Lord President—I have no doubt with regard to this case.

The lease and goodwill of this hotel form part of the sequestrated estate, and the business cannot be carried on without the licence. At the date of the sequestration the hotel had been carried on under a series of certificates for the persons who held the lease of the hotel. It happened accidentally that at the time of the sequestration there was no certificate of the right kind, for the bankrupt had *per incuriam* not applied for one in time. He therefore applied for and obtained a permit which enabled him to carry on the business just as if he had got a certificate. The next Licensing Court occurred after the sequestration, and the bankrupt with the sanction of the trustee applied for a new certificate, which was granted. It appears to me that the existing certificate and licence are documents belonging to the bankrupt's estate, and that they go as accessories of it to the creditors. Therefore I think that the trustee is entitled to the certificate and licence in order to get a transfer. If the bankrupt attaches any importance to getting back the certificate after the transfer has been obtained, there is no reason why he should not get it back after the trustee has made use of it—that is to say, after the next Licensing Court, when the purchaser will be bound to get a fresh certificate in his own name.

I think we should recal the deliverance in so far as appealed against, and ordain the bankrupt's agent to deliver the certificate and licence to the trustee.

Lord Mure concurred.

Lord Shand—There can be no doubt that if the sequestration had occurred during the currency of the certificate, and the business was to be sold, the bankrupt would have been bound to give the certificate up. There is here this peculiarity that the certificate was not so granted. The trustee might have said to the bankrupt that he was to leave the premises, and he would then not have been bound to get a new certificate. But it was arranged that he should remain, and that he should get a new certificate.

It was said by the bankrupt that the trustee had not used him well. That may or may not be so. We cannot enter into it in regard to the present question, though it may be that the bankrupt has a right of action to enforce any arrangement he has made with the trustee.

Lord Adam concurred.

The Court recalled the deliverance of the Sheriff-Substitute in so far as appealed against, and ordained the bankrupt's agent to deliver the certificate and licence to the trustee.

Counsel for Appellant—Dickson. Agent—David Turnbull, W.S.

Counsel for Mr Coupland—Party.

Counsel for Mr Fyfe, the Agent for the Bankrupt—Younger. Agents—Ronald & Ritchie, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

CARTER (M'GREGOR & PRINGLE'S TRUSTEE) *v.* JOHNSTONE.

Bankruptcy — Indorsed Cheque — Assignation in Satisfaction—Payment in Cash—Trade Transaction—Act 1696, *c.* 5.

The indorsation by a bankrupt to a creditor within sixty days of bankruptcy of a cheque in which the bankrupt is payee, in payment of a debt already due, is an assignation in satisfaction within the meaning of the Act 1696, c. 5.

A firm of wool brokers in Leith had consigned to them in July 1883 certain wool for sale, which was sold in the months of August, September, and October following. According to the ordinary course of the wool trade, the price should have been remitted to the consigner within twenty-one days from the date of the sales. This was not done, but on 5th January 1884 the brokers sent to the consigner, who resided near Moffat, an advice-note stating—"We have this day sold on your account the under-noted wool. . . Remittances are due in twenty-one days." On 21st January they remitted the amount due. The remittance was made partly by means of two cheques drawn by third parties in favour of the brokers, and payable to them or their order, one crossed generally upon an Edinburgh bank, the other uncrossed upon a bank in Jedburgh. At the time this remittance was made the brokers were, and had for some time past been, insolvent; their bank account was overdrawn, and they had never previously made a remittance in this form. The indorsee cashed the cheques at his bank in Moffat; he had not been pressing for payment, and had no knowledge of his debtors' impending insolvency. On 22d January the brokers took advice with regard to the state of their affairs, and on 24th January issued a circular to their creditors. Their estates were sequestrated on 5th February 1884. *Held*, in an action of reduction at the instance of the trustee in the sequestration, that the indorsations of these two cheques were neither payments in cash nor transactions in the ordinary course of trade, and were reducible under the Act 1696, c. 5.

This was an action of reduction under the Act 1696, c. 5, at the instance of F. W. Carter, C.A., trustee upon the sequestrated estates of M'Gregor & Pringle, wool brokers in Leith, against John Anderson Johnstone, Archbank, Moffat, in which the pursuer sought to reduce certain payments which had been made within sixty days of bankruptcy by the bankrupts to the defender by means of two indorsed cheques.

The defender had transacted business with the bankrupts from the year 1875 down to the date of their sequestration in 1884. In July 1883 Johnstone consigned to M'Gregor & Pringle certain clips of wool for sale. These wools were

sold, some on 8th August to Whitwell, Hargreaves, & Co., Kendal, and J. W. Grainger, Kilmarnock; some on 25th September to J. Templeton & Son, Ayr; and some on 30th December following to J. Aykroyd & Sons, Bradford. The total price realised was £292, 12s. 1d. According to the practice in the wool trade, this amount, less charges and commission, should have been remitted to the consigner Johnsone within twenty-one days from the date of the respective sales. M'Gregor & Pringle, however, made no remittance, but on 5th January 1884 sent to Johnstone an advice-note in these terms—"We beg to advise that we have this day sold on your account the under-noted wools;" then followed a note of the wools consigned in the previous July; and at the foot of the advice-note was this—"Remittances are due in twenty-one days." This advice-note covered the account sales, which brought out £280, 3s. 8d., the nett amount due the consigner after deducting charges, commission, &c.

This sum of £280, 3s. 8d. M'Gregor & Pringle remitted to Johnstone on 21st January in the following way:—They had in their possession (1) a cheque dated 15th January 1884, drawn by Duncan & Brown, wool merchants, Canonmills, upon the Stockbridge Branch, Edinburgh, of the Commercial Bank of Scotland (Limited), for £86, 12s. 3d, payable to them or their order, and crossed generally; and (2) a cheque dated 17th January 1884, drawn by John & William Hilson, Jedburgh, on the Bank of Scotland, Jedburgh, for £120, payable to them or their order, and uncrossed. Neither Duncan & Brown nor J. & W. Hilson were purchasers of any of the wool consigned by Johnstone to M'Gregor & Pringle. These two cheques M'Gregor & Pringle indorsed to their creditor Johnstone (putting on them "Pay Mr J. A. Johnstone or order"), and sent to him on 21st January, along with two bank drafts for the balance, in payment of their debt of £280, 3s. 8d. At the date of raising the action the pursuer was not aware that the balance had been remitted by means of these bank drafts.

These cheques were received by Johnstone on 22d January, and paid into his account with the Bank of Scotland at Moffat on the following day. They were presented for payment and duly honoured.

M'Gregor & Pringle's estates were sequestrated on 5th February 1884, and F. W. Carter, the pursuer, was subsequently appointed trustee.

On the record as originally framed the averments of the pursuer were as follows, after setting forth the facts above stated — "M'Gregor & Pringle as partners and as individuals were insolvent at the time the said indorsations were made, and continued so down to the date of the sequestration of their estates, and the indorsations of the said cheques or drafts by them to the defender were made and granted for the satisfaction or further security to the defender of the debt or debts then due to him by the said M'Gregor & Pringle in preference to other and prior creditors within the space of sixty days before the said M'Gregor & Pringle as partners and as individuals became bankrupt." Then particulars of the sales above stated were given, and it was further averred —After each of these sales the proceeds of the wools sold thereat were respectively (less commission and charges) due by the bankrupts to the defender, and in the ordinary course of business ought to have been remitted within twenty-one days of the respective sales. This, however, was not done, and the said debt remained unpaid till within sixty days of the bankruptcy, when it was paid in manner above stated.

The pursuer pleaded—"(1) The transactions represented by the indorsations challenged, and the said indorsations themselves, are reducible under the Act 1696, cap. 5, as being entered into, made, and granted by the bankrupts in satisfaction or security to the defender of a pre-existing debt within 60 days of bankruptcy in preference to other creditors."

The defender pleaded—"(1) The averments of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (2) The payments in question being payments in cash are not reducible under the Act 1696, cap. 5. (3) The transactions and payments in question were in the ordinary course of trade, and are therefore not reducible under the Act 1696, cap. 5."

The Lord Ordinary (M'Laren) on 16th January 1885 found that the transaction sought to be reduced ought to be sustained as a money payment of a debt which was already due, repelled the reasons of reduction, and assoilzied the defender.

"*Opinion.*—These cases raise [*see* Note *infra*] an important question in bankruptcy law, and if I do not discuss them at length it is not because they are undeserving of deliberate consideration, but because the result of the consideration which I have given to them may be expressed very briefly.

"I take first the case in which the bankrupts within the statutory period of constructive bankruptcy paid a creditor by indorsing over to the creditor a cheque which they had received in the ordinary course of business. For the trustee it is contended that this is an assignation of a valuable security, and therefore reducible under the statute 1696. By the defender it is treated as a cash payment, or a mode of payment equivalent to cash.

"There is nothing more clearly settled in bankruptcy law than that an insolvent is entitled to pay *primo venienti* until he makes a declaration of insolvency. When he 'stops payment' he is considered insolvent; but his creditors have no right to compel the restoration of moneys paid by the bankrupt in discharge of his current liabilities, on the allegation that he was insolvent at the time when such payments were made. This is not an exception to the operation of the statute of 1696; it is a case not falling within its scope; because the statute only annuls dispositions and assignations in satisfaction of debt, and does not interfere with the payment of debts in the ordinary and legitimate way.

"If an insolvent hands his creditor his own cheque in satisfaction of a debt, this is considered a cash payment, because it is the way nine-tenths in amount of all the cash transactions of the world are settled.

"It has not been shown to me that any sound distinction can be taken between payment by a cheque on the insolvent's individual account and payment by indorsing and handing over a cheque which the debtor has received from another person. And first, I am not of opinion that the indorsing of a cheque in discharge of a debt is an

'assignation' in the sense of the statute. A cheque may in certain circumstances have the effect of an assignation of funds held by the banker. But in the ordinary uses of such a document it is nothing more than a warrant for payment. It is an arrangement by which a sum of money standing at the credit of one person is transferred through the intervention of the bankers' clearing-house to the credit of another person, thus saving the parties the trouble and risk incident to the actual uplifting of coin from one banking establishment and transferring it bodily to another. This is evidently payment in the most convenient form, and has nothing of the nature of an assignation, so far as I can discover. It is only an extension of the principle of payment by cheque, that the receiver of the cheque, if he happens to have a sum of the same amount to pay, should indorse the cheque to his creditor, instead of sending it to the bank and drawing out a sum of the like amount.

"But, secondly, I do not think that the transaction challenged is tainted with the evil which it was the object of the statute to defeat.

"When a debtor resorts to the assignation of goods or securities in lieu of payment, it may be assumed that he is either unable to pay his way, or that he fears to attract attention to his circumstances by exposing his property to sale. Neither of these presumptions has any application to the indorsement of a cheque. In the present case there was nothing whatever to prevent the bankrupts from cashing the cheque at the office of the banker on whom it was drawn, and with the proceeds purchasing a bank order for the amount which they desired to remit to their creditor. The indorsing the cheque was only what any solvent person might have done to save the trouble of actually cashing it. Insolvency was not the cause of indorsing, and the indorsing of the cheque would not in my judgment raise any presumption of insolvency.

"In this case I am of opinion that the transaction challenged ought to be sustained as a money payment of a debt which was actually due."

[NOTE.—At the same time the Lord Ordinary delivered judgment in the case of *Carter* (*M'Gregor & Pringle's Trustee*) v. *Wallace*, in which payment had been made by a bank order indorsed over by the bankrupts to the defender.

This case had been heard along with *Carter* v. *Johnstone*, and the argument in both cases was the same, the defenders maintaining that their case was *a fortiori* of *Carter* v. *Johnstone*.

The Lord Ordinary assoilzied the defenders.

"*Opinion.*—In the case of *Carter* v. *Wallace*, where the payment challenged was made by indorsing a bank order, I have, if possible, even less doubt. A bank order is really a bank note. The only difference is that it is in the form of a draft, and is for an odd sum of money, while the ordinary printed bank note is for an even sum. and is in the form of a promissory-note. The one is a banker's obligation like the other, and both according to universal usage are treated as cash. If the bank order in question had been payable to bearer, and had been handed over like a £100 bank note, no one would have thought of disputing the payment. It was necessary that the document should be indorsed, because I presume it was drawn payable to the bankrupts or their order. What difference the indorsation makes I fail to see. In this case also I am of opinion that the transaction was actual payment, and that it is not reducible."

This judgment was acquiesced in.

Counsel for Pursuer—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defenders—Dickson. Agent—J. & A. Hastie, S.S.C.]

The pursuer reclaimed, and after hearing counsel the Court allowed him to add the following amendment to the record—"None of the said indorsations was granted in the ordinary course of dealings, or formed a transaction in the course of trade. At the date of the said indorsations the said M'Gregor & Pringle were not in fact carrying on business or dealing with customers in the course of trade. Conscious of insolvency, the partners on 18th January ceased to go to their office or carry on business, and they did not resume doing so before the public announcement of their suspension of payment, which was made by circular on 24th January. The said indorsations were granted by reason of the inability of the said firm to meet their debts by payment in cash or by draft on their bankers, who were the Commercial Bank, and not the Bank of Scotland."

The defender in his answer to this amendment stated that the cheques in question "were indorsed by Messrs M'Gregor & Pringle, and received as cash by the defender in the ordinary course of trade in payment of a debt actually due. The defender had not asked for payment, and had no intention of taking a preference, but received the cheques in perfect *bona fide* without any suspicion of the impending bankruptcy of the indorsers. The cheques were cashed by the defender at the branch of the Bank of Scotland at Moffat on 22d January, and passed through the Edinburgh Clearing House on 23d January. The circular referred to was not issued by Messrs M'Gregor & Pringle until 24th January, and no copy was sent to the defender, as he had then ceased to be a creditor. Further, averred that indorsed cheques are a common and ordinary medium of payment, and that such documents are given and taken as cash in the ordinary course of trade both in Scotland and England. Admitted that the Commercial Bank were Messrs M'Gregor and Pringle's bankers."

An interlocutor was then pronounced remitting to the Lord Ordinary to allow parties a proof of their averments, the pursuer to lead in the proof, reserving the question of expenses.

A proof was taken before Lord M'Laren, in which, in addition to the facts already stated, it was proved that M'Gregor & Pringle were insolvent on 21st January 1884, when they indorsed the cheques in question. Their bank account, which was kept at the Leith branch of the Commercial Bank, was overdrawn to the extent of £684, and the bank agent deponed that he would not have honoured any of their cheques after the 21st, and that he would not have given them a bank draft if they had proposed to purchase it unless they had first repaid the over-draft; this overdraft the bank agent explained had only been allowed on Friday the 18th after pressure, and in the expectation that something would be paid to reduce it on the following day.

Evidence was also led by the pursuer to show that according to the practice in the wool trade payment was made by the buyer within 14 days from the date of the sale, and a remittance sent by the wool broker to the consigner within 21 days, that this remittance was usually made by cheque drawn upon the broker's own banker, and that it was not the practice of the trade to make remittances by indorsing over cheques received from other persons.

In regard to the practice of indorsing cheques the pursuer deponed—"It is very unusual in my experience, where the firm is of any respectability and solidity to find mercantile men paying their debts by indorsing the cheques of third parties, and that for several reasons. One reason is, that it would seem as if they were afraid of their own bankers; that their bankers had either refused further credit or stopped it altogether, and that they could not pay the customers' cheques into the bank with the view of getting money out again in case the cheques were stopped by the bank. In the next place, it is inexpedient to let outside creditors know whom they are dealing with. Again, if anything goes wrong in the way of getting a receipt or discharge they have no cheque, whereas their own cheque coming back indorsed forms a capital voucher failing everything else. Another, and perhaps the most important reason is, that the common rule of trade is to cash a cheque the moment you get it; there may be assets to meet it to-day, but not to-morrow, and consequently if a cheque is indorsed and passed round the country, it may be a long time before it comes back to its bankers. There is also an inconvenience in taking cheques representing certain sums, and supplementing them in order to make up the desired amount. You require either to have a small cheque on the firm's own account or a draft—in fact it makes a complicated transaction, and makes it difficult for the cashier to balance his cash."

The defender led evidence in support of his averment that indorsed cheques "are given and taken as cash in the ordinary course of trade;" the result was practically as stated by the Lord Ordinary in his opinion *infra*, with this addition, that it was proved that in certain cases there would be a saving of commission in indorsing over a cheque, and that this applied to the cheque for £120 drawn at Jedburgh.

The Lord Ordinary (M'Laren) on 24th October 1885 pronounced this interlocutor—"In respect of the statute 1696, c. 5, reduces, decerns, and declares in terms of the conclusions of the action: Finds the pursuer entitled to expenses from the date of the interlocutor reclaimed against, &c.

"*Opinion.*—This action was brought to try the question whether certain bank cheques indorsed by M'Gregor & Pringle to the defender constitute an effectual payment to the defender, or are to be treated as constituting an illegal preference.

"The defender Mr Johnstone had no knowledge of his debtor's insolvency, and was not pressing for payment. Hence it is assumed that there is no foundation for a charge of fraud such as the common law would reach. The question is, whether the indorsements constitute a fraudulent alienation of the bankrupt's effects within the meaning of the statute 1696, c. 5, or whether they fall within the known exceptions to the statute, as being either the equivalents of cash or at least a payment in the ordinary course of business?

"It is of course a condition of every argument on this subject that the statute, neither in words nor in intention, interferes with the regular payment of debts as they become due. And in the construction of the statute, if we may accept Professor Bell's historical exposition, it has been the uniform opinion and practice of our Judges that account-money shall be treated as in all respects equivalent to coin, where it is transferred in payment of a debt, and in the ordinary course of business. For this reason it has been recognised that banker's obligations, as well as cheques upon the debtor's bank account, are to be treated as actual payment without any inquiry into the circumstances.

"This principle has received effect in the present sequestration, and has been acquiesced in by the trustee. At the original hearing of the present case I was of opinion that the indorsed cheques ought to be treated as account-money, and that it was unnecessary to send the case to proof. I came to this conclusion the more readily that the record did not raise any circumstantial case of illegal preference, and I was not prepared to hold that under all circumstances or irrespective of circumstances a payment made by indorsing over another man's cheque was liable to be cut down by the statute 1696.

"In the Inner House the pursuer has been allowed to amend his condescendence, and the amended record was remitted to me for trial. A proof has been taken, and I may be permitted to say that on further consideration I entirely concur in the view of the Inner House, and I will say that I should not be disposed hereafter to sustain any proposed extension of the known exceptions to the statute 1696, c. 5, without inquiry into the circumstances of the particular case, and the commercial usages which may be urged in support of the transaction as a mode of payment.

"I will also add that in my opinion the averments which were made by way of amendment of the record have been established. I have reconsidered the case without any reference to the views expressed by myself at the first hearing, and for the reasons which I shall state, I am of opinion that the pursuer has established his case.

"In the arguments addressed to me on the statute 1696, c. 5, the exceptions of cash payment and payment in the ordinary course of business were treated as distinct exceptions, each governed by its own conditions and rules. My view of the statute is somewhat different. I think that in its language the statute is sufficiently comprehensive to disable the debtor from meeting his obligations in any other way than by payment. If a debt is due, and a document is sent to the creditor, it is a question under the statute whether this is payment, or whether it is the alienation of an asset to a favoured creditor. Some modes of remittance being universally used to effect payment are in this question treated as currency or equivalents of cash. Other commercial documents may or may not be *media* of payment, according to the purposes for which they were obtained, and the reasons for using them on the

particular occasion. In regard to this class of documents no unvarying rule can be laid down, but each case must be considered on its merits. I take first the general case of a remittance by a bill of exchange, and I shall afterwards consider whether the indorsed cheques fall within this case.

"If a commercial house holding a bill payable in a foreign country, indorses that bill to a creditor in the foreign country, in order that he may receive the contents and apply them in extinction of his claims, then in the absence of fraud I should consider that to be a good payment. The circumstances being supposed the same, except that the parties are in the United Kingdom, I should not be disposed to sustain the payment without inquiry. Yet if the sum to be paid was larger than the balance which the party usually kept at his bankers, and if the evidence should instruct that this was the usual mode of payment between the parties, we should probably uphold the transaction. This at least is the opinion of Professor Bell in his commentary on the statute. Again, in the simple case of an endorsed bill given in lieu of payment, without any course of dealing or explanatory circumstances, we should certainly hold that to be a preference.

"As already observed, there is a general understanding that bankers' obligations are equivalent to cash under all circumstances. In a question under this statute there seems to be no difference between a bank note and a bank order, except that the one is printed and payable to bearer, and that the other is filled up in writing for the required sum, and is made payable to the purchaser's order. Both are *media* of exchange used as money, and necessarily so used on account of the inconvenience of carrying about or sending considerable sums of coin.

"In the present case the documents remitted to the defender were not bankers' obligations, but were the cheques of two of the bankrupts' customers drawn upon their bankers. There is a considerable body of evidence to the effect that it is customary to accept endorsed cheques as *media* of payment; and in view particularly of the evidence of gentlemen connected with the Bank of Scotland and the British Linen Company, who were examined for the defender, it is impossible to doubt that the cheques of private individuals do to a large extent pass from hand to hand like bankers' notes. At the same time, it is the fact that by the majority of commercial men, as well as persons not engaged in business, cheques received are sent direct to the recipient's banker for collection, and remittances are made either by bank orders or by cheques on the account of the party making the remittance. I also consider it proved that this, which I take to be the regular and correct mode of making inland remittances, was the mode of payment used and practised by M'Gregor & Pringle, the bankrupts, and by the other wool-brokers of Leith. Indeed, the witness Mackay is not able to recall any single instance during his service as book-keeper to M'Gregor & Pringle, in which remittances were made otherwise than by bank order or the cheque of the firm itself.

"These are the facts, and it is further to be considered that when a cheque on a banker is endorsed and sent into the circle, it is diverted from ts primary purpose and converted into a bill of exchange payable on demand. That being so, I am of opinion that the indorsed cheques cannot be considered as account money, and that the law applicable to bills of exchange endorsed within the period of constructive bankruptcy is the law to be applied to the solution of this case. For this reason I began by explaining my views of the effect of the statute of 1696 on payments by bill.

"The present case is a case of an inland remittance. There is no general usage to support the payment in that particular manner, and no convenience in doing so. The practice of the firm of M'Gregor & Pringle not only lends no support to the defender's case, but is the most significant fact in the case when the intention to give a preference is considered. At the time when the cheques were indorsed over M'Gregor & Pringle were in deep water; they could not have purchased a bank order for £206, and their own cheque for that sum would not have been honoured unless by special arrangement. They were under obligation to their bankers to apply incoming money in reduction of a temporary over-draft which had been given them to meet a pressing emergency. All these circumstances lead me to the conclusion that the indorsation of the two cheques in question was not the equivalent of a cash payment, but was a mode of settlement resorted to by the bankrupts under the pressure of extreme pecuniary difficulty, and when they were unable to meet an obligation of the given amount in cash. I find, therefore, that the documents libelled are reducible as assignations of valuable assets made within sixty days of bankruptcy in satisfaction of debt and in preference to other creditors."

The defender reclaimed, and argued—There was no distinction in principle between an indorsed cheque and a cheque drawn on the bankrupt's own bank account, which would admittedly have been equivalent to a payment in cash. The crossing of one of the cheques made no difference in its negotiability—*Smith* v. *Union Bank*, L.R., 10 Q.B. 291, *aff.* 1 Q.B.D. 31. Cash payments, according to Professor Bell, were not struck at, because they are the "ordinary way of discharging obligations"—2 Bell's Comm. 201; *Forbes* v. *Brebner*, M. 1128; Elchies, *voce* Bankruptcy, No. 26; *Blincow's Trustee* v. *Allan & Company*, December 3, 1828, 7 S. 124, and August 28, 1833, 7 W. & S. 26; *Dixon, Langdale, & Company* v. *Cowan*, December 3, 1828, 7 S. 134; *Ramsay* v. *Kirkwood*, June 11, 1829, 7 S. 749; *Mackintosh* v. *Brierly*, February 19, 1846, 5 Bell's App. 1. This principle applied to indorsed cheques, which were also "commonly received as cash"—2 Bell's Comm. 202. They were documents drawn on a banker, and immediately exchangeable for cash. The principle which had been applied in the case of bills with a currency did not apply to indorsed cheques, because such bills were merely a means of converting credit into negotiable cheques—*White* v. *Briggs*, June 3, 1843, 5 D. 1148, Lord Justice-Clerk Hope at 1174; *Horsbrugh* v. *Ramsay & Company*, June 26, 1885, 12 R. 1171. There was no case in which a bill payable on demand or a past-due bill had been held reducible. The statute did not strike at actual payment, but at satisfaction—*Cf.* Lord Fullerton in *Gibson* v. *Forbes*, July 9, 1833, 11 S. 916, at 929; Stair, i. 18, 5; *Taylor* v. *Farnie*, March 8, 1855, 17 D. 639, at 651. Even if this was not held to be a

cash payment, it was a remittance in the ordinary course of trade—*Campbell* v. *M'Gibbon*, M. 1139.

Argued for the pursuer—An indorsed cheque was struck at by the words of the Act, being an "assignation in satisfaction"—*British Linen Company* v. *Carruthers*, June 6, 1883, 10 R. 923. The *onus* was therefore upon the defender to show that such documents came within the exception of cash payments, or that the indorsations were made in the ordinary course of trade. They were not within the exceptions of cash payments which had never been extended beyond actual cash, bankers' obligations, or cheques on the debtor's own account—*Miller* (*Allan's Trustee*) v. *Phillip*, February 24, 1883, 20 S.L.R. 862. Nor was the payment in the ordinary course, either of the wool trade generally or of the bankrupt's own business, as shown by the evidence. It was no no doubt a recognised mode of making a remittance to a distance to indorse over bills to a creditor resident in the place where the bills were accepted transactions such as those in question.

At advising—

Lord Shand—The amount in dispute in this case is not large, but the question to be decided is one of considerable importance, and the decision may apply to other transactions of a similar kind by the firm of M'Gregor & Pringle on the eve of their bankruptcy.

The estates of that firm were sequestrated on 5th February 1884. Sixteen days before the bankruptcy, viz., on 21st January, the bankrupts endorsed two cheques drawn in their favour which they had received from debtors, the one for £86, 12s. 3d., the other for £120, and sent them to the defender Mr Johnstone, at Archbank, Moffat, in satisfaction of a debt due by them to him for wool sold on his account. One of these cheques was drawn on the branch of the Commercial Bank at Stockbridge, Edinburgh—the other on the Bank of Scotland at Jedburgh. It is clear that Mr Johnstone received these cheques in the most perfect good faith, in entire ignorance of the insolvency of his debtors, and that the bankrupts ought to have sent him a remittance in November previously, by which time they had themselves received the prices of the wools which he had sent to them for sale.

The question to be decided is, whether notwithstanding the complete *bona fides* of the defender the endorsement and transmission of the cheques to him was not a preference struck at by the statute 1696, as being a voluntary assignation by the bankrupts granted in favour of the defender within sixty days of bankruptcy in satisfaction of a prior claim? The Lord Ordinary has decided this question in favour of the pursuer, the trustee in bankruptcy. I am of opinion that his Lordship's judgment is sound, and I concur generally in the grounds he has stated in support of it.

The transaction complained of comes directly within the words of the statute, which declares voluntary dispositions and assignations to be void and null. The indorsation of the cheques in question was an assignation in form and in substance of an asset or right belonging to the bankrupts. The words "Pay Mr J. A. Johnstone or order," written and signed on the back of the cheques, was simply a short form of assignation, and when followed by transmission of the cheques by post operated as a transfer of the documents and their contents to the defender. So much the defender's counsel were obliged to concede. They sought, however, to avoid the effect of the statute by attempting to bring the case under both or either of two classes of exceptions to which the statute has been held inapplicable, or rather to both or either of two classes of cases which it has been held are not struck at by the statute, viz.—(1) cash payments by a debtor; and (2) transactions in the ordinary course of business.

In no possible view can the case be presented as one of a cash transaction, for that term is properly applicable only to the case in which in return for goods or other consideration given at the time the purchaser pays the stipulated price. The wools in this case had been delivered for sale months before, and had been sold, and the price had been due for months. But even for past-due debts it has been long settled that cash payments are not preferences struck at by the statute, payments in cash not being in any sense "dispositions, assignations, or other deeds;" and it has been argued that endorsed cheques such as the defender received were simply equivalents for cash payments, and ought to be so treated in the present question. It is quite true that certain equivalents to cash payments have been recognised, and in practice at least have been understood to be effectual and not struck at by the statute. A draft or order purchased from a banker and transmitted to a creditor in another town—the debtor's cheque on his own banker—and in some cases even the indorsation and transmission to a creditor abroad of indorsed bills payable in the country where the creditor resides have all been regarded as equivalents for cash payments, or different forms of making cash payments. It has been maintained in this case that cheques drawn by third parties in favour of a merchant and indorsed by him are equally to be so regarded, and are not in principle distinguishable from the other equivalents to which I have referred. This argument cannot in my opinion be sustained. The other equivalents just enumerated are, in a proper and ordinary signification of the term as understood by merchants, payments in cash. A payment to a creditor at any distance is never made by sending cash or bank-notes either by messenger or parcel. A banker's draft or order is the ordinary and safe mode of making a cash payment. The payment in cash is made to the banker, who having an agency at the place of payment, undertakes to pay the amount required to the creditor there. An indorsed bill (or indorsed bills) payable in a foreign country is, again, the recognised mode of transmission of cash—the ordinary form of making remittances between merchants—and so is a cash payment or direct equivalent, and so also the granting of a cheque by a debtor on his own bank account. It is quite true that such a cheque intimated to a banker operates as an assignation of so much of the debtor's funds as are in the banker's hands, and in this view it may be said that *prima facie* the granting of such a cheque, if within sixty days of bankruptcy, is within the language of the statute a preference. But in the ordinary every-day conduct of business, and even in the making of payments by persons not in business, cash pay-

ments are comparatively speaking rarely made in specie or in bank notes, but are, on the contrary, most frequently made in the form of drafts or orders by the debtor on his own banker. The debtor is thus making payments of his own cash through his banker with whom his money is deposited, and so the cheque or order is like the banker's draft a direct equivalent for cash. The proposal to treat payment by endorsed cheques in the same way is going a great deal further, and would be an extension of the term cash payments to a different class of transactions, for which it seems to me there is neither authority nor sound principle. Cheques drawn in favour of a creditor create estate in him, and if by him transferred by indorsation are really properly described as assignations of rights or estate belonging to him. No better illustration of this case can be given than to take the cheques in question which were sent to a creditor in Moffat, though payable to the order of his debtors, one of them in Edinburgh and the other in Jedburgh. The argument for the defender comes practically to this, that all cheques on bankers, wherever payable—and it is not easy to see that the rule should be limited to cheques or orders on bankers only—payable to order and indorsed, should when transmitted be regarded as cash, or equivalent to cash, or to a banker's draft or order, the recognised mode of paying cash. To this I am unable to give my assent, and I see no ground for holding as the result of the proof which has been led that an endorsed cheque can properly be so regarded. It was argued that the particular mode of making payment or satisfaction of the debt due to the defender, by the indorsation of the cheques in question, should be sustained, because the bankrupts might have themselves cashed the cheques in Edinburgh, and purchased a bank draft with the proceeds, and so remitted the debt in ordinary course. I very much doubt whether the bankrupts could have so acted. Indeed, the inference to be drawn from the evidence is that they could not have gone to their bankers to cash the cheques because of the overdraft on their own account, and the immediate demand which their bankers would have made to have the proceeds of the cheques applied to the reduction of that overdraft. But even supposing that the bankrupts could have obtained cash for the cheques in Leith, and remitted the amount, all that need be said is that in that case they had realised part of their estate and turned that into cash, and if in this way by a bank order they made a cash payment, the payment would not be affected by the statute. Such considerations cannot affect the decision of the case. The Court must take the transaction as it occurred, and in that particular form it must be looked at with reference to the statute. A debtor might no doubt in many cases give an effectual preference by converting a security into cash, and paying a particular creditor in cash the amount of his debt, whereas if he had assigned the security to his creditor the transaction would have been undoubtedly struck at by the statute.

The argument founded on the averment that payment or satisfaction given by the indorsed cheques in question was payment within the ordinary course of business, I think equally fails—whether the ordinary course of business is to be taken as referring to the business of the bankrupts themselves or of merchants generally. Such a thing was never done by the bankrupts themselves before in the course of the nine years during which the firm carried on business. It is clear that in the transaction challenged a course never before adopted was taken by the bankrupts in the crisis at which their business had arrived, and probably because they believed they might be liable to a criminal prosecution for appropriating money to their own use which as agents they ought to have transmitted months before to their principal. Nor does the proof show that it is the ordinary course of business in the wool trade or amongst merchants to make their ordinary payments by sending out to their creditors cheques received and indorsed by them in discharging their debts. It is true that the evidence shows that some firms and individuals receive a good many indorsed cheques, and accept these in satisfaction of debts—of course with a right of recourse if any cheque be dishonoured. Most of the witnesses who speak to this practice—in so far as it can be said there is such practice—are engaged in some special business, such as cattle-salesmen and job and post masters. None of these parties, however, make payments to their creditors in the ordinary course of business by indorsed cheques. One firm in Glasgow, indeed, in order to save exchange on remittances seems to pursue a practice to some extent of sending indorsed cheques as payments to their creditors, but their practice is quite exceptional, and not in accordance with the ordinary course of trade. The defender has thus failed to make out either that the indorsation or transmission of the cheques in question was a proper equivalent for a cash payment, and so is to be regarded as a cash payment, or that such a mode of making payment was in the ordinary course of the business of the bankrupts or of merchants generally. The judgment of the Lord Ordinary ought therefore to be affirmed.

Lord Adam—I concur. The bank cheques in question are set out in the print, and the first of them was drawn by Duncan & Brown in favour of M'Gregor & Pringle, and the other by John and William Hilson, also in favour of M'Gregor & Pringle. The defender is not a creditor of Duncan & Brown or of J. & W. Hilson, and it was only in respect of the indorsation by the bankrupt that he acquired any right to the amount of the debt due to M'Gregor & Pringle by the drawers of the cheques. Now, it appears to me that these indorsations are just in the words of the statute an assignation in satisfaction of a debt. There is no trace of a cash transaction from beginning to end of the case, and in principle I can see no difference between these indorsations and an assignation by the bankrupt of a bond for a similar amount due by Duncan & Brown and the Hilsons to him.

It was said in the course of the discussion that these indorsations were equivalent to a cash payment, and that they were in the same position as cheques drawn by a person on his own banker. I think the two things are quite different. A draft by a person upon his own banker is no doubt equivalent to cash, because a cheque is simply an order for payment on one who holds money belonging to the drawer. But these indorsed cheques are in quite a different position—

they are in no sense an order on a person who holds actual money of the bankrupt; and that being so, I agree with Lord Shand in thinking that we cannot extend further the rules applicable to drafts drawn by a person on his own banker, and we certainly cannot extend them to indorsed cheques such as we have in the present case.

As to the defence that what was done here was in the ordinary course of business, I agree with Lord Shand in thinking that it was entirely out of the ordinary course of business, and that it was in fact the first and only time in which the bankrupts had adopted such a course.

I therefore agree with Lord Shand in the opinion which he has expressed.

The Lord President concurred.

Lord Mure was absent on Circuit.

The Court adhered, and found the pursuer entitled to expenses, except such as were occasioned by the amendment.

Counsel for Pursuer (Respondent)—D.-F. Mackintosh—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defender (Reclaimer)—R. Johnstone—C. K. Mackenzie. Agents—J. C. & A. Steuart, W.S.

Friday, March 5.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

GWYNNE *v.* DRYSDALE & COMPANY.

Patent—Specification—Infringement.

The specification of a patent for the invention of "improvements in pumping engines" set forth that this was to be accomplished by arranging the pump-case "with the suction and discharge pipes to swivel, so that the suction and discharge pipes can be set at any angle without interfering with the driving engine," and the claim of novelty was "the arranging the pump-case to swivel substantially as hereinbefore described, with reference to the accompanying drawings, for the purpose specified." The arrangement referred to, which was described in the specification, consisted of several pieces of mechanism, none of which were claimed as novel. The pump-case and motor-frame were cast separately with circular flanges corresponding to each other so that they might be bolted together; as the pump case was made to overhang the motor-frame, there was a trunnion or check and turned hollow boss projecting from the flange of the pump-case which fitted into a hole in the flange of the motor frame, and thus the concentricity of the pump-case with the driving shaft was maintained; there was cut in the flange of the pump-case an annular slot with a T-shaped section into which fitted the heads of the bolts, which passed through holes in the other flange and which were secured to it by nuts; these bolts were capable of moving round the annular slot, but not of being pulled out; the result was that the pump-case could be freely rotated by slackening the screws, and could be fixed at any and every angle by clasping the two flanges together. It was alleged that this patent had been infringed by the construction of pumps in which the pump-case was made to overhang, and was attached to the motor-frame by means of bolts passing through holes drilled into the flanges, by which arrangement it was alleged to be possible, if the bolt-holes were equidistant, to turn the pump-case to certain definite angles by taking out and replacing the bolts in successive positions. *Held* (following *Harrisons* v. *Anderston Foundry Company*, July 2, 1875, 2 R. 857, *rev.* June 20, 1876, 3 R. (H. of L.) 55) that in law to constitute an infringement of such a combination the whole combination must be used, and that the inventor's combination *minus* an essential part of it was no longer the combination patented, and that therefore, even assuming the defenders' pump-case could be rotated to certain definite angles, his arrangement was essentially different from the pursuer's, as it would not enable the pump-case to be swivelled to any and every angle, and required in its use interference with the driving engine, which it was a characteristic of the pursuer's invention not to require; further, that it had not been proved that the defender's pumps would accomplish any such result as that ascribed to them by the pursuer.

Observed (*per* Lord President) that an infringer by merely omitting some immaterial part of the mechanism described in the specification, or substituting for such immaterial part some mechanical equivalent, will not escape conviction if his machine contain all the essential and characteristic features of the patented combination.

John Gwynne, sole partner of the firm of John & Henry Gwynne, hydraulic and mechanical engineers, Hammersmith Iron Works, London, brought this action against Drysdale & Company, Bon Accord Engine Works, London Road, Glasgow, to have them interdicted from "infringing the letters-patent, dated 23d July 1878 . . . granted to the pursuer for the invention of 'improvements in pumping-engines;' and, in particular . . . . from making or selling or using without the pursuer's consent or license any mechanism, or method or arrangement of mechanism, relating to pumping-engines in which pumps are driven by steam-power, and having for its object to enable their suction and discharge pipes to be swivelled and set at any angle, without interfering with the driving-engine, and constructed in the manner described in the said letters-patent, and the specification relating thereto, or in a manner substantially the same; and from making or selling or using without said consent or license any apparatus or machine constructed with, or embracing in its construction, such mechanism or method or arrangement of mechanism as aforesaid."

The defenders pleaded that the patent was null and void in respect of (1) prior use; (2) no practical utility; and (3) failure to distinguish what was old and not claimed from what was new and