[*24th June* 1839.]

(Appeal from the Court of Session, Scotland.)

HENRY BROCK and others, Appellants.[1] (No. 20.)

[*Knight Bruce—John Stuart.*]

Mrs. MARGARET ISABELLA M'CALLUM or WEBSTER and others, Respondents.

[*Tinney — James Anderson.*]

Bonâ fide Payment—Consignation—Bankrupt—Stat. 1696, *c.* 5.—A company having been pressed by a creditor, who threatened legal proceedings, but whose title to discharge the admitted debt the company doubted, remitted the amount to their agents, who, with full authority for that purpose, after depositing the sum in bank, lodged the bank receipt in a process of multiplepoinding then commenced, in order to be disposed of as the court should appoint; and an order of court having thereafter been pronounced, appointing the said agents to consign the admitted sum in bank, upon a receipt taken payable to such person as should be preferred by the court, and to lodge the receipt with the clerk to the process; the company was sequestrated before this order of court had been complied with:—Held, in a question betwixt the creditor and the trustee on the debtor's estate, (affirming the judgment of the Court of Session,) 1. that the amount had been effectually consigned, and formed no part of the sequestrated estate of the debtor; 2. that as a bonâ fide consignation, and equivalent to payment of an admitted debt, which the debtor in the ordinary course of business, and under pressure, agreed to consign, such consignation was not struck at by the act 1696, c. 5.

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[1] Fac. Coll. 14th Nov. 1838; 1 D., B., & M., (new series), p. 1.

1st Division.

Lords Ordinary Corehouse and Cockburn.

MESSRS. CONNELL, merchants in Glasgow, had for some years acted as the agents in Great Britain of Neil M'Callum, who was resident in Jamaica, and by whom various remittances had been made to them, as his agents, both on his own account and on account of the Cousins Cove estate, which he managed or held as executor of his deceased brother Alexander M'Callum, who had also been resident in Jamaica.

In making these remittances to the Connells, Neil M'Callum distinguished the funds or produce which he transmitted on his own account from what he sent home as belonging to the Cousins Cove estate, and in communications with the Connells had expressly desired them to keep the one account distinct from the other.

Acting on the special instructions from Neil M'Callum, the several transactions between him and the Connells were by them kept quite distinct in their books, and, according as they related to his own business or were transactions with him as manager of Cousins Cove, were invariably entered in separate accounts.

The funds which belonged to Neil M'Callum himself, in the hands of the Connells, were fully accounted for to his executor, Mr. Gordon.

Of the funds remitted by Neil M'Callum on account of Cousins Cove, there remained in the hands of the Connells an admitted balance of 2,564*l.* 8*s.* 3*d.*, with interest from 2d March 1836, amounting, on 26th November 1836, to 2,639*l.* 14*s.* 4*d.* It is exclusively to this fund that the present question relates.

Neil M'Callum died in the year 1835, while the Connells held the above balance. He appointed Mr. Gordon to be his executor, who expede confirmation

before the commissaries of Edinburgh on 5th September 1836. Mr. Gordon required payment from the Connells of the sums due on their accounts with Neil M'Callum, both as an individual and as the manager of Cousins Cove; and the Connells, while they settled the balance due on their account with Neil personally, declined payment of the balance due on the Cousins Cove account, in respect they were advised that Mr. Gordon, qua executor simply of Neil, had no valid title to uplift and discharge any part of the estate of Alexander M'Callum which was situated in Scotland, and that an effectual discharge could only be granted by a party obtaining confirmation in this country as in right of Alexander.

A good deal of correspondence took place between the agents in Edinburgh of the parties in regard to this objection, and it was ultimately resolved that the question was one which required to be determined by the Court.

Messrs. Hunter, Campbell, and Co., the agents in Edinburgh of the Connells, wrote to Mr. Bertram, the agent for Mr. Gordon, on 17th October 1836, thus: "With regard to the Cousins Cove balance, we understand you are to exhibit to us the proved will of Alexander M'Callum, and satisfy us that the office of executor passed from Neil M'Callum to Mr. Gordon his executor;" and in answer, Mr. Bertram, on 21st October 1836, wrote: "In reference to your communication of 17th instant, I have written to London for the proved will of Mr. Alexander M'Callum, and I have instructed my correspondent to obtain the opinion of Mr. Burge upon the question, as to whether the office of executor under that will passed from Neil M'Callum to Mr. Gordon his executor;"

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adding, "In the meantime it occurs to me that Messrs. "Connell ought to consign the admitted balance upon "Cousins Cove estate." The suggestion in the latter part of this letter was immediately noticed by Messrs. Hunter, Campbell, and Co., thus:—"You state cor- "rectly what passed between us as to the mode of "clearing away the difficulty regarding Mr. Gordon's "title to discharge the Cousins Cove balance. The "Messrs. Connell are ready to pay that balance the "moment their professional advisers assure them they "are safe to do so. In these circumstances, and as the "only impediment is an objection to your client's title, "which it is in your power to clear up within a few "days, your suggestion as to consignation appears to us "unusual; but if you insist on it, we shall communicate "what you have stated to the Messrs. Connell."

An opinion was obtained, that Mr. Gordon, as the personal representative of Alexander, had in that character a title to those funds recovered by Neil and remitted to Scotland; but, secondly, that Mr. Gordon "would not be the legal representative of Alexander "for the purpose of receiving and giving discharges for "that part of Alexander's personal estate which was in "Scotland, unless Alexander's will is also proved in "Scotland." This opinion and other documents were communicated by Mr. Bertram to Messrs. Hunter, Campbell, and Co. on 11th November 1836, and in reference thereto, in his letter of that date, he says:—"I "trust that these documents, joined to what you already "have in your possession, will remove all obstacle to "the payment of the Cousins Cove estate money to "Mr. Gordon's attorney."

Messrs. Connell refused to make payment to Mr.

Gordon of the balance due by them. In a letter of 19th November 1836, Mr. Bertram stated to Hunter, Campbell, & Co. :—" I must therefore take my own measures " for immediately securing the debt, unless your clients " will without further delay consign its amount. This I " hope they will agree to, since they admit their liability " for the debt, and consignation will save me the neces- " sity of resorting to such steps as may be requisite for " securing my clients. Upon its being made, I have no " objection to discuss the question of title with you, " either judicially or by reference." Thereafter, on 24th November 1836, Mr. Bertram writes :—" In your " letter of yesterday, refusing to pay the Cousins Cove " balance upon the title of Mr. Gordon, as executor of " Neil M'Callum, you take no notice of my demand " for consignation and of my offer, upon that being " made, to discuss the question of title by reference. " That demand and offer I now repeat, and in the " meantime, to prevent delays, I have sent to Glasgow, " for service on Messrs. Connell, the summons in the " proper action to force consignation, and to bring all " parties interested into the field. As the defenders " have consented to dispense with the induciæ, the " summons will be ready to call next week, and I beg " to intimate that upon its first appearance in the rolls, " I shall move for consignation of the admitted balance, " unless your clients shall previously comply with my " demand. It is a very reasonable demand, as I ask " them to do no more than to part with money which " they admit to be not their own. Their compliance " will prevent the necessity of my resorting to unplea- " sant measures. Of the validity of Mr. Gordon's title

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"I have not yet seen reason to change my opinion." And again, on 25th November 1836, Mr. Bertram writes:—"Your letter received this morning does not "take any notice of the demand for consignation extra-"judicially, and the offer in that case of a reference "upon the question of title, which I made in my letter "of 19th instant, and repeated in my letter of yester-"day."

Messrs. Hunter, Campbell, and Co., on 26th November 1836, in a letter to Mr. Bertram, stated:—"We beg "to inform you that the Messrs. Connell have remitted "to us the sum of 2,639*l.* 14*s.* 4*d.*, being the amount "of the balance on the Cousins Cove account, with "interest at four per cent. to yesterday. We have in "the meantime lodged that sum in the British Linen "Company, on a deposit-receipt in our name, which, "as the Messrs. Connell's sole desire is to obtain a "sufficient discharge of what they owe, we are ready to "dispose of in any way that is consistent with their "safety. From this date they shall be accountable "only for bank interest on that sum. We have no "objection, on your naming the clerk with whom you "mean to lodge the multiplepoinding, to place the "deposit-receipt in his hands, indorsed by us, and with "the following marking:—'This receipt contains the "'admitted balance on the Messrs. Connell's account "'for Cousins Cove estate, and is lodged with the "'clerk to be disposed of as the Lord Ordinary may "'appoint in multiplepoinding Connells v. the Repre-"'sentatives of Alexander and Neil M'Callum.'"

The remittance to Hunter, Campbell, and Co. was entered in Messrs. Connell's cash-book thus:—

" 1836,

" Nov. 25. Cousins Cove Estate.—Remitted through
" British Linen Company to Hunter,
" Campbell, and Co., W. S., Edinburgh,
" to be disposed of by them in payment
" or consignation of balance due this
" estate - - £2,639 14 4"

And this entry in the cash-book was transferred to the ledger, the account of the Cousins Cove estate being debited with the amount thus:—

" 1836,

" Nov. 25. To cash - - - £2,639 14 4"

Messrs. Hunter, Campbell, and Co. deposited the money in bank, taking a receipt for it in their own name in these terms:—

" £2,639 14*s.* 4*d.*

" British Linen Company's Office, Edinburgh, 26th Nov. 1836.

" Received from Messrs. Hunter, Campell, and Co., " W. S., Edinburgh, two thousand six hundred and " thirty-nine pounds, 14*s.* 4*d.*, which is this day placed " to the credit of their deposit-account with the British " Linen Company. (Signed) *Alex. Goodsir*, Sec."

Mr. Bertram wrote, on the 29th November 1836,— " I am glad to find that the Messrs. Connell have at last " done what I long since requested them to do, by con- " signing the money admitted by them to be due."

A marking on the back of the deposit-receipt, as adjusted by Messrs. Hunter, Campbell, and Co. and Mr. Bertram, was in these terms:—" This receipt " contains the balance admitted by Messrs. Connell to " be due on their account current for Cousins Cove " estate, and is lodged in process of multiplepoinding " at their instance against the representatives of Alex-

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" ander and Neil M'Callum, in order to be disposed of " as the Court shall appoint. (Signed) *Hunter*, " *Campbell*, and Co., W. S."

The deposit-receipt was placed in the hands of the clerk in Court to the process upon 30th November 1836.

Previous to the case appearing in the rolls of Court, Mr. Bertram, on 15th December 1836, intimated that it occurred to him, " that it will be proper to have the " contents of the deposit-receipt which you lodged in " the clerk's hands consigned judicially upon a receipt " taken payable to the party or parties who may be " preferred. I shall accordingly make a motion to " that effect, upon the case appearing in the roll." Accordingly, when the cause did appear in the rolls, on the motion of Mr. Gordon's counsel, an interlocutor was pronounced by the Lord Ordinary (Corehouse) on the 21st Dec. 1836: " Farther, appoints the pursuers to " consign the admitted sum of 2,639*l.* 14*s.* 4*d.*, with " bank interest thereon since 26th November last, in " the bank of the British Linen Company, and that " upon a receipt taken payable to such person or " persons as shall be preferred thereto by the Lord " Ordinary or the Court in the course of this process, " and to lodge the same in the hands of the clerk; and " for that purpose authorizes their agents, Messrs. " Hunter, Campbell, and Co., to get up from the " clerk of process the receipts granted to them for the " foresaid sum, of the above dates, and lodged in pro- " cess, in order that they may obtain payment thereof; " reserving to the pursuers to state in this process all " objections competent to the title to discharge of the

" party who may be preferred, with all answers to such " objections."

Before the agents of Messrs. Connell could act on the interlocutor of the Lord Ordinary, and within three days after its date, the estates of Messrs. Connell were sequestrated, in virtue of the Bankrupt Statute, 54 Geo. 3., c. 137; the money remaining with the British Linen Company, deposited in name of Messrs. Hunter, Campbell, and Co., and the deposit-receipt was left in the hands of the clerk of court.

Henry Brock, accountant in Glasgow, as trustee on the sequestrated estate, craved leave to sist himself " as " a party to the action, for the interest of the creditors " of the raisers;" and the Lord Ordinary (Corehouse,) pronounced an interlocutor, (3d Feb. 1837,) holding him " sisted, as trustee foresaid, a party to this action, and " allows the same to proceed accordingly."

Thereafter, an order was pronounced by the Lord Ordinary, Cockburn, (before whom the cause then depended, in place of Lord Corehouse, removed to the Inner House,) appointing Mr. Brock " to give in a " condescendence of the fund in medio by Tuesday " next, with certification," to which answers were lodged for Mr. Gordon; and on those pleadings, as subsequently revised, the record was closed.

The Lord Ordinary (Cockburn) having heard parties upon the closed record, pronounced the following interlocutor, accompanied with the note thereto annexed, which explains the nature of the pleas of the parties respectively (31st May 1838):—" The Lord Ordinary having heard " the counsel for the parties, and considered the record, " prefers the claim of Henry Brock, as trustee on the " sequestrated estate of Arthur and James Connell, to

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" the fund in medio, and decerns: Finds him entitled to " expenses, appoints an account thereof to be given in, " and when lodged remits to the auditor to tax and " report. (Signed) H. COCKBURN."

" *Note.*— Whatever difficulty there may be in this " case, it is much more in the construction to be put " upon the facts than in the legal rule.

" The general view of the facts, as the Lord Ordi- " nary sees them, is this:— Messrs. Connell owed " 2,639*l.* 14*s.* 4*d.* to the estate of the deceased Alex- " ander M'Callum. Payment of this was demanded " by the claimant William Gordon, as his executor. ' The Connells did not dispute the debt, but they " denied Gordon's right to receive, and consequently " his power to discharge it. This point is not yet " settled. In this situation, Gordon wished the money " to be extra-judicially consigned, for this process of " multiplepoinding had not then been instituted. This " proposal gave rise to a correspondence between the " agents of these parties, the result of which was, that " the Connells sent the money to their own agents in " Edinburgh, and made an entry in their books, stating " that the sum was to be disposed of by them (their " agents) in payment 'or consignation of the balance " ' due to this estate.' There are other entries made " in order to square the books, and to account for the " cash being no longer in the Connells hands, but " nothing which alters the purpose for which they " parted with it. The summons in this action being " soon afterwards executed, the agents placed the bank " receipt for the money in the hands of the clerk to the " process, with a marking on its back, bearing:—' This " ' receipt contains the balance admitted by the Messrs.

" ' Connell to be due on their account current for
" ' Cousins Cove estate, and is lodged in process of
" ' multiplepoinding at their instance against Alexander
" ' and Neil M'Callum, in order to be disposed of as
" ' the Court shall appoint.' In about three weeks
" after this, judicial consignation was ordered by the
" Lord Ordinary to be made by the Connells, the
" receipt to be taken, ' payable to such person or per-
" ' sons as shall be preferred by the Lord Ordinary or
" ' the Court; and reserving to the pursuers all objec-
" ' tions to the title to discharge of the party who may be
" ' preferred.' Nothing was done in implement of this
" order, and three days thereafter the Messrs. Connell
" were sequestrated. The whole of these proceedings
" took place within sixty days of their bankruptcy.

" The money is now claimed by the trustee for the
" creditors, and he is opposed by Gordon, who claims
" it for the estate of Alexander M'Callum.

" The Lord Ordinary has preferred the trustee, and
" on one or other of these two grounds,—

" First, he is of opinion that the bankrupts were
" never divested of the money, and that, it being theirs
" when they were sequestrated, it belongs to their cre-
" ditors. The true import of the arrangement, he
" thinks, was, that Gordon was distrustful of the safety
" of the money while in the bankrupts hands,—that
" they were distrustful of his title to receive it, and that
" in these circumstances it was put into a situation of
" safety for both, but that the voluntary consignation
" did not transfer the property, and was not meant to
" do so.

" The receipt (not the property or the right to it,
" but the mere receipt) was for a time in the hands of

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" the Connells agents, but for Connells behoof partly, " and then went into the hands of the clerk, not as a " completed conveyance to Gordon, or to any one, but " for the security of the party who should ultimately be " found to have right to it. There was no assignation " intimated or unintimated; and, supposing that an " indorsation would have been effectual, there was no " indorsation. If there was a trust created in the per- " sons of the agents or of the clerk, it was a trust, partly " for the protection of what was understood to be still " the truster's property, though subject to a claim, and " rather than interpose a trustee to be a mere holder " for that claimant, if it had been intended to complete " his right as proprietor, payment would have been " made to him at once in the ordinary way. In short, " there is nothing here but what occurs in most cases of " consignation, where the consignor, instead of being " divested, rather marks, by the very act of only con- " signing, that though he may have quitted the pos- " session, and fettered his power of administration, he " has not ceased to have the property. Accordingly, " on the one hand, some act remained to be performed " by the bankrupts before the transference could be " complete. Even the order for judicial consignation, " which was given after all the other proceedings on " which Gordon founds, was an order on the bank- " rupts. And, on the other hand, can it be said, that " without any such additional act by the bankrupts, " Gordon had actually obtained the right? If it had " been he who had failed, could his creditors have " claimed this money as already their debtors, while the " doubt as to his title, on account of which it had been " refused to be given him, was still as unsettled as ever?

" Suppose that there had been no bankruptcy, and " that Gordon's title had been found bad, would not the " Connells have simply resumed possession of the money " as their own? Would they have had to derive a " new right to it by a conveyance from Gordon, who " the consignation had made the owner, while the " validity of his title was under discussion?

" The cases of Gray v. Ross, 16th January 1706, " and of Baird, 4th January 1744, though not identical " with this one in the circumstances, proceed on the " principle that a deposit with a third party, for behoof " of the person who should be ascertained to have the " best right, did not divest the depositor.

" Second, If there was a completed transference it " was in violation of the act 1696.

" The ground taken by Gordon at the debate was, " that this was a payment in money, and in the common " course of business, of a debt already due.

" The cases of Speir, 30th May 1827, and of " Mitchell, 26th June 1834, enter deeply into this " matter, and seem to furnish the legal rule. In the " first it was found, 'that a payment in cash by a " 'bankrupt, within sixty days from his bankruptcy, to " 'an indorser of a bill accepted by him but not then " 'due, as a provision for the said bill when it became " 'due, is reducible under the act 1696, c. 5, inde- " 'pendent of fraud at common law.' The case was " decided on the distinction between a payment made " in the ordinary way, as the immediate extinction of a " debt, and as a mere preparation for paying a debt " not yet actually exigible. The second went on " exactly the same ground. A person, within sixty " days of bankruptcy, sold a house and paid the price

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" into a bank where he had a cash credit. This was " done by the hand of one of the cautioners, neither of " whom, however, knew that the principal was em- " barrassed, and for the purpose of relieving them. " The sale was found good to the purchaser, and the " payment good to the bank; but quoad the cautioners " against whom no claim had been yet made, it was " decided that they would take no benefit by the trans- " action. As to them, it was not a proper payment of " a present debt.

" Now, there was no present debt constituted here in " favour of Gordon. The money was due, but it was " not due to him. Accordingly what took place may " have been an ordinary business arrangement, but it " was not a payment. Hence it did not extinguish the " debt. The Connells had got no discharge. If the " money had perished in the hands of their agents, or " of the bank, or of the process clerk, it would have " perished to them. The arrangement amounted in " effect as an intention merely to a provision for " paying.

" It was argued for Gordon, that a voluntary con- " signation is not an infringement of the act 1696, and " that this common judicial precaution would be useless " if it were. It would not be useless; because its only " object being to put disputed property into a position " of safety, this end would be attained till the respon- " sibility of a trustee made any other case unnecessary.

" The Lord Ordinary agrees that it is not struck at by " the act, but only because it transfers no property. " If, however, it does transfer property, then he thinks " that the statute reaches it. He knows no authority or " principle for giving one creditor a preference over the

" rest, merely because, instead of making his demand, " like them, extra-judicially, he chooses to do it by " an action, and because, in that action, an honest " defender is willing, for his own credit, or his ad- " versary's comfort, to throw the money into court, " reserving his objections to the adversary's title to " receive it."

The respondent having presented a reclaiming note to the First Division of the Court of Session against this interlocutor, their Lordships (14th Nov. 1838) pronounced the following interlocutor:—" The Lords " having advised this reclaiming note, and heard coun- " sel for the parties, alter the interlocutor reclaimed " against, and find that the sum of 2,639*l*. 14*s*. 4*d*. " sterling, in dispute, contained in the deposit-receipt, " No. 4. of process, forms no part of the sequestrated " estate of the raisers of this process, and is not claim- " able by the trustee upon that estate in competition " with the party in right of the deceased Neil M'Callum " or Alexander M'Callum, and repel the claim and " pleas maintained by the said trustee: Find that the " said sum, as the fund or part of the fund in medio " in this process, belongs to such of the defenders or " others as shall be preferred thereto in the compe- " tition; and with these findings, remit to the Lord " Ordinary to proceed farther in the cause: Find the " compearer, Henry Brock, the trustee on the said " estate, liable in expenses; allow an account thereof " to be given in, and remit the same, when lodged, to " the auditor, to be taxed."

The trustee, having petitioned the Court to grant authority to present an appeal against this interlocutory judgment, leave was granted in December 1838.

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At this stage Mr. Gordon died. The respondent, Mrs. Margaret Isabella M'Callum or Webster, who is the only child of Alexander M'Callum, as well as the residuary legatee of her uncle, Neil M'Callum, obtained a decree-dative as executrix-dative qua residuary legatee of the said Neil M'Callum, ad omissa et quoad non executa, and thereupon she and her husband, for his interest, lodged, 19th January 1839, in process, a minute craving that they should be sisted as claimants in room of Mr. Gordon. An interlocutor was accordingly pronounced to that effect.

Connells trustee appealed.

Appellants Argument.

Appellants.—The interlocutor appealed from was objectionable, while on both grounds the interlocutor of the Lord Ordinary was well founded in the legal conclusions deducible from the facts of the case. (1.) The question whether there was a complete transfer of the fund, so as to be beyond the reach of Messrs. Connell or the trustee, would depend not merely on the terms of the correspondence, but on the views which the parties took of that correspondence at the time. Now Bertram's own misgivings on the subject showed that he did not act as if the money was safely consigned in court beyond the power of the consignors or the diligence of their creditors. His letter of the 15th December 1836 admits distinctly that there was no consignation at that date, and that the money was not then taken out of the order and disposition of the Connells. If the Connells were divested of the fund by the mere remittance to their own agents in Edinburgh, in whom was the fund vested? Not in the hands of the respondent,—not even

in manibus of the court, like a consigned fund awaiting the order of the judge. If the money had been lost on whom would the loss have fallen? Not on the respondent, who had no control over the fund, and who had not even got consignation. There was no transfer of the money; indeed Messrs. Hunter, Campbell, and Co. had no authority to transfer the money. [*Lord Chancellor.*—It is no where made part of the appellants case that Hunter, Campbell, and Co. had no authority.] It was beyond their authority; and the point is now open under the third plea in law in these words: "There is no ground, in the circumstances of the case, "for maintaining that the bankrupts were divested "of their right to the sum contained in the deposit-"receipt," &c. And on the facts, the legal title would be held, either in Scotch or English law, to be in the Connells. [*Lord Chancellor.* — But look at Hunter, Campbell, and Co.'s letter of the 26th November 1836.] The money was intercepted however before consignation, by the sequestration of the parties ordered to make consignation, for at the date of the sequestration there had been merely an order to consign; so that there was no consignation, either judicial or extra-judicial. Gray v. Lord Ross, 16th January 1706 (Mor. 7724.); Baird v. Murray, 4th January 1744 (Mor. 7738.)

(2.) Supposing that there was a transference of the fund, so as to prevent its acquisition by the appellant for behoof of the general creditors in the same direct manner as if it had been still in bonis of the bankrupts at the date of the sequestration, the transaction by which such transference was effected was reducible under the act 1696, c. 5. On the eve of bankruptcy

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Appellants Argument.

no act can be done so as to alter the condition of the creditors, who as a body are supposed to be in right of the fund from the time of constructive bankruptcy. (2 Bell, Com. 205—208.) By the act 1696, c. 5., all voluntary deeds, by which, directly or indirectly, the bankrupt gives over his effects to one creditor preferably to others, within sixty days before his bankruptcy, whether in satisfaction of his debt or merely in farther security, are declared null and void; and according to the construction adopted by the Court the deeds struck at are not those merely for the completion of which written conveyances are necessary, but all acts whatsoever subject to the known exception of payments in cash in the ordinary course of business, although no writing had intervened or been necessary. (See the cases cited in 2 Bell, 211; Forbes, 27th January 1715, Mor. 1124, 2 Bell, 212; M'Math v. M'Kellar's Trustees, 1st March 1791, Bell's Cases, 22: President Campbell's opinion, p. 39; Moncreiff v. Cockburn's Creditors, 8th February 1694, 1 Fount., 596.) Regard ought especially to be had to the two recent cases noticed by the Lord Ordinary, Speir v. Dunlop, 30th May 1827[1], remitted back by the House of Lords[2] for reconsideration where the Court[3] reduced the transaction as falling within the act 1696, the doctrine established being that if an ultroneous payment be made as a security against a debt to become due at a subsequent period, the transaction was reducible, and the case of Mitchell v. Rodger, 26th June 1834[4], where the decision in Speir v. Dunlop was recognized. Now, in the present case, there had been nothing done by the bankrupts beyond a deposi-

[1] 4 S. & D. 92. and 5 S. & D. 680.
[2] 2 Wils. & Shaw, 253.
[3] Fac. Coll. 30th May 1827, p. 516.
[4] 12 S. & D. 802.

tation in the hands of a third party to provide for payment of a debt in their estimation not yet exigible by the creditor, and there merely had followed a change in the mere depositary of the bank receipt. But there had been no consignation by judicial authority, but merely extra-judicial consignation, and not compulsory, and therefore the transaction was within the statute. The respondents could not show that there had been any pressure on the Connells for payment; there had been therefore no staving-off of pressure. Nothing had been got by hastening the action, as Messrs. Connell merely remitted the money to their agents from propriety and delicacy towards all parties.

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Appellants Argument.

Respondents.—There were two questions: 1. Whether the fund was subject to the order and disposition of the Connells at the date of the bankruptcy; and, 2. Supposing it was not so whether the payment was struck at by the act 1696, c. 5. The facts as to the situation of parties are not disputed. There had been no refusal to pay on the ground that the money was not due; but merely a delay caused from doubts raised as to the necessity of confirmation by Neil M'Callum's executor in Scotland; a ground taken, it might be remarked, more than sixty days before the bankruptcy. On that point, it might be observed in passing, there was no necessity for such confirmation as the case of Frith v. Buchanan, Hamilton, and Co.[1], in reference to the statute 4 Geo. 4. c. 98., vesting moveable estate in the next of kin, ipso jure, without confirmation, established. But the multiplepoinding was necessary, in order to

Respondents Argument.

[1] 15 D., B., & M., 729.

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Respondents Argument.

effect a judicial discharge for the party; and the money was remitted to await the decree in that action. It had been said that Hunter, Campbell, and Co. exceeded their powers, and therefore that the money must still be held as not having passed from the Connells; but that point was not raised, as a Noble Lord had remarked, and the third plea did not embrace it. Besides, this new plea was excluded, for it had been assumed by the appellants throughout their case that Hunter, Campbell, and Co. did act with authority; and in any view the authority to pay or consign was clear from the correspondence,—the money having been sent to Edinburgh in answer to a demand of consignation. Then, as to the effect of the receipt by the clerk of the Court;—there was no Accountant General in Scotland; and when money was paid in to await the decree of the Court, the practice was, if there was unwillingness, to take an order of Court on the party to consign, or if there was desire on one part and willingness on the other, then voluntary consignation was equivalent, and so say the Lords Gillies and Corehouse.[1] Holding this to have been judicial consignation,—and the appellants admit that the transfer was complete,—if there was judicial consignation, which there certainly was, (there having been consignation by consent, the clearest proof of the fact,) the asking of the order for consignation was a mere additional precaution,—a change in the depositary, and dispensing with Hunter, Campbell, and Co. as the interposed party, and merely matter of arrangement. It was to be observed, that the interlocutor ordering consignation of the receipt was by

[1] 1 D., B., & M., new series, p. 6.

Lord Corehouse, (who held in the Inner House that there was judicial consignation of the fund,) and not by Lord Cockburn, who held an opposite opinion.

In Scotland risk was no criterion of property. Property is not transferred, though it may be at the risk of the buyer. So property sold remains at the risk of the buyer, but is not his till delivery.[1] A sounder criterion of risk is, whether the creditors could have arrested. The Connells could not; neither would an arrestment by their creditors have been effectual.[2] The trustee had no better right to the fund than either the Connells or their creditors; so that upon either criterion the ground taken was untenable.

(2.) The transaction was not reducible under the act 1696, c. 5. The best answer to the remark, that the judges below had not heard this point, was the fact that the report bears that counsel for the trustee of the Connells were heard on both points. 1. This had not been a voluntary act; 2, payment had been demanded before the sixty days; 3, the interlocutor, finding the holder of the fund liable in once and single payment, discharged the Connells; and, 4, the obligation existed before the decree; so that is not a voluntary act which a party is compellable to do in performance of a legal obligation. But whether it was voluntary or not it was the payment of a debt. Payments in cash are not struck at by the act, and consignation is defined by Erskine[3] as in the judgment of law equivalent to

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[1] Gordon, 4 Bro. Supp.; Robertson v. Creditors of Mathieson, 1st Feb. 1738, Mor. 3077.

[2] Gordon v. Hughes and Dunbar, 11th June 1824, 2 Sh. App. 310; Sourer v. Smith, Mor. 744; Stalker, Mor. 745.

[3] B. iii. tit. 4. s. 5.

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payment. Again, whatever the transaction be called, whether payment or otherwise, it was a payment in the ordinary course of business, and so not struck at.[1] The appellant had rejected the ground on which the Lord Ordinary put the case, which was, that though there was consignation there had not been payment. It was now said, there had neither been consignation nor payment; but merely security till consignation was forced. [*Knight Bruce.*—Yes.] But then the Court, disagreeing with the Lord Ordinary, held that there had been consignation; and so the Lord Ordinary's view that the fund was in medio failed.

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LORD CHANCELLOR.—In this case the first division of the Court of Session, by an unanimous judgment, differed from the Lord Ordinary, and altered his interlocutor. From respect for the opinion of the Lord Ordinary I thought it right to examine carefully all the circumstances of the case and all the authorities referred to. Although I did not upon the argument at the bar entertain any doubt of the correctness of the judgment of the Court, this investigation has only confirmed that opinion.

Messrs. Connell of Glasgow had been employed by Neil M'Callum, in the course of which employment a large sum became due from them to him, which was paid to William Gordon his executor, and is not now in question. But he having directed them to keep separate accounts of the transactions respecting a West India property called Cousins Cove estate, to which it is said that Alexander M'Callum, to whom Neil was

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[1] Dundas, 2d June 1808, F. C.

executor, had been entitled as mortgagee, they (Messrs. Connell) questioned the authority of Mr. Gordon, as executor of Neil M'Callum, to demand payment of the balance of that account, contending that they could not safely pay to a personal representative of Alexander; and on this the doubt arose, although, as all their dealings had been with Neil M'Callum, it is difficult to understand the ground; but it is not necessary to consider that question. Mr. Gordon demanded payment; Messrs. Connell admitted the debt; but, having raised this objection, Mr. Bertram, Mr. Gordon's agent, in his letter of the 21st October 1836, after informing them that he had written to London on the subject, observes that it occurred to him that Messrs. Connell ought in the meantime to consign the admitted balance upon the Cousins Cove estate. On the 19th November Mr. Bertram again writes that measures will be immediately taken for recovering the debt unless Messrs. Connell consign the amount. On the 21st November Messrs. Hunter, Campbell, and Co., the agents of Messrs. Connell, request Mr. Bertram to pause before taking the steps pointed out; and on the 23d they decline to pay Mr. Gordon, and warn him against any steps of diligence. On the 24th Mr. Bertram informed the agents that he had given directions to commence the proper action to enforce consignation, and that he should proceed unless they complied with his demand of consignation; and on the 25th renewed his demand for consignation extra-judicially. On the 26th Messrs. Hunter, Campbell, and Co. informed Mr. Bertram that Messrs. Connell had remitted the balance to them, and that they had lodged it in the British Linen Company's bank, on a deposit-receipt, in their own names, and that

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they were ready to dispose of it in any way consistent with the safety of Messrs. Connell, and that they had no objection to place the deposit-receipt in the hands of the clerk to be named in the action of multiplepoinding, with a marking that it would be disposed of as the Lord Ordinary should appoint, and giving notice that bank interest only would be paid from that time.

On the 29th November Mr. Bertram, in answer to that proposal, said that he was glad that Messrs. Connell had at last done what he had so long requested them to do, by consigning the money. The money was placed by the British Linen Company to the credit of Hunter, Campbell, and Co., and a receipt given in their name, which they, according to their undertaking, deposited with the clerk in the action, with this indorsement: "This receipt contains the balance admitted by Messrs. "Connell to be due on their account current for "Cousins Cove estate, and is lodged in the process "of multiplepoinding at their instance against the "representatives of Alexander and Neil M'Callum, "in order to be disposed of as the court shall "appoint."

On the 15th December Mr. Bertram proposed that the contents of the deposit-receipt lodged in the clerk's hands should be consigned judicially upon a receipt taken payable to the parties who might be preferred, and stating that he should make a motion to that effect; and accordingly, on the 21st December, an interlocutor was pronounced appointing the pursuers to consign the admitted balance, with bank interest from the time of the deposit, and that upon a receipt taken payable to such person or persons as should be preferred by the court in the course of the process, and to lodge the

same in the hands of the clerk; and for that purpose the Lord Ordinary authorized the agents, Messrs. Hunter, Campbell, and Co., to get up from the clerk to the process the receipt granted to them, and lodged in process, in order that they might change the deposit, reserving to the pursuers to state all objections to the title of Gordon to discharge.

Three days after this, that is on 24th December, the estates of Messrs. Connell were sequestrated. The Lord Ordinary thought that the trustee on their estate was entitled to this sum; but the Inner House were of opinion that it formed no part of the sequestrated estate.

Some question was raised at the bar as to the authority of Hunter, Campbell, and Co. so to deal with this fund, but I find no ground for any such question. In the appellants case it is stated that Messrs. Connell entered this remittance in their books in these words:—

"25th Nov. Cousins Cove estate. Remitted the British "Linen Company to Hunter and Co., to be disposed by "them in payment or consignation of balance due to "this estate;" and it is stated that Hunter, Campbell, and Co. were to dispose of the sum in payment or consignation of the balance when they were satisfied that it could be disposed of in a way consistent with the perfect safety of their clients. What Hunter, Campbell, and Co. did was clearly within this authority. The question therefore is, whether by the law of Scotland in a case in which a debtor pressed by one claiming as his creditor, and threatened with legal proceedings, but questioning the title of the claimant to give a discharge for the admitted debt, agrees to consign the amount, and actually remits it to his agents, who, with

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full authority for that purpose, agree with the creditors to pay the amount to whomsoever the court in a suit then commenced shall find it due, and against which agents, before sequestration, an order of court is made directing them to pay to whomsoever the court should find it due, the sum so remitted shall upon a subsequent sequestration against the debtor be held to be part of his estate. The debtors pay the money to their own agents it is true, but with authority to pay or consign in satisfaction or security for the debt in any manner they may think safe. They accordingly do extrajudicially consign it in security of the debt; and before sequestration of the debtor the agents are judicially ordered to part with all control over it by giving the control to the officer of court to abide the adjudication between the parties claiming, in which adjudication the Connells had no interest.

The facts of the case exclude all suspicion of fraud or undue preference. To bring a case within the act 1696 there must be a voluntary payment. The case of Speir v. Dunlop[1] was relied upon by the appellant, but in that case there was no demand, no pressure, and security was given for a debt not due. As to the case of Mitchell v. Rodger[2], it was a case of fraudulent preference in a failing debtor in favour of a friend, who had become surety for him. Neither of these transactions were in the ordinary course of business, whereas the transaction in question is admitted to have been so. There was pressure by the creditor, and a consignation made upon his proposal, and after it was made he accepts it as a consignation, and deals with the party to

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[1] 5 S. & D. 680.

[2] 12 S., D., & B., 802.

whom it was made, after which it would I apprehend have been impossible for him to raise any question as to the consignation being payment, so far as the debtor was concerned; but beyond this, the party to whom the consignation is made, with the full authority of the debtor, enters fresh into a personal obligation to pay to whomsoever might be found entitled, and afterwards submits, and is subjected to a judicial order, to part with all control over the money, for the purpose of placing it under the exclusive control of the Court.

I have not particularly adverted to the position of the money having been, at the time of the arrangement made, in the hands of the British Linen Company under this receipt, because I consider it as put into the hands of Hunter, Campbell, and Co., who in fact, had the control over it; which is the most favourable view of the case for the appellants. If their instructions had been to pay and not to consign, no question could have arisen; and why is not consignation to be equally protected as payment? The authorities[1] in the law of Scotland clearly show that consignation is held equivalent to payment. There is a total absence of all evidence of fraud or undue preference;—so that the only just conclusion to be arrived at is, that this was a payment admitted to be in the ordinary course of business, and in the only mode in which payment could be made when doubts existed as to the legal title of the claimant to recover payment of an admitted debt. If this judgment be not according to the law of Scotland, then, although a debtor may pay a debt within the sixty days, he cannot under any circumstances make consignation to secure

[1] Ersk. b. 4. tit. 3. sect. 5.

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it, however pressed by his creditors, and however impossible it may be to make actual payment with safety to himself.

I have no doubt as to the propriety of advising your Lordships to affirm the interlocutory judgment appealed from, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. & T. WEBSTER—RICHARDSON and CONNELL, Solicitors.