averments of the pursuer were sufficient, if proved, to infer reduction of the sale to Richardson. They were in effect that Messrs Raeburn had fraudulently put forward Richardson, who was a man of straw, to purchase the subjects for an inadequate price in order that they might get payment of Wilson's debt to them. Any transaction, however indirect, designed to give one creditor an illegal preference, was struck at by the Act 1696, c. 5. In any view, the Lord Ordinary was wrong in assoilzieing Richardson without inquiry—Goudy on Bankruptcy, p. 85; *Millar* v. *Duncan & Low*, December 11, 1822, 2 S. 71, 2 W. & S. 579; *Nicol* v. *M'Intyre*, July 13, 1882, 9 R. 1097, *per* Lord Young.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I think the judgment of the Lord Ordinary is right.

If there had been averments relevant to show that there had been a conspiracy by which Richardson, not entering into a *bona fide* transaction for himself, was acting solely as a means of getting payment of Messrs Raeburn's debt, such averments would have presented a case for inquiry.

The pursuer has acted very frankly in not overstating his case, but on such averments as he makes in support of his conclusion for reduction and his conclusion against Richardson, I cannot hold that they entitle him to inquiry.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, Q.C.—Hunter. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders and Respondents W. & J. Raeburn and Haddon & Turnbull—Wilson Q.C.—Steedman. Agents —Steedman & Ramage, W.S.

Counsel for the Defender and Respondent Richardson — Chree. Agents — Mackenzie & Fortune, S.S.C.

Thursday, January 24.

SECOND DIVISION.

M'CALL'S TRUSTEES *v.* MURRAY.

Succession—Vesting—Discretion of Trustees—Direction to Divide so soon after Death of Liferentrix as Deemed Proper.

A testator directed his trustees to pay the liferent of the residue of his estate, heritable and moveable, to his daughter, and in the event of her death without issue, "then, so soon thereafter as deemed proper," to divide the residue of his estate into equal shares, according to the number of his sisters in life "at the period of such division, and such of them as may have died leaving lawful issue;" and having thus divided the residue, to pay it over to his sisters in certain proportions, whom failing to their issue, it being declared that if any of his sisters should have predeceased "the said term of payment and division amongst them" leaving issue or descendants, such issue or descendants should take the share which would have been their parent's, and that in case any of them should predecease without leaving issue or descendants the share should be held to have lapsed. The liferentrix died unmarried in October 1899. One of the truster's sisters survived the liferentrix, but died unmarried in January 1900, before the estate had been divided by the trustees. *Held* that her share vested in her on the death of the liferentrix.

Succession—Heritable and Moveable—Conversion—Intention of Testator.

A testator directed his trustees on the death of his daughter without issue, to "divide" the residue and to "pay" it in certain proportions to his five sisters or their issue or descendants. He declared that the provisions to females should be exclusive of the *jus mariti* and right of administration of their husbands, and empowered the trustees if they thought proper, "in order that the provisions herein conceived in favour of females may be rendered more secure," to lay out these provisions on the security and in the purchase of heritable property. The testator also conferred on his trustees power of sale. The testator died in 1869, and was survived by his daughter and five sisters, three of whom were married and had issue. He left estate partly heritable and partly moveable. The heritage consisted of house property in Glasgow. The testator's daughter died without issue, and at the date of her death the trustees had not exercised their power of sale. Thereafter, in a question as to the persons entitled to succeed to one of the residuary legatees in whom a share of the residue had vested, *held* that her share was wholly moveable and fell to her heirs *in mobilibus*.