

done herself had she taken the trouble to make a will. Still there are other sentences in her letter which are entitled to some consideration. She says—"My case of jewels which you gave me are for Jane Law Graham, and my watch for Catherine Wilson." Here are regular bequests, and no doubt these two ladies are entitled to be treated as legatees. Further, she adds—"I do not wish to specify here who are to get my other little matters, as you will, I am sure, take a little trouble and divide them among my heirs." Now, here is a testamentary purpose clearly expressed, and I think the husband is bound to give effect to it. But what is the subject of this testamentary purpose; it is "my other little matters." Now, taking these words with the others, this must mean her jewels and matters of that kind—in short, her parapherna. And no doubt the word "divide" is enough for testamentary purposes, and therefore may very fairly receive effect. This sentence with which I have just been dealing, and the previous one relating to the disposal of the jewels and watch, stand in contrast to the beginning of the letter, for here there is an expression of the subject and the object of the bequest, whereas in the other there is neither subject nor object specified.

Lastly, there comes this expression—"I would like you from the interest of my money to give Robert Watson, James Wilson, and last, not least, yourself, a handsome remembrance of me, although they should require to wait some time." Now, it is said that the bequest here of a handsome remembrance to the husband out of the interest is inconsistent with the view that the whole was to belong to him. At first this seemed plausible enough, but on further consideration it appears to me that there is perfect consistency between the bequest of the money and a wish that a handsome remembrance should be taken by the legatee from the interest of the principal sum. What this lady desired to give her husband and these other two gentlemen was not money, but a tangible remembrance—in fact, a keepsake—and this would properly be carried out by the purchase of mourning rings. They must be handsome, but something of that description is certainly meant. These are to be paid out of the interest of the capital sum. The money was left to the husband, with an expressed wish that he in the disposal of it should take into consideration what he thought she would have wished him to do with it. This left the matter entirely in his right, but under that expressed wish. Under these circumstances it is very natural that she should say that the keepsake should come out of the interest. So there is nothing inconsistent in the last part of the letter with the view that the husband was to have absolute control over the money. Therefore I am for adhering.

**LORD DEAS**—This is entirely a question of construction, and I agree with your Lordship that the sound construction of this letter is, that whatever belonged to the wife was placed entirely at the disposal of the husband, subject only to a few little gifts. If the first words had not been qualified there could not have been any doubt. Now, the first qualification is—"Knowing that you will do as I wish with it." She does not say "Do what I told you to do with it;" and it must be remembered that this document is dated in 1869, and

Mrs Wilson did not die till 1873. She did not write it with the idea that she was to die immediately, and evidently she had not given her husband precise instructions. In the latter part of the letter it is indicated that the sum of money is to go on bearing interest, for some keepsakes are to be paid out of the interest. But this only shows that the testatrix did not expect her husband to spend the money at once, for at the time when this letter was written he was a very rich man, and did not require to spend it. There is nothing substantial to show that the writer intended the money to be given in trust.

**LORDS MURE and SHAND** concurred.

The Court adhered.

Counsel for Wilson (Reclaimer)—Mackintosh.  
Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Trustee (Respondent)—  
Kinnear—M'Laren. Agents—Mackenzie & Ker-  
mack, W.S.

Saturday, January 19.

## SECOND DIVISION.

[Lord Craighill, Ordinary.]

### WELSH v. WELSH'S TRUSTEES.

*Presumption—Parent and Child—Where a Father Pays his Son's debts.*

In an action by a son against his father's trustees for payment of legitim, the defenders pleaded that various sums fell to be deducted in respect of advances made by the father to the son, which they said the son was bound to repay, or at all events to collate. These mainly consisted of two sums expended in payment of a debt contracted by the son and for which the father was not liable. The pursuer averred, in answer, that the debt had been paid with his money, handed to his father for that purpose. This was denied by the defenders.—*Held* that, apart from evidence, where a person pays the debt of another, he is *in dubio*, presumed to do so with the debtor's money; and that where the two parties stand to one another in the relation of father and son, that fact is not sufficient to overturn the presumption, although in that case it cannot be held to be so strong.

Authorities referred to—Ersk. Inst. iii. 4, 6; Trotter v. Robertson, Jan. 20, 1672, M. 11,526; Dickson on Evidence, sec. 395; Webster v. Kettie, June 4, 1859, 21 D. 915; Douglas v. Douglas, Nov. 8, 1876, 4 R. 105; Ersk. Prin. iv. 2, 19.

Counsel for Pursuer (Reclaimer)—Dean of Faculty (Fraser)—Nevay. Agent—W. N. Masterton, Solicitor.

Counsel for Defenders (Respondents)—Kinnear—R. Johnstone. Agent—T. J. Gordon, W.S.

Tuesday, January 22.

FIRST DIVISION.

[Bill Chamber, Lord Adam.

PET.—MYLNE (M'CALLUM'S TRUSTEE),  
v. M'CALLUM.

*Bankruptcy—Trustee, Discharge of—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 152—Intimation to Creditors.*

Where a trustee in bankruptcy presents a petition for discharge, there should be intimation made to such of the creditors as have expressed an unfavourable opinion of his conduct at the statutory meeting of trustees held previously to the making of the application under the 152d section of the Bankruptcy Act of 1856.

This was a question arising under an application by W. R. Mylne, C.A., trustee on the bankrupt estate of John M'Callum, distiller in Crieff. The petitioner was elected trustee on 24th July 1874. He divided the funds of the estate, and on November 7, 1877, called a meeting of creditors under the 152d section of the Bankruptcy Act of 1856. That section provides that the trustee—"Shall call a meeting of the creditors . . . to consider as to an application for his discharge, and at such meeting he shall lay before the creditors the sederunt book and accounts, with a list of unclaimed dividends, and the creditors may then declare their opinion of his conduct as trustee, and he may thereafter apply to the Lord Ordinary or the Sheriff, who, on advising the petition, with the minutes of the meeting, and hearing any creditor, may pronounce or refuse decree of exoneration and discharge." At this meeting four creditors, representing a value of £11,699, voted for a resolution declaring that the creditors were satisfied with the conduct of the trustee. Two creditors, representing a value of £3290, one of whom was M'Callum the bankrupt himself, as mandatory for his wife, moved a resolution that the trustee should not be discharged, in respect that he had been guilty of gross mismanagement. On November 15, 1877, Mr Mylne presented a petition for his discharge and exoneration to the Lord Ordinary on the Bills. The prayer craved the Lord Ordinary, "after or without hearing the parties who voted for the motion submitted to said meeting," to pronounce decree of exoneration and discharge. The Lord Ordinary ordered intimation to the Accountant in Bankruptcy.

In the report issued by the Accountant he noticed that there had been a motion made at the meeting of creditors that the trustee ought not to be discharged, but that there was a majority both in number and value against it. His report concluded thus—" (1) That a majority both in number and value of the creditors present or represented at a meeting duly called for the purpose of considering as to the trustee's application for his discharge, declared themselves satisfied with the conduct of the trustee, and with his accounts, and authorised him to apply for his discharge. (2) The Accountant has not found evidence in the sederunt book to support the charges of mismanagement and failure to account contained in the said motion. (3) The Accountant is of

opinion, seeing that no creditors have appeared to oppose this application to the Court, that the petitioner is entitled to his discharge, and to delivery of his bond of caution, in terms of the prayer of the petition." The Lord Ordinary thereupon exonerated and discharged the petitioner.

The minority of creditors brought the judgment under review by reclaiming note.

It was objected to the competency that this was not properly a reclaiming note, the minority not having been parties to the process in the Outer House. To that it was answered that they should have been made parties to the petition by intimation, and the petitioner could not now take advantage of this omission.

At advising—

LORD PRESIDENT—I think there is raised here an important point of practice, and I am not sorry that it has been brought before the Court and deliberately argued. I do not think that the 152d section of the statute throws much light on the point. It provides that the trustee—[reads *ut supra*].

Now there is no necessity for the creditors to pass any resolution approbatory of the trustee's conduct as a preliminary to his presenting his petition for discharge; and indeed it may be doubted if it is necessary for them to pass any resolution at all. It is only said that they "may declare their opinion of his conduct." It seems rather that the only necessary preliminary is that he shall have laid before the meeting the sederunt book and accounts and a list of the unclaimed dividends. When the petitioner presents a petition for his discharge, the question arises—Does it require to be intimated to the creditors? There is always intimation to the Accountant in Bankruptcy. Should there not also be intimation to the creditors—be they a majority or be they a minority of the whole creditors—who have at the meeting previous to the application for discharge announced that they have objections to such an application being made? It does not appear how they are to know without intimation that such a petition has been presented. It may be presented either to the Sheriff or to the Lord Ordinary, and there is no time within which it must be presented. I think it would be a highly dangerous thing that the creditors should not have the opportunity of making their appearance and taking such objection to the trustee's discharge as they may have.

Where the minute of meeting, which is a probative instrument, bears that all the creditors expressed their concurrence, there may be no such necessity, but where the minute bears, as it does here, that there is a difference of opinion which is not altogether contemptible in amount, that constitutes a serious objection to the trustee's discharge. I think that in such a case there ought to be some intimation; and there having been none such here, notwithstanding that there is some sort of suggestion of it in the prayer of the petition, I am for recalling the Lord Ordinary's interlocutor, and remitting to him that he may hear parties.

LORDS DEAS, MURE, and SHAND concurred.

The Court recalled Lord Adam's interlocutor,