The 3d article of the condescendence is as follows:—[*reads.*]

The Sheriff-substitute held the averments in both articles relevant, and allowed a proof of both. The Sheriff differed as to the relevancy of the 3d, and disallowed any proof except in reference to the agreement stated in No. 2. A proof has been led, and judgment given as to the proof, but we are asked to consider whether the Sheriff did right in holding the statement in the 3d article irrelevant.

Had the 3d article stood alone, and the only demand preferred in the action been for payment of the pursuer's debt, as the legal inference from the facts alleged, I think that it scarcely admits of question that the case presented is relevant. What is represented is this, that one party takes possession of the entire stock and estate of an insolvent trader collusively and fraudulently, and appropriates it in its entirety to his own use, leaving nothing from which his creditors can operate payment of their debts. Surely such a transaction cannot be represented as legitimate. There is the element, in the first place, of insolvency; of an appropriation, in the next, of the entire property of the insolvent trader; and there is, further, the exclusion of any supposed innocent appropriation by the affirmation that the act of appropriation proceeded from collusion between the party taking and the party giving possession, and was fraudulent—that is, done with bad intention. I should be sorry to think that a transaction of such a nature could be upheld as illegal, or that it could be affirmed that creditors of insolvent debtors in Scotland should be deprived of their just rights by such a simple and easy arrangement.

That they must have a remedy against such an act seems plain, and the two remedies sought seem to me to present alternatives fairly calculated to meet the evil, unless the arm of the law is to be wholly paralysed in the vindication of the just rights of creditors.

The leading view of the Sheriff was, that the statement of the alleged contract to pay, contained in the 2d article of the condescendence, vitiated the statement in the 3d; and that, the statement being assumed as true, no wrong was done. He regarded the case as one presented in all its aspects as one in which it must be held as true that there was a special contract in the advocator's favour.

The case, as I regard it, was really presented in article 3 in an alternative view. The advocator, in his 2d condescendence, professes ignorance of the details of the arrangements entered into, but avers an agreement to pay his debt. The 3d article, as I understand it, proceeds upon the footing not that there was an agreement, but that there was not. The gravamen is, and the substantive averment to support the second *medium concludendi* was, that the respondent appropriated the estate, leaving the advocator in such a position that he could not recover his debt. Can I hold that the pursuer really meant to say, in libelling this 3d article of the condescendence, that the respondent was under personal obligation to pay the debt? It is a question as to what is really meant by the advocator, and it would be absurd, I think, to hold him as affirming in the same breath the existence of the contract and the gross fraud by which he was deprived of the power of recovering his debt by an appropriation of his debtor's estate. The reasonable and fair reading is,—there was a contract. I ask judgment on that footing; if there was no contract, there was such an irregular and illegal transaction as to warrant me to recover the debt or get a replacement of the property.

We do not in this country, any more than elsewhere, hold alternative pleading incompetent; and had the words 'or otherwise' preceded the 3d condescendence, I do not see how anything could have been urged against the relevancy. If the true meaning of the statement is to present an alternative view, shall we, on the narrow ground of an omission fully to express what was truly meant, withhold a remedy against what law considers a fraud?

As to the alleged necessity for further specification of the fraud, which is the second ground, I confess I see no palpable defect of statement. Insolvency,—appropriation of the insolvent's estate,—the necessary deprivation of a power on the part of his creditors to operate payment of their debts, and that done collusively and fraudulently,—seems sufficient.

As to the 3d reason, it applies to the alternative conclusion. It is not necessary to go into the question if, as I think, there is a case laid for the remedy of payment, but I can only say I do not share in the views of the Sheriff as to the extrication of the conclusion, or as to the necessity of a special condescendence in the outset of a case of a partner's share of effects taken by a fraudulent arrangement in wholesale from possession of an insolvent.

The other Judges concurred.

Agent for Advocator—Wm. Miller, S.S.C.

Agents for Respondent—M'Ewen & Carment, W.S.

Friday, March 12.

FIRST DIVISION.

CITY OF GLASGOW BANK *v.* DALL AND OTHERS.

Multiplepoinding — Relevancy — Riding Interest. Three parties, general creditors of the common debtor, claimed right to a sum which had been consigned by him in this country in name of the claimants, for behoof of the party having best right thereto. *Held,* altering the judgment of the Lord Ordinary, that the claim of one of the parties was not irrelevant, in respect his claim was not a riding interest, but, like the others, that of an ordinary creditor of the common debtor.

This was an action to ascertain the right to a consigned sum, being the price of certain tweed goods sold in Australia by Mr Halliburton, wool broker there, and which price, after being brought to this country and deposited in bank, was claimed by three parties, viz., Messrs James Mitchell & Company, Willans, Overbury, & Company, and Mr Dall, as trustee on the sequestrated estate of Mr George Chisholm.

Mitchell & Company maintained that they had in the year 1864 sold the goods in question to Mr Chisholm, as the agent and representative in this country of Mr Halliburton, and that, the price of these goods being still unpaid, Mitchell & Company, as creditors of Halliburton, were entitled to be preferred to the consigned sum, being the fund *in medio*, or, at all events, were entitled to a share of it along with the other creditors of Halliburton. Willans, Overbury, & Co. claimed the fund in virtue of an alleged right of pledge or hypothec, which they

maintained they had acquired from Halliburton and Chisholm in security of certain wool shipments; while Mr Dall, Chisholm's trustee, claimed the fund on the ground that the goods were bought by Chisholm from Mitchell & Company, as an individual and not as an agent, and sold in Australia by Halliburton for Chisholm's behoof.

An objection having been taken to the relevancy of Mitchell & Company's claim, on the ground that Halliburton was not a claimant in the process, the Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered closed record in the competition, Finds that the facts averred on record by the claimants James Mitchell & Company are not relevant to support their claim to any extent: Repels the claim of the said James Mitchell & Company, and decerns: Finds them liable to the other claimants, Thomas Dall and Willans, Overbury, & Company, in the expenses of answering and discussing the claim of the said James Mitchell & Company: Allows accounts thereof to be given in, and remits the same when lodged to the auditor to tax and report; and appoints the cause to be enrolled that the competition, as between the said Thomas Dall and Willans, Overbury, & Company, may be proceeded with.

"*Note.*—The argument was limited to the claim of Mitchell & Company, which the other claimants concurred in maintaining to be wholly irrelevant. The Lord Ordinary is of opinion they are well founded in the contention.

"The claim of Mitchell & Company is rested upon two distinct grounds—*First*, They claim to be ranked preferably on the fund *in medio* to the extent of £345, 14s., on the ground that, to that extent, the fund consists of the price for which goods sold by them to Mr Halliburton in Australia were sold by or for behoof of that gentleman on his own account in the colony. But, assuming the facts to be as stated by the claimants, the sale and delivery of goods by them to Mr Halliburton could only give them right to demand payment of the price for which they sold them to him. It could not give them any right to reclaim the goods or the price realised for them by the purchaser, either as a *surrogatum* for the goods or on any other footing. *Secondly*, Mitchell & Company claim to be ranked upon the fund *in medio* simply as general creditors of Mr Halliburton for the price of the goods above referred to, and for other sums. The fund is admittedly money which was remitted by, or by order of, Mr Halliburton to this country, and has been consigned in the City of Glasgow Bank. It is claimed by Dall, Chisholm's trustee, as being the price of goods belonging to Chisholm, and sold on his account by Halliburton. It is also claimed by Willans, Overbury, & Company, in respect of an alleged security transaction in their favour. It is not claimed in any way by Halliburton, who has not appeared, and has lodged no interest in this process. In this state of matters there is no room for the second branch of Mitchell & Company's claim, which they could only have maintained through Halliburton, and as a riding interest upon his claim, if he had lodged one. If the transaction by which the fund was consigned in bank is liable to objection at the instance of Mitchell & Company, or other creditors of Halliburton, the objection would require to be insisted in otherwise than by lodging a claim in the multiplepoinding."

Mitchell & Company, after making certain additions to the record, to show the nature of the consignation, reclaimed against this interlocutor.

M'KIE for reclaimers.

SHAND and RETTIE for Willans, Overbury, & Company.

J. MARSHALL for Dall.

The Court, being of opinion that there was no ground for holding Mitchell & Company's claim to be irrelevant any more than that of the other claimants, unanimously recalled the Lord Ordinary's interlocutor, and remitted the case to him to allow the parties a proof of their averments.

Agents for Reclaimers—Goldie & Dove, W.S.

Agent for Willans, Overbury, & Company—H. Buchan, S.S.C.

Agents for Dall—J. & H. G. Gibson, W.S.

HOUSE OF LORDS.

Friday, January 26.

CLEPHANE AND OTHERS *v.* MAGISTRATES OF EDINBURGH.

(Vol. iii, p. 84.)

Charitable Trust—Hospital—Obligation. Circumstances in which *held*, in applying a previous judgment of the House of Lords, that a sum of £7000, but not interest accruing thereon, was to be applied in building a certain church; and that it was not necessary to rebuild a hospital which had been demolished through railway operations, the purposes of the charity being sufficiently fulfilled by administration of outdoor relief.

The action in which the present appeal was taken was instituted in the year 1856, in the name of certain poor persons, beneficiaries or pensioners of the charity known as the Trinity Hospital of Edinburgh, the administration of which is vested by Crown Charters in the Corporation of the City of Edinburgh. The object of the action was to obtain from the Court of Session a decree, finding and declaring that the sum of £17,171, 9s. 6d., received by the respondents from the North British Railway Company as compensation for the compulsory sale of the Trinity College Church of Edinburgh, formed part of the trust-estate vested in the Corporation for behoof of the said charity, and that the money was applicable to the purposes of the charity. The Corporation were about the same time called as defenders in another action, instituted by a minority of its members in conjunction with other individuals, for the purpose of having it declared that the whole of the above mentioned sum was applicable to the purpose of building a church similar in style and model to the ancient Trinity College Church, which, as already mentioned, had been acquired by the North British Railway Company for the purposes of their undertaking. The Corporation, acting upon the advice of counsel, had, previous to the institution of these actions, come to the resolution of applying the sum of £7000, part of the money in question, in building a suitable church, in which, without aiming at reproducing the architectural style or embellishments of the ancient edifice, they should be able to provide sufficient accommodation for the pensioners of the Hospital, and for those inhabitants of the district who had been accustomed to worship in the Hospital Church. The balance (including all in-