

letter which appears in the correspondence between the parties, Robert Paterson wrote to Gladstone and enclosed a bill for £15 which he requested him to discount, and after referring to some other matters he added—"I would not have troubled you, but I find I cannot want the money myself. . . . You may rest assured, however, it will be met when it falls due. When sending me your cheque you can just retain the discount from it. Of course this is strictly confidential between you and I."

It is to be observed that while in this first transaction Robert Paterson is seeking an advance on his own behalf, when he next returns to borrow from Gladstone it is ostensibly on behalf of his firm that he does so; and it is at this stage of the proceedings that I think the money-lender begins to be in fault, for he must have had his suspicions aroused that things were not all right when a firm of builders in good repute required to borrow at 40 per cent., and he must have known that it was impossible for them to continue carrying on business upon these conditions.

Gladstone might by a little inquiry have found out whether Robert Paterson was dealing fairly with him and with his fellow-partners; but he seems to have abstained from all such inquiry, and accordingly the question which arises in the present case is, with whom does the fault lie which enabled this fraud to be committed? Unquestionably a fraud, and a bad fraud, has been committed, and if it could have been shown that the firm of Paterson Brothers had in any way derived benefit from the fraud, then assuredly they would have been liable; or if it could have been shown that the firm had enabled Robert Paterson to commit the fraud, their liability would in these circumstances have also been established.

But the firm not only derive no benefit from what has been done, but they knew nothing about these transactions until a charge upon the four bills in question was threatened. If we contrast this with the state of knowledge of the respondent Gladstone, it will not be difficult to determine upon whom the loss must fall.

He knew or must have suspected the real state of matters, and if he had only made reasonable inquiry, no loss would have resulted to anyone.

I am therefore of opinion that Gladstone was in fault, and that upon him the loss must fall.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

Counsel for the Complainers—M'Kechnie—Watt. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Respondent—Jameson—Law. Agent—Alex. Campbell, S.S.C.

Friday, February 21, 1890.

OUTER HOUSE.

[Lord Kincairney.  
COUNTS OF ELGIN AND OTHERS,  
PETITIONERS.

*Curator bonis*—Appointment of Peer.

On the petition of the Dowager-Countess of Elgin and a son and daughter, the Earl of Elgin was appointed *curator bonis* to another son of the Dowager-Countess who was of unsound mind and incapable of managing his own affairs.

Counsel for the Petitioners—Gillespie.  
Agents—Thomson, Dickson, & Shaw, S.S.C.

Tuesday, January 20, 1891.

SECOND DIVISION.

[Sheriff of Aberdeen.

LITTLEJOHN v. STIVEN.

*Bankruptcy*—Consignation—Preference—Act 1696, c. 5—*Bankruptcy Act 1856, sec. 12.*

A firm of merchants brought an action for £79, 16s. 2d. as the balance of an account due to them, and used arrestments on the dependence. Upon the alleged debtors consigning £100 in the hands of the Sheriff-Clerk the arrestments were loosed. Within sixty days of the use of arrestments the estates of the debtors were sequestrated. The depending action was intimated to the trustee in bankruptcy, but he failed to assist himself, and decree was pronounced by default in favour of the pursuers, who claimed a right to receive the sum found due to them out of the said £100. The trustee claimed the said sum as part of the sequestrated estates, and maintained that it was only a deposit, not a consignation, and that in any case as a security granted within sixty days of bankruptcy it fell to be reduced.

Held that consignation had been made in due form, and as being equivalent to payment, was not reducible. Diss. Lord Rutherford Clark, who held that the consignation being merely a *surrogatum* for the arrestment conferred no preference.

Upon 18th March 1889 Charles Reynolds & Company, warehousemen, London, brought an action in the Sheriff Court at Aberdeen against John Grieve & Company, auctioneers there, for the sum of £79, 16s. 2d., being the balance of a mercantile account, and upon 20th April 1889 used an arrestment on the dependence of the action in the hands of the Town and County Bank, Limited, Aberdeen, to the extent of £100.

Upon 27th April 1889 Messrs Grieve & Company entered into an arrangement with

Messrs Reynolds & Company, under which they placed £100 in the hands of David Littlejohn, Sheriff-Clerk, Aberdeen, and got the arrestment withdrawn. The agents for Messrs Reynolds & Company wrote to the bank that this had been done "in respect that the amount arrested has been consigned in the hands of the Sheriff-Clerk," and the sum was entered in the consignment-book belonging to the Sheriff Court in ordinary form. No receipt was given, as receipts for money consigned were not usual, but to please the agent for Messrs Grieve & Company the consignment was entered by the Sheriff-Clerk-Depute upon the principal interlocutor-sheet of the process in the depending action.

The estates of the said Messrs Grieve & Company were sequestrated upon 19th June 1889. William Stiven, accountant, Dundee, was appointed trustee, and to him the dependence of the above action was duly intimated. He, however, did not assist himself, and upon Messrs Grieve & Company failing to find caution for expenses, decree went out against them by default, with expenses.

Messrs Reynolds & Company thereupon demanded payment of the said sum of £79, 16s. 2d. and expenses out of the £100 in the hands of the Sheriff-Clerk, who, upon the trustee in bankruptcy claiming right to the whole £100, raised an action of multiple-pounding, with the said £100 as the fund *in medio*.

The claimants Messrs Reynolds & Company pleaded—" (1) The fund *in medio* was judicially consigned in the said action at the claimants' instance against the said John Grieve & Company in the hands of the pursuer as the Clerk of Court, in security and for payment to the claimants of such sums—principal, interest, and expenses—as might be decreed for in their favour. (5) Extrajudicial consignment, all parties concurring, is quite as good and effectual for the aforesaid purposes as judicial consignment. (7) The said consignment, whether judicial or extrajudicial, is not a voluntary preference to the prejudice of the said John Grieve & Company's other creditors, struck at by the Act 1696, c. 5, or reducible at common law, or in respect of the sequestration. (8) The claimants having obtained decree in the said action for the amount sued for with interest and expenses, the right of the claimants to the free fund *in medio*, whether the same was judicially consigned as aforesaid or only extrajudicially consigned as aforesaid, or to so much of the said fund as is necessary to satisfy their claims, is preferable to that of the said William Stiven, as trustee for the creditors of the said John Grieve & Company, and the claimants are therefore entitled to be ranked *primò loco* on the free fund *in medio* in terms of their claim."

The claimant William Stiven, the trustee in bankruptcy, pleaded—" (1) The arrestment by the defenders, the said Charles Reynolds & Company, having been used within sixty days of the bankruptcy of the said John Grieve & Company, the same became inept, and the arrested money be-

came the property of the creditors of the said John Grieve & Company, and is now claimable by the defender, the said William Stiven, as trustee aforesaid. (2) There could be no judicial consignment of the said sum of £100 without the sanction or interposition of the Court, and the alleged entry in the consignment-book and marking on the interlocutor sheet by the Sheriff-Clerk were not judicial acts affecting the legal rights of parties or constituting judicial consignment. The Sheriff-Clerk can only perform a judicial act under the authority of the Court. (3) The deposit of the said sum of £100 cannot in the circumstances give the defenders, the said Charles Reynolds & Company, a higher right than they held under their said arrestment, and that arrestment having been cut down by the sequestration, the present claimant is entitled to be preferred to the fund *in medio*. (4) The bankrupts, the said John Grieve & Company, having been in a state of hopeless bankruptcy at the time when the said deposit was made, were not entitled to do anything to change the condition of matters under which a preference would be given to any creditor, and especially to a creditor whose debt was *bona fide* disputed to the prejudice of the general body of creditors. (5) In the whole circumstances the present claimant is entitled, as trustee aforesaid, to be ranked preferably on the fund *in medio* as claimed, and the opposing claimants ought to be found liable in expenses."

The Sheriff-Substitute (BROWN) allowed the claimants a proof, which brought out the facts given above, and thereafter pronounced the following interlocutor—" Finds in law . . . (b) that consignment of the sum in question was duly made in the hands of the Sheriff-Clerk; (c) that said consignment is not struck at by the Act 1696: Therefore repels the claim for the said William Stiven, as trustee on the sequestrated estate of the said John Grieve & Company: Sustains the claim for the said Charles Reynolds & Company, and ranks and prefers them on the fund *in medio* in terms thereof, &c.

"Note.— . . . The first point in the case raises the legal effect of placing the money in the hands of the Sheriff-Clerk. There seems to me to be no room for doubt as to what was the intention of the pursuers at least, for they had arrested the bankrupt's funds, and persistently declined to recal the arrestment until, as they believed, consignment had been made. I think it is very clear that the defenders in the original action were not in any way improving their position by the course to which they acceded, but the Sheriff-Clerk made it perfectly plain that consignment was the result of the negotiations about which he was consulted, and apart from that, the money having been lodged on the demand of the pursuers, who so intended, I think the trustee cannot now be heard to plead an understanding to the contrary, more especially as the agent who represented the bankrupt does not say that consignment was not mentioned. Indeed, I do not understand what deposit in the hands of

the Sheriff-Clerk means. He was not the medium through which such a private arrangement as the trustee contends for fell to be effectual, and I cannot doubt that he received the money only on the condition that it should be subject to the orders of Court, and would have declined to have anything to do with it on any other footing, and, as I have already said, he made that quite plain. Still, the trustee urges that neither the intention of parties, nor a reasonable inference from their negotiations, nor an entry by the Sheriff-Clerk in the register of consigned moneys, nor a marking to that effect in the interlocutor-sheet, has the effect of judicial consignment until the Sheriff makes an order. In practice, so far as my experience goes, consignment is not determined by any rigid rule, consigned money being dealt with as subject to the orders of Court just as commonly when it has been voluntarily as formally made. The question really is one of mere definition, for in several cases the Court have recognised consignment by arrangement as carrying the same efficacy as when made judicially—*Gordon v. Brock*, November 13, 1838, 1 D. 1; *Pollock v. Scott*, July 16, 1844, 6 D. 1297; *Campbell*, December 2, 1858, 21 D. 63.

“But the trustee says, in the second place, that assuming effective consignment to have been made, the transaction is struck at by the Act 1696. . . . My opinion is that the challenge under the statute is not well founded. In the first place, I think the point is concluded by authority, for in *Gordon v. Brock* it was held that the trustee of a bankrupt had no claim on money consigned by him, Lord Gillies remarking, ‘To say that this is defeated by the bankruptcy would just be to make every consignment a mere mockery.’ The ratio of the principle there applied apparently is that consignment operates as a cash payment through the medium of the Court, the consigned money indeed being subject to arrestment to the extent of any balance after the orders of Court are satisfied, but otherwise being not only earmarked, but placed by the bankrupt beyond his control, and specifically appropriated. No doubt the consignment was conditional on the issue of the action, and if the defence had been successful it would have reverted to the bankrupt, and as a consequence fallen to his trustee, but Reynolds & Company having prevailed, the decree of the Court in their favour, operating *retro*, practically puts the consigned money in the position of a cash payment.

“The trustee has founded on a number of other considerations. He represents, for example, that when consignment was made on 27th April the bankrupt was in desperate circumstances within the knowledge of Reynolds & Company, and indeed that they are jointly with the bankrupt concerned in obtaining a preference over the other creditors. That the transaction of 27th April could in any sense be regarded as collusive is clearly out of the question, because the parties met with very diverse views, and it was only after much insist-

ence that Reynolds & Company got their terms, it being obviously of much importance to John Grieve & Company that their credit should be restored by recal of the arrestment. But I do not see a particle of evidence from which it can be inferred that Reynolds & Company had any knowledge whatever of the affairs of John Grieve & Company, and in converting a mere security into a fund specially dedicated for their behoof they were only pursuing their lawful rights, it appearing to the bankrupt, on the other hand, that it would be for his benefit in the ordinary course of business that they should have this advantage.”

The trustee appealed to the Sheriff (GUTHRIE SMITH), who affirmed the Sheriff-Substitute's interlocutor.

“*Note*.—It is well settled that money consigned in a depending process ceases to be part of the bankrupt's estate of the person consigning it. The Sheriff-Clerk becomes custodian or trustee for the party in whose favour the process may ultimately be decided. If the defender succeeds, he will get it back; if he fails, the other party will be entitled to it. It is in fact conditional payment, the condition being that the creditor who has brought the action will succeed in making the claim good to meet which the consignment has been made. I agree with the Sheriff-Substitute that there is no difference between consignment judicially ordered and consignment arranged by the parties, for in either case the money through the medium of the Clerk of Court is placed in *manibus curiæ*. This being the nature of the transaction, I do not see how the trustee can re-claim the fund whether the bankrupt succeeds or no, for, as Lord Gillies puts it in the case of *Gordon v. Brock*, 1 D. 1, what is the meaning of consignment if it is not ‘to provide against the risk of the debtor's bankruptcy.’ It is evidently one of those cases in which the trustee, on the principle of *tantum et tale*, is bound by the act of the bankrupt just the same as if he had withdrawn his defence and made payment of the debt. Arrestment is a different matter. That is a diligence done by the creditor for his own protection, and requires to be cut down when executed within the period of constructive bankruptcy with a view to the equal distribution of the estate. But I cannot accede to the view of the trustee, that because the bankrupt in this case was forced to make consignment in order to get rid of the arrestment of his bank account, it is to be treated as the substitution of one form of security for another, and that both are equally challengeable in the interests of the general body of creditors. The argument probably would have prevailed if the depositary chosen had been a private party, but the moment the money was placed *sub judice*, the matter was ended as far as the bankrupt was concerned if the case ended against him.”

The trustee appealed to the Court of Session, and argued—There was no payment here, nor even judicial consignment, but only a private arrangement under which

by means of a deposit another and better security was attempted to be surrogated for that obtained by the arrestment itself used within sixty days of bankruptcy. This attempted preference fell to be reduced under the Bankruptcy Act of 1856, section 12, as a *surrogatum* for the arrestment, or under the Act 1696, cap. 5, as a further security granted within sixty days. Convenience, not necessity, led to this security being given. In the case of *Gordon*, relied upon, the money admittedly did not belong to the bankrupt, whoever had a right to it, and there was there complete divestiture and payment in favour of some one not the bankrupt. Here the debt was disputed and the subject of litigation. It was secured, not paid. Observations by Judges upon consignment equivalent to payment had no bearing upon consignment in security.

Argued for real raiser—There was consignment here in ordinary form, which was equivalent to payment in course of trade, and therefore not struck at by the Act 1696. The consignment was not voluntary, but necessitated by the arrestment. That the payment was conditional upon the creditors making good their claim made no difference. If they succeeded, the money became theirs as from the date of consignment. Extra-judicial consignment had the same effect as judicial—*Lockwood*, July 4, 1738, Elch. Notes 37; *Spier v. Dunlop*, May 30, 1827, 5 Sh. 729; *Pollock v. Scott*, July 16, 1844, 6 D. 1297; and especially *Gordon v. Brock*, November 13, 1838, 1 D. 1.

At advising—

LORD JUSTICE-CLERK—The facts of this case, stated shortly, are as follow:—Charles Reynolds & Company, warehousemen, London, raised an action in the Sheriff Court at Aberdeen against John Grieve & Company there, concluding for payment of the sum of £79, 16s. 2d., the balance of an account due to them, and upon 20th April 1889 they arrested £100 in the hands of the Town and County Bank upon the dependence of the action. Messrs Grieve & Company, being very anxious to have this arrestment recalled, entered into an arrangement with Messrs Reynolds & Company by which they agreed, if the arrestment was withdrawn, to place £100 in the hands of the Sheriff-Clerk at Aberdeen. This sum was handed to the Sheriff-Clerk, the arrestment was withdrawn, but upon 19th June 1889 the estates of Messrs Grieve & Company were sequestrated. Notice of the dependence of the action was given to the trustee in bankruptcy, who declined to sist himself, and the trustee not having sisted himself, Messrs Grieve & Company were called upon to find caution, and upon their failure to do so judgment was pronounced against them, and accordingly Messrs Reynolds & Company got decree for the sum sued for out of the £100 in the Sheriff-Clerk's hands.

The trustee in bankruptcy now demands that the £100 shall be given to him as part of the bankrupt's estate. The first question is, whether by handing over this money consignment was or was not made, and I

think it is important to see what is said as to this by two perfectly neutral parties—namely, the Sheriff-Clerks in Aberdeen. Mr Conner states that the parties came to him, and that it was proposed that £100 should be consigned with the Sheriff-Clerk and the arrestment withdrawn. He says—“Mr Keith (agent for Messrs Grieve & Company) then handed me £100 and asked a receipt for it. I said we did not give receipts for such sums, but that we entered them in the usual way in the consignment-book. Then, to satisfy Mr Keith, and after consulting with Mr Murison, I marked the consignment of the £100 on the interlocutor-sheet;” and Mr Murison says—“The consignment was deliberately made. If I recollect rightly, Mr Keith asked for a receipt, and I told him we were not in the habit of giving receipts, but that the usual marking would be made in the consignment-book and interlocutor-sheet.”

Now, I take that evidence to mean that this consignment was made in ordinary form in the books of the Sheriff Court at Aberdeen—that there was nothing exceptional about it. If this was not consignment, I do not very well understand why these two men of business declined to grant a receipt for money which they had received, and they explain that according to usual practice the sum was entered in the consignment-book, and to please Mr Keith noted upon the interlocutor-sheet. There is no evidence that anything further required to be done in the Sheriff Court to make consignment. Stiven says more was necessary, and that this was only deposit, but although this was contended for, I have heard nothing from the case or the argument to show what was wanting to make this come up to consignment. I have therefore no hesitation in holding that there was here efficient and sufficient consignment.

If so, the next question is, what was the legal effect of this efficient and sufficient consignment? I think, as was expressed by the Lord President in the case of *Gordon*, that nothing more remained to be done to pass the money to the creditors. The debtor could have no claim to it except so far as he might have consigned too much to meet the claim made in the action at the instance of his creditors. He made the consignment as if he were paying over the money to his creditors, supposing these creditors' claim was held good. To hold otherwise would be to make this consignment quite nugatory. We cannot go into the merits of the action. If there was a good defence to it, and if the trustee thought he had such a defence, it is strange that he declined to sist himself, but judgment having gone by default, Messrs Reynolds & Company hold their decree, and are in my opinion entitled to make it good against the sum consigned in the hands of the Sheriff-Clerk.

LORD RUTHERFURD CLARK—I cannot assent to the judgment which your Lordship proposes.

The arrestments were used within sixty

days of the sequestration of the estate of the common debtors. It is plain therefore that they could not of their own force create any preferential security in favour of the arrestors. This is indeed admitted, and it follows as a necessary consequence from the provisions of the 12th and 107th sections of the Bankrupt Act of 1856.

But the arrestments were withdrawn on an arrangement under which the common debtors consigned £100 in the action on the dependence of which the arrestments were used. I do not think that this makes any difference. The consigned money came in place of the arrested fund. The new security originated the arrestments, and was created over a part of the common debtors' estate.

It is true that the arrangement for the consignment was made by the agreement of parties. But it was not in proper sense voluntary. The arrestors might have been compelled by the intervention of the Court on a petition for loosing or recal of arrestments to take the consignment in place of the arrestments. On the part of the common debtors the consignment was made by the constraint of the arrestment. If it had been purely voluntary on their side it would in my opinion have fallen under the Act 1696, cap. 5.

A security which takes its origin in an arrestment cannot, I think, have a greater force than the arrestment itself so long as it is constituted over the estate of the common debtor. Of course there would be a difference if the arrestments had been loosed on caution, for in that case the security is constituted by the obligation of a third party, so that the provisions of the Act of 1856 are no longer applicable. But when the arrestments are recalled or withdrawn on consignment the security remains over the estate of the common debtor. The consignment is, I think, made in order to give to the arrestor the same security in character and legal effect which he would have under the arrestments. It works out the security by anticipation, so that in the meantime the common debtor shall be freed from the arrestment, and the arrestor shall not be under the necessity of raising an action of furthcoming. But the consigned fund represents the sum which the arrestor could have recovered under the action of furthcoming, and must, I think, be taken under the same conditions as those which would affect any sum recovered under a decree of furthcoming. It is unnecessary to say that if they had resorted to a furthcoming the respondents could have no preference.

It is said that the money on being consigned ceased to be a part of the common debtors' estate. I cannot adopt that view. It was nothing more than a part of the common debtors' estate put into the hands of the Court to await the issue of the action, to be paid to the pursuers if they succeeded, and to be handed back to the defenders if they were assolvied. I do not see anything more in all this than a security over a part of the common debtors' estate originating in an arrestment and

having the same legal force. From what circumstance it can acquire greater force I fail to see.

I do not think that the case of *Gordon* is at all applicable. The circumstances were very different. What is more material, the Court had not to consider the questions which are before us in this case.

LORD TRAYNER — I concur with the Sheriff in thinking that there was here effective judicial consignment of the money which forms the fund *in medio*. The effect of such consignment is determined by the decision in the case of *Gordon v. Brock*, 1 D. 1, which is not distinguishable in principle from the present case. It is quite true that in that case the person who made the consignment admitted that he was debtor in the sum consigned, and consigned it in order that it might be awarded by the Court to the person who could show the best right to it, while here the consigner denied liability, and made consignment only to get rid of his creditor's or pretended creditor's diligence. I think that that makes no difference in the effect of judicial consignment when once made. The effect of such consignment is to divest the consigner of the sum consigned, and to place it in the hands of the Court, to be dealt with as the Court may order. If the pursuer of the action in which consignment has been made obtains decree the consigned money is his as from the date of its consignment, and it is his in the character of a cash payment as from that date. From that date the creditor has no claim for interest on the amount consigned as against his debtor.

It was maintained for the appellant that consignment only came in place of the arrestment, just as if one security had been substituted for another, but both alike subject to be cut down by the debtors' bankruptcy. I cannot adopt that view. The arrestment only laid a *nexus* on the bankrupts' estate for the creditor's security, but the consignment divested him of that estate, and the subsequent bankruptcy could not carry to the bankrupt's trustee estate which was not his at the date of the sequestration. Nor is there any room for the contention, in my opinion, that the consignment is struck at by the Act 1696, cap. 5.

LORD YOUNG was absent when the case was heard.

The Court adhered.

Counsel for the Pursuer and Respondent — Jameson — M'Lennan. Agents — Auld & Macdonald, W.S.

Counsel for the Defender and Appellant — Asher, Q.C. — Rhind. Agent — Wm. Officer, S.S.C.