thought incapable of acquiring a residential settlement; and surely it would be a stranger thing to hold that being able to acquire, he might through absence in another parish for the requisite period be incapacited from losing a residential settlement acquired from his father. The evidence of Hunter, in whose house the pauper lodged for two months, seems to me to be the most important. The pauper should be judged of by what he was able to do, and Hunter proves that he was not only able to work, but that he drew wages, purchased his own provisions, and acted in such a way as to show that he could make and could also spend the money that he earned. The doctors who have been examined are no doubt of opinion that he was congenitally imbecile; but there are many degrees of imbecility, and an imbecile, whatever doctors may say, who is capable of doing the things which were done by this pauper appears to me to be one who is *sui juris*, and capable therefore of either gaining or losing a residential settlement.

Lord Rutherfurd Clark—I also am of the same opinion. The case of the appellant is that the pauper has always been in *statu pupillari*, and therefore that he retained the residential settlement derived from his father, notwithstanding that after minority he was absent from that parish for more than the full number of years required by the statute. I think the appellant's case fails in fact, and therefore that the Sheriff-Substitute's judgment should be affirmed. On the nicer questions raised I give no opinion.

The Lords dismissed the appeal, and affirmed the judgment of the Sheriff-Substitute.

Counsel for Appellant — J. Burnet — Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Mackintosh—Lang. Agents—W. & J. Burness, W.S.

Thursday, July 13.

SECOND DIVISION.

[Sheriff of Argyllshire.

NICOL *v.* M'INTYRE.

Bankruptcy—Statute 1696, *cap.* 5—*Preference Created by means of Bills.*

A person involved in pecuniary difficulties, within sixty days of his insolvency handed three bills drawn in his favour to the agent of one of his creditors, who happened to be also agent for a branch of the Commercial Bank. The latter discounted the bills at the bank, and they were paid by the several acceptors as they became due. *Held* that, although there was no fraudulent intention, this was a transaction challengeable under the Act 1696, cap. 5.

In December 1879 Angus Campbell, farmer, residing at Soroba, near Oban, was pressed by several of his creditors for payment of their claims. Among these he was charged by John M'Intyre, residing at Lochvoil Villa, Oban, on the 13th of December, on a bill for £100 which he had failed to meet. On the 15th Campbell called on Mr MacArthur, who was acting as M'Intyre's agent, and was also agent for the Commercial Bank at Oban, and told him that he was making arrangements for paying this debt out of the proceeds of a sale of stock which he had advertised to take place at his farm of Soroba on the 16th, and that the sale was to be conducted by his agent Mr Lawrence, from whom he undertook to get a letter authorising that the debt should be so paid. The sale was accordingly conducted by Mr Lawrence. Under the conditions of roup six months' credit were given to purchasers on approved bills, and consequently there was little or no cash paid at the sale, but bills were granted by the several purchasers payable six months after date. Mr Lawrence was not able to pay M'Intyre's claim in full, but on the 24th of December he handed over to MacArthur £10 in money, showing him at the same time the bills which he had received and which the National Bank had refused to discount. Of these bills MacArthur selected three which he was willing to discount, and these after being endorsed by Campbell were discounted by MacArthur at the Commercial Bank, for which he was agent, and of which bank the acceptors were customers. The bills as they became due were paid by the several acceptors. A similar transaction was concluded at the same time with another creditor.

Campbell's estate was sequestrated on the 8th February 1880, and at a meeting of creditors held at Oban on the 20th of the month James Nicol, solicitor, Oban, was elected trustee; thereafter the present action was raised by him against M'Intyre, on the averment that Campbell was insolvent at the date of the said arrangement with the defender, and when the said bills were obtained by him through his agent, and that this fact was well known to the defender and his agent; that the estate of the bankrupt had been sequestrated within sixty days of the date of delivery of the said bills to the defender, and that that delivery was a preference struck at by the Bankruptcy Statutes and the common law, under which it was reducible.

He pleaded—"(1) The defender having obtained an undue and illegal preference over the bankrupt's other creditors, to their loss and injury, is bound to surrender the same. (2) The endorsation and delivery of the bills referred to within sixty days of bankruptcy, and at a time when he was hopelessly insolvent, being an alienation by the bankrupt of his estate, and struck at by the Bankruptcy Statutes and the common law, the defender is bound to restore the value of said bills. (3) Even assuming that £10 were paid in cash, the same was not a *bona fide* payment in the circumstances, and therefore the defender is bound to repeat said sum."

The defender denied that he was cognisant of the insolvency of the bankrupt when he obtained the bills through his agent, or that he was party to a fraud on the general creditors.

He pleaded—"(1) The payment of £10 received from Mr Lawrence as agent for the debtor Angus Campbell, was a *bona fide* payment, and is not struck at by the Bankruptcy Statutes as an illegal preference. (2) The sum of £46, 2s. 2d. paid to account of defender's debts, in the circumstances set forth, was also a *bona fide* payment to account of defender's debt, and is not reducible. (3) The defender not having received a security or preference struck at by the Bank-

ruptcy Acts, is entitled to be assoilzied, with expenses."

The import of the proof appears in the Judges' opinions.

The Sheriff-Substitute (CAMPION) found "that the money and bills delivered by Mr Lawrence, on behalf of the bankrupt Angus Campbell, to Mr MacArthur, agent for defender, on 23d December 1879, amounting to the sum of £56, 2s. 2d., were so delivered and made in *bona fide*, and were not delivered and made illegally and fraudulently to disappoint the rights of the just creditors of the said Angus Campbell; that the said deliveries and payments were not made in violation of the Act 1696, c. 5, and were not challengeable either under the said statute or at common law; assoilzied the defender from the conclusions of the petition, and decerned."

The Sheriff-Principal (FORBES IRVINE) recalled the above interlocutor, and found in law "(1) that there was no proof that the parties acted otherwise than *in bona fide*, and therefore that there was no ground of reduction at common law or under the Act 1621, c. 18; (2) that the cash payment of £10 was not struck at by the Act 1696, c. 5, and to that extent assoilzied the defender from the conclusions of the action; but (3) that the endorsation and delivery of the bills referred to within sixty days of bankruptcy was a voluntary deed on the part of the bankrupt, which was null and void under the said Act 1696, c. 5, and was rightly challengeable as such by the pursuer, the trustee on his sequestrated estate; therefore, as regards this part of the case, decerned and ordained the defender to pay to the pursuer, as trustee foresaid, the amount of £46, 2s. 2d. sterling, with interest as concluded for."

He added this note:—"The Sheriff sees no reason in the circumstances of this case to doubt the good faith of the parties. There is, therefore, in his opinion no case for the pursuer either at common law or under the Act 1621, c. 18, directed against deeds granted to conjunct and confident persons 'without true and necessary causes.'

"Farther, as regards the payment of the £10 in money, it has long been matter of recognised law that a cash payment of a debt, at a time when it is legally exigible, is not struck at by the Act 1696, c. 5, even where such payment is made within sixty days of bankruptcy.

"The real question therefore is, Whether, apart altogether from any consideration of fraud (*Stoppel* v. *Maclaren*, November 15, 1850, 13 D. 345), the making over to the defender the bills endorsed by the bankrupt is challengeable under the terms of the Act of 1696, which 'declares all and whatsomever voluntary dispositions, assignations, or other deeds which shall be found to be made or granted directly or indirectly be the foresaid dyvour or bankrupt, either at or after his becomeing bankrupt, or in the space of sixty dayes of befor in favors of any of his creditors, either for their satisfaction or farther security in preference to other creditors, to be voyd and null.'

"It appears to the Sheriff that this part of the transaction is so challengeable. The law on this head, as explained and fixed by practice, and by a long course of decided cases, is clearly stated by Professor Bell, in terms which seem directly applicable to the present case, and indeed to be all but conclusive of the question now at issue.

"'The Act,' he says, 'clearly applies to indorsations of bills, and also to drafts made in favour of prior creditors on persons indebted to the bankrupt. These are both of them assignations in the strict terms of the Act. Bills have been assimilated to cash, as being the money of a trader, the instruments of his commerce with which he makes his payments and manages all his transactions, as in law "bags of money." But a debtor may gratify a favourite creditor, either by drawing in his favour a bill upon some of his own debtors, or by indorsing to him a bill payable to himself, or, what is the same thing, by giving it over, the indorsation by which he holds it remaining still blank; and if such deeds as these were unchallengeable, a trader, upon the eve of bankruptcy, and within the sixty days, might distribute among his favourite creditors the greater part of his circulating capital and of his outstanding debts—nay, the goods in his warehouse might be alienated effectually by disposing of them and taking the bills for the price payable to the persons meant to be favoured. But the words of the statute, as well as its spirit, include such deeds. The Act comprehends "all dispositions, assignations, or other deeds made and granted, &c., in favour of creditors, either for satisfaction or futher security, in preference to other creditors; and a bill, whether an original draft in the creditor's favour, or an indorsation to a draft in which the bankrupt is creditor, is strictly and properly an assignation for satisfaction or security in preference to the other creditors."' (Bell Comm., M'Laren's edit., ii., 197, and p. 211 of 5th edit.)

"The numerous later decisions, varying occasionally as they necessarily do according to the differences, often minute and critical, in the facts on which they depend, substantially confirm this statement of the law.

"It is sought by the defender to bring this case within the class of transactions in the usual course of trade, as to which it is contended that the rule of the Act does not apply. But the case here of a simple endorsation by the bankrupt seems essentially different from the examples usually given of such privileged dealings, as where on the day that a bill falls due, and may effectually be paid in money, it is paid by the discount of another bill, or where a bill is given and received as cash in payment of goods delivered, in which case it is held to be a payment in money.

"It might perhaps be contended that the defender's plea derives some strength from the undertaking by the bankrupt on the 13th December that the bill should be paid out of the proceeds of the sale, but in a case much more favourable to the defender such a plea was held unavailing, even although when the bill was granted, and before the sixty days, the bankrupt had stated, and the granter understood, that he would make payment of the bill as soon as he had money—*Ross* v. *Falconer*, June 26, 1868, 6 Macph. 960."

The defender appealed to the Second Division of the Court of Session, and in support of his contention quoted the case of *Watson* v. *Young*, March 1, 1826, 4 S. 507.

The pursuer replied—The whole circumstances of the transaction revealed that it was not one in the ordinary course of trade, and fell therefore under the statute—*Blaikie* v. *Wilson*, July 1, 1803, quoted in Bell's Comm. ii. 204; *Pattison* v. *Allan & Company*, December 3, 1828, 7 S. 124; *Mitchell*

v. *Rodger*, June 26, 1834, 12 S. 802; *M'Cowan* v. *Wright*, June 21, 1852, 14 D. 901; *Ehrenbacher & Company* v. *Kennedy*, July 10, 1874, 1 R. 1131.

At advising—

Lord Justice-Clerk—In order to come to a satisfactory opinion on this case it is necessary that we should look at the substance of the transaction, and see whether what was done was in the ordinary course of trade. It seems to me that it was not. Campbell, the debtor, had been for some time in pecuniary difficulties—that is quite evident, because the creditor M'Intyre had given him a charge on a protested bill. In that state of matters M'Intyre and Campbell came to an agreement by which Campbell put in a third party to sell some of his surplus stock, and to keep the price realised for M'Intyre and another creditor. That does not recommend itself to me as a usual act of ordinary administration, and seems to have been invented to secure payment of Campbell's debts to M'Intyre and the liquidators.

The purchasers at this sale gave bills for the stock bought by them, and of these bills some were handed to M'Intyre's agent and discounted by him, and the cash so received applied in partial extinction of the debt due to M'Intyre.

In these circumstances I am quite satisfied with the judgment of the Sheriff-Principal.

Lord Young—I concur, and I think, now that we have heard the facts of the case, that any difficulty which seemed originally to attach to it has disappeared.

The case clearly falls under the Act 1696, c. 5, but is not to be regarded as one involving fraud in any sense.

The statute has for its object to preserve as far as possible equality among creditors by restoring to the estate for the benefit of all interested any asset which by being alienated within sixty days of insolvency might have or has disturbed the state of the insolvent's affairs. It is not necessary for the purposes of that statute that there should be any want of *bona fides* in the alienation struck at. The statute is held to affect anything which the law can lay hold of whereby the equality of distribution of the insolvent's estate might be disturbed. It has accordingly been held to strike at bills of exchange granted by the bankrupt within the restricted period, although these cannot be held to be alienations of his existing estate. In short, it may be safely stated as law that under that statute any act whatever affecting the bankrupt's estate whereby the equality of distribution may be disturbed will be set aside. The only exception—although it even is not absolute—is in the case of cash payments. But cash payments are exceptional not only in this branch of the law, but in all others. If a creditor gets payment of his debt in cash it is no matter to him where the cash comes from. In fact it makes no difference that the debtor may have stolen the cash, because this is the only, or at all events the most conspicuous, exception to the rule that your author cannot give you a better title than he himself has. The thief of money can always do so. The object of this exception is to protect transactions in the ordinary course of business. If the debtor here had paid the whole of M'Intyre's claim in cash, as it seems he did to the extent of £10, there would have been no question about it. But instead of this, three bills in favour of the bankrupt were handed to M'Intyre's agent along with the £10 to make up the balance of the debt. M'Intyre's agent happened also to be the agent of the branch of the Commercial Bank at Oban, and he had selected these bills as bills which could be easily turned into cash, and he as agent of the bank did cash them, and by his doing so in that capacity the proceeds of these bills can be reached under the Statute 1696, and the transaction can be set aside and equality be restored in the distribution of the bankrupt's estate. Had it been otherwise—that is, had it been the true state of the case that the bankrupt had himself raised the money by personally discounting these bills, and had then paid the debt in cash—then the transaction would have been protected. But that is not the state of the case, and we can set aside the transaction as falling under the Statute 1696. In that view I concur, but without any imputation of dishonesty.

Lord Craighill—I also concur, and agreeing as I do with your Lordship in the chair and Lord Young, I do not consider it necessary to add much to what has been already said.

On looking at the proof I have no difficulty in coming to the conclusion that the Sheriff has read it aright, and that in point of fact the balance of this debt was not paid in cash.

As M'Arthur received these bills as agent for the creditor M'Intyre, that puts them in the same position as if they had been received by the creditor himself. That being so, the payment was in bills, and not in cash, and so falls to be set aside under the Statute 1696, cap. 5.

Lord Rutherfurd Clark—I am of the same opinion. The bills here were endorsed to the bankrupt, and I think that it is the fact that they were thereafter handed over to M'Arthur as agent for M'Intyre. This, in my opinion, was a contravention of the Act 1696. It is of no consequence that the bills were afterwards cashed or discounted by M'Arthur as agent for the Commercial Bank without being endorsed by M'Intyre. This was a matter of their own concern, and it is obvious that M'Intyre did not endorse them, nor was ever asked to do so, because it was hoped that by abstaining he would be able to avoid the Act.

The Lords dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Appellant—Shaw. Agent—John Gill, S.S.C.

Counsel for Respondent—Dickson. Agent—Robert Emslie, S S.C.

Thursday, July 13.

FIRST DIVISION.

[Lord Lee, Ordinary.

THOMPSON *v.* NORTH BRITISH RAILWAY.

Reparation—Issue—Relevancy—Pursuer engaged in Unlawful Act—Duty of Railway Servant where Passenger in Breach of Law.

The pursuer of an action of damages for bodily injury against a railway company,