Wednesday, February 25.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

PRINGLE'S TRUSTEES *v.* WRIGHT.

Bankruptcy—Illegal Preferences—Act 1696, *c.* 5—*Cash Payment by Insolvent Debtor—Sums in Receipts granted to Daughters—Loan—Proof.*

A husband, who from time to time had received from his wife certain sums, partly her own and partly savings out of her housekeeping, on his undertaking to credit her in his books with principal and interest, within a fortnight after his wife's death in 1896, and in accordance with a promise made to her on her death-bed, granted to each of his daughters receipts for certain sums, amounting together to the sums at his wife's credit, as received by him from them respectively, and at the same time opened accounts in their names in which these sums were put to their credit, and in which interest was regularly added in subsequent years. At that time he was solvent.

In 1902 the father found himself in difficulties, and on 3rd May he was unable to meet bills amounting to £1600. He subsequently cashed through his sons and son-in-law certain cheques which he had collected, and on 7th May he applied the proceeds to payment of the amounts due to his daughters, who were at the time aware that he was in difficulties. On 9th May the father granted a trust-deed, and on 17th May the trust-deed was suspended by sequestration.

Held that the trustee on the sequestrated estate was not entitled to recover the amounts paid to the daughters, these being payments in cash of debts duly constituted and resting owing.

Thomas v. *Thomson*, January 13, 1865, 3 Macph. 358, and *Coutts's Trustee* v. *Webster*, July 8, 1886, 13 R. 1112, 23 S.L.R. 810, *followed*.

In July 1902 James Alexander Robertson-Durham, C.A. Edinburgh, trustee on the sequestrated estates of Robert Pringle, conform to act and warrant of confirmation by the Sheriff-Substitute at Edinburgh, dated 31st May 1902, raised an action against the five daughters of Mr Pringle, namely, Mrs Janet Tait Pringle or Wright and her husband for his interest, Christina Pringle, Mrs Catherine Pringle or Crouch and her husband for his interest, Agnes Pringle, and Nellie Pringle.

The conclusions of the action were that each of the defenders Mrs Wright and Christina Pringle should make payment to the pursuer of £131, 7s. 10d., with interest from 7th May 1902, and each of the defenders Mrs Crouch, Agnes Pringle, and Nellie Pringle should make payment of £26, 6s. 3d., being sums paid to them in cash by their father about a fortnight before his sequestration.

The pursuer pleaded—"(1) The said payments having been collusive alienations by the bankrupt to conjunct and confident persons without true, just, and necessary cause after he was insolvent, in contravention of the Act 1621, cap. 18, the pursuer is entitled to decree as concluded for, with expenses. (2) Said payments having been made out of the ordinary course of business within sixty days of notour bankruptcy are reducible under the Act 1696, cap. 5, and the pursuer is entitled to decree as concluded for. (3) The payments by the bankrupt to his daughters being donations fraudulently made and received in knowledge of his insolvency, the pursuer is entitled to decree as concluded for."

The defenders pleaded—"(3) The payments to the defenders having been justly due to and exigible by them, and having been made in discharge of *bona fide* debts due by the bankrupt, the defenders should be assoilzied. (4) The payments sought to be reduced having been made for a true, just, and necessary cause, and in respect of a valid payment by the defenders, are not struck at by the Act 1621, cap. 18. (5) The said payments being in implement of an obligation legally incumbent on the bankrupt, and being paid in cash, are not reducible under the stat. 1696, cap. 5. (6) The pursuer's averments of collusion and fraud on the part of the defenders being unfounded in fact, the defenders should be assoilzied, with expenses."

Proof was allowed and led.

The following statement of the facts is taken from the opinion of the Lord Ordinary (KYLLACHY):—

"The facts of the case, as they appeared at the proof, are, I think, shortly these—The bankrupt's wife (who died in June 1896) was at the time of her marriage in 1862 possessed of some small savings, which were used in furnishing the house. She subsequently, as her husband prospered, made certain savings out of her housekeeping, which she came to regard as her own, but which she gave to her husband from time to time, on his undertaking to credit her in his books with principal and interest. These sums, including the sum spent on furnishings, seem to have amounted, with interest, to about £200. At least that is the bankrupt's evidence, which I am disposed to accept. She had besides at her death, which occurred as I have said in June 1896, accumulated a further hoard, put aside in a wardrobe drawer, and amounting to about £80. Of this sum also her husband obtained possession after her death, and on her death-bed he seems to have promised to leave or gift the whole sums assumed to belong to her to her daughters in certain proportions. Of course the money was legally the husband's, or at anyrate was at his disposal. But it may perhaps be fairly considered that he was under a certain moral obligation—an obligation which he accepted and recognised—to carry out his wife's wishes.

"In these circumstances what seems to have happened was this. The bankrupt—being then solvent and, indeed as I think

is sufficiently proved, prosperous — proceeded within a fortnight after his wife's death to make his several daughters his creditors for the amount at his wife's credit in his books, together with certain small sums received by him, but not at her credit, and together also with the £80 which, as I have said, was found at her death. He did so in a manner which was, I think, quite effectual, and which (he being solvent) was quite regular. He granted to each of his daughters receipts for certain sums as received by him from them respectively, and he opened at the same time in his books accounts in their several names, in which these sums were put to their credit, and in which interest was regularly added in the subsequent years. In short he constituted the sums in question as loans by his daughters to him, duly vouched—the basis of the transaction being no doubt a remuneratory donation, but the effect being to make his daughters his creditors, so that at any time they might have demanded payment. So far I had no reason to doubt the evidence of the bankrupt and his cashier Mr Small, together with the real evidence afforded by the entries in the books. And so standing matters, I cannot doubt that if any of the daughters on getting married, or otherwise wanting the money, had brought an action against the bankrupt for payment, such action must have succeeded.

"In 1902, however, the bankrupt (having as he says, embarked in a new line of business which proved unprofitable) found himself in difficulties, and on Saturday the 3rd of May he was unable to meet or to obtain renewals of bills due on that day amounting to about £1600.

"I am satisfied upon the evidence that the bankrupt then, if not previously, realised that bankruptcy was impending. And that being so, he seems to have stopped paying into his bank account—which was overdrawn—certain cheques and other payments which he subsequently collected, and having cashed the cheques through his sons and son-in-law, he seems to have applied the proceeds in paying debts, particularly certain household accounts, a small sum due to a relative in Kirkcaldy, and the debts, or what I have held to be debts, due by him to his daughters. This he did in the early days of the following week. Particularly on Wednesday, the 7th May, he paid in cash to his daughters the sums now in question, taking from them the receipts, as to which receipts it is only necessary to say that, although dated the 6th for reasons which the bankrupt explains, they were, it is I think proved, obtained by him in exchange for the money on Wednesday the 7th. To be quite accurate, there was one of the receipts signed on the 8th by a daughter who did not reside at home, and who received the money through her sister. But that does not seem material. The daughters, as is I think proved and indeed admitted, knew when they got the money that their father was in difficulties, and that the money (for which they were not pressing) was being paid to them for that reason, but they do not appear to have known or gone into particulars. They got and took payment of their debts in cash, and they claim to retain the money. The bankrupt, who had been from Tuesday the 6th in communication with his creditors, granted a trust-deed on Friday the 9th, but on the 16th, a week later, this trust-deed was superseded by sequestration, which was taken out on that day on the bankrupt's petition."

On 22nd November 1902 the Lord Ordinary pronounced the following interlocutor:—"Assoilzies the defenders from the conclusions of the action, and decerns."

Note.—"This is an action whereby a trustee in bankruptcy seeks to obtain repetition of certain cash payments made by the bankrupt about a fortnight before his sequestration, and when he was, although not notour bankrupt, insolvent. The payments were made to certain of his daughters, and the ground of action is that they were either gratuitous or, if made in discharge of just debts, fraudulent preferences at common law.

[*His Lordship then stated the facts ut supra.*]

"I am of opinion, in these circumstances, that the pursuer is not entitled to recover the payments in question. They were not, as I think, proved to be gratuitous payments, but were payments of debts duly constituted and resting-owing. Being such, and being payments in cash, they are not, I think, challengeable either under the statutes or at common law. The case is, I hold, ruled by the cases of *Thomas* v. *Thomson*, January 13, 1865, 3 Macph. 358, and *Coutts' Trustee* v. *Webster*, July 8, 1886, 13 R. 1112, and I do not feel at liberty to canvass the doctrine of these cases, or by any strained construction to read the decisions otherwise than as establishing, or rather recognising, the general proposition that payments in cash made by a debtor while he is still in administration of his estate, in discharge of debts justly due, are not challengeable on the ground that the debtor was or knew that he was insolvent, and that the creditor also knew or had reason to know that fact.

"The result is that I assoilzie the defenders, with expenses."

The pursuer reclaimed, and argued—The present was not a cash payment of a debt in the ordinary course of business. It might therefore become the subject of inquiry followed by reduction — *M'Cowan* v. *Wright*, March 10, 1853, 15 D. 494, opinion of Lord J.-C. Hope, 503; *Angus' Trustee* v. *Angus*, November 21, 1901, 4 F. 181, 39 S.L.R. 119. The only documents of debt in the present case were receipts. A receipt was not *per se* a binding obligation. A receipt did not create an obligation. It did not constitute a debt. A receipt was only an adminicle of evidence. It was *prima facie* evidence of an obligation to pay. But proof could be led to show that there could be no legal obligation to pay, and if it was proved that this was the case the receipt was valueless —*Thomson* v. *Geikie*, March 6, 1861, 23 D. 693, opinion of Lord Wood, 698; *Neilson's*

Trustees v. *Neilson's Trustees*, November 17, 1883, 11 R. 119, 21 S.L.R 94; *Paterson* v. *Paterson*, November 30, 1897, 25 R. 144, 35 S.L.R. 150. In the present case it was clearly proved that the money for which the bankrupt had granted a receipt was the bankrupt's own. Further, the case did not fall within the decisions of *Thomson, supra*, and *Coutts' Trustees, supra*, because the payment in this case was not made to satisfy a debt. The case of *Shaw's Trustee* v. *Stewart and Bisset*, November 15, 1887, 15 R. 32, 25 S.L.R. 38, showed that there might be exceptions to the general rule that a payment in cash might be made by an insolvent debtor while still in the administration of his estate for debts due by him. The present case was an exception to the rule.

Counsel for the defenders and respondents were not called on.

LORD JUSTICE-CLERK—In the course of Mr Younger's argument I do not think anything has been brought forward which shows that this case is distinguishable from those cases which have already been decided upon the point.

In the present case the fact is not disputed that the receipts were given for the money at a time when the bankrupt was quite solvent. That being so, if prior to his bankruptcy he chose to pay off the obligations in cash I do not think that it is a matter with which the Court will interfere. There is no doubt a certain anomaly in the law in the matter, but it has been satisfactorily decided that if a man, even if he knows that he is insolvent, but yet being in the administration of his estate, pays in cash a debt due to one of his creditors, that payment is not struck at by the law.

LORD YOUNG—I think the facts in this case are in substance these—I may state them almost in a sentence—that this gentleman was under the honest belief—the feeling—that in all honour it was his duty to pay this sum of £200 to his daughters. I think, whether he ever gave his mind to the question whether the law obliged him, or a court of law would interpose to compel him to pay to the daughters, he had a feeling that he was in honour bound to do it; and regarding it as a gift, I think he not only made the gift, looking to the receipts and to the evidence of the circumstances under which they were granted, but he also fulfilled it and implemented it. It is a rule of law, in my opinion, which I am prepared to act upon, that while this Court will not interpose to compel the fulfilment of a gift, it will, on the other hand, certainly sustain a gift if fulfilled, and protect the recipient in the possession. Now, I think the gift was fulfilled here by giving it at the date when these receipts were granted to the daughters without going through the operation of handing their money to them and taking it back on a receipt given by him to show it. I think it is established that the gift, which he made according to a feeling of duty, with which I entirely sympathise, was fulfilled. I am therefore of opinion that the judgment of the Lord Ordinary is well founded.

LORD TRAYNER—I concur. I think the Lord Ordinary has stated correctly what is the result of the transaction between the bankrupt and his daughters. He says that by granting them the receipts "he constituted the sums in question as loans by his daughters to him duly vouched, the basis of the transaction being no doubt remuneratory donation, but the effect being to make his daughters his creditors, so that at any time they might have demanded payment." This view is in accordance with the cases of *Thomson* v. *Geikie*, 23 D. 693, and *Christie's Trustees* v. *Muirhead*, 8 Macph. 461. Accordingly the only remaining question is, whether the obligation constituted and proved by the receipts was fulfilled in such a way as to be unchallengeable under the statute. I think it was because it was a payment in cash. No doubt the bankrupt at the time of payment was in insolvent circumstances, which I think the daughters knew. But still that does not invalidate a payment in cash made by the bankrupt to a duly constituted creditor who is in a position to demand payment of his debt. On these grounds I concur with the Lord Ordinary.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—H. Johnston, K.C.—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defenders and Respondents—Wilson, K.C.—Steedman. Agents—Steedman & Ramage, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff Court at Stirling.

AITKEN *v.* GOURLAY.

Title to Sue—Action by Mother for Death of Legitimate Child—Father Divorced for Desertion, and Whereabouts Unknown—Onus—Presumption of Life—Husband and Wife—Parent and Child—Reparation.

A woman whose husband had been divorced for desertion brought an action of damages for the death of their child. She averred that she did not know where the father was, or whether he was dead or alive, and that she had supported herself and her children without any assistance from him since he deserted her about five years before. *Held* that the father must be presumed to be alive, and (*diss.* Lord Young) that while the father was in life the mother had no title to sue.