Friday, June 8.

SECOND DIVISION.

[Sheriff Court at Paisley.

WHYTE *v.* UNION BANK OF SCOTLAND, LIMITED.

Bankruptcy—Illegal Preference—Act 1696, *cap.* 5—*Novum debitum—Ex facie Absolute Assignation in Security.*

Estates were sequestrated on 28th April 1915. On 1st March 1915 a bank was the creditor of the bankrupt to the extent of £179, 2s. On that day the bankrupt granted in favour of the bank an assignation *ex facie* absolute but admittedly in security whereby he assigned to the bank a sum of £200 due to him. On 4th March 1915 this debit against the bankrupt was changed into a credit in his favour, Subsequently as the result of a series of payments to the bankrupt a debit balance was raised against him of £200 at the date when the account closed. *Held* that the assignation was a good security and not struck at by the Act 1696, cap. 5, inasmuch as it was retained by the bank in security of advances made subsequently to its date and not of prior debts.

The Act 1696, cap. 5, enacts—". . . All and whatsoever voluntar dispositions, assignations, or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favours of any of his creditors, either for their satisfaction or farder security, in preference to other creditors, to be void and null."

John Balderston Whyte, chartered accountant, Paisley, acting as trustee on the sequestrated estates of George Robertson & Company and James M'Lardie Robertson, builders and contractors, Paisley, raised an action of multiplepoinding in the Sheriff Court at Paisley in name of the Magistrates of Paisley as *pursuers and nominal raisers* against the Union Bank of Scotland, Limited, *defenders and claimants*, and against himself in his capacity of trustee, *real raiser, defender, and claimant.* Both defenders lodged claims to a sum of £200.

The *facts* of the case were set forth in the opinion of the Sheriff (Wilson) as follows:—"The competition in this multiplepoinding is between the trustee on the sequestrated estates of George Robertson & Company and the Union Bank of Scotland, Limited. The bankrupts were sequestrated on 28th April 1915. On 1st March 1915 they had granted in favour of the Bank an assignation, *ex facie* absolute but admittedly in security, whereby they assigned to the Bank a sum of £200 due to them by the burgh of Paisley. At the date of this assignation the bankrupts had at the credit of their current account with the Bank a sum of 18s., but at the same time they were due the Bank £180 under a bill which the Bank held and which had fallen due on 28th February. Accordingly on 1st March the Bank was the creditor of the bankrupts to the extent of £179, 2s. By 4th March, however, this debt of £179, 2s. against the bankrupts was changed into a credit in their favour of £80, 5s. The conversion from the debit to the credit was effected mainly by a lodgment by the bankrupts of £280 in cash on 4th March 1915. From that date onwards down till the close of the bank account on 27th April 1915 only one sum, viz., £70 on 8th April, was paid into the account to the credit of the bankrupts, whilst on the other hand a series of payments to the bankrupts resulted in a debit balance being raised against them of exactly £200 at the date when the account was closed, viz., on 27th April, the day before the sequestration. The sum of £200 which was assigned by the bankrupts to the Bank in security as aforesaid forms the fund *in medio* in this action, and it is claimed by the trustee on the one hand and by the Bank on the other hand. The question for decision is whether the assignation in security in favour of the Bank is or is not null under the Act 1696, cap. 5."

The defenders, the Union Bank of Scotland, Limited, pleaded, *inter alia*—"1. The claimants, the Union Bank of Scotland, Limited, having made advances to the said George Robertson & Company on said account-current as stated in the condescendence of sums amounting to £200 and interest in consideration of the sums assigned to them by the said assignation, and the said assignation having been granted and completed by intimation prior to the date of the sequestration of the estates of the said George Robertson & Company, the claimants should be preferred to the fund *in medio.* 2. The said George Robertson & Company having obtained, by drawing on said account-current as averred by these claimants, full value for said assignation, and the same not having been granted for the Bank's satisfaction or in further security in preference to other creditors within the meaning of the Act 1696, c. 5, the Bank should be preferred to the fund *in medio.*"

The defender Whyte pleaded, *inter alia*—"1. The pursuers being due the said George Robertson & Company the said balance of £200 under said contract, and the whole estates of the said George Robertson & Company having been transferred to the claimant by virtue of said Act and warrant, he is entitled as trustee foresaid to be ranked and preferred to the whole fund *in medio* in terms of his claim, with expenses against the other claimants. 2. The assignation founded on by the Union Bank having been voluntarily granted by the bankrupts in security of a prior debt, and within sixty days of the sequestration of their estates, is null and void by the Act 1696, cap. 5, and the Bank's claim should therefore be repelled with expenses to this claimant. 3. The assignation founded on by the Bank not being a *novum debitum*, and being dated within sixty days of the granters' sequestration, is of no avail in a competition with the claim of the bankrupt's trustee, and should be set aside, *ope exceptione*, with expenses."

On 25th January 1916 the Sheriff-Substitute (BLAIR) ranked and preferred the claimant Whyte to the fund *in medio*.

On 22nd March 1916 the Sheriff (WILSON) recalled the interlocutor of the Sheriff-Substitute, and ranked and preferred the claimants the Union Bank of Scotland, Limited, to the fund *in medio*.

Note.—[After the narrative above quoted] —"At the oral debate before me the agents for the parties explained that they knew of no authority directly in point on the one side or the other, and accordingly they based their respective contentions on the terms of the statute and on the general principles disclosed in the decisions which they claimed could be applied by analogy to the circumstances of this case.

"In my opinion the Bank's security for the balance of £200 due to them is not struck at by the Statute of 1696.

"The assignation in favour of the Bank is not relied on as conferring a security for any debt owing to the Bank at or prior to the date of the granting of the assignation, because the whole of the balance of £200 represents debts incurred to the Bank after the Bank had obtained, and whilst it still held, the security.

"Moreover, the security which is claimed cannot be regarded as unfair to other creditors, because the Bank only claim on the security to the extent to which they actually paid money on the faith of the security.

"In other words if and in so far as the security became effectual to the Bank the money advanced by the Bank to the bankrupts came in place of the security.

"Considerations such as these seem to me to show that the Bank's claim must be outwith the sweep of the statute.

"The counter argument for the trustee is I think fallacious.

"The contention was on these lines—that when the assignation was originally granted the Bank was a creditor for £179, 2s., that the granting of the assignation was within sixty days of the bankruptcy—that it was therefore in security of a prior debt, and as such was wholly null and void.

"Now I assume that an assignation in security of the prior debt of £179, 2s. would be struck at by the statute. The fallacy underlying the contention consists in regarding that debt as the debt in respect of which the Bank is claiming to hold the security. In point of fact the original debt of £179, 2s. was extinguished, and the security is relied on not for that debt but for a debt subsequently incurred—representing actual money payments paid by the Bank after they obtained the assignation and whilst they were holding the security.

"In the absence of any express qualification or agreement to the contrary—and no such qualification or agreement appears or is averred—the assignation, being *ex facie* absolute, conferred a right of security over the fund assigned on the occasion and to the extent of each subsequent advance made by the Bank to the bankrupts—*Hamilton* v. *Western Bank*, 1856, 19 D. 152.

"I think it unnecessary to refer in detail to the discussion submitted to me on the one side and the other regarding the application to the present case of principles affirmed in previous cases involving what were regarded as analogous questions.

"I may explain, however, that I see nothing in the principles founded on which is adverse to the view that this case is outwith the scope of the Act of 1696, but although—alike in recent decision and in recent text books—questions of the precise character under consideration in the present case have not been dealt with, I think that there is clear enough authority for the opinion which I have expressed in favour of the validity of the security held by the Bank, and of their claim in this litigation.

"Thus in *Robertson* v. *Ogilvie*, November 21, 1798 (Morrison's Dictionary, *voce* Bill of Exchange, Appendix, Part I, No. 6) an indorsation of a bill within sixty days of bankruptcy, although reduced under the Act of 1696, c. 5, in so far as it related to prior debts, was sustained as a security for money advanced between the date of the indorsation and the actual bankruptcy.

"That decision seems to me to be exactly in point and to rule the present case.

"I refer also to *Stein* v. *Forbes*, (1791) M. 1142, and to Bell's Commentaries, 7th ed., vol. ii, page 197.

"For the reasons which I have given, and on the authority of the cases which I have cited, I must sustain the appeal, and rank and prefer the Bank in accordance with its claim to the whole fund *in medio*."

The defender Whyte appealed, and argued —As the bankrupts were debtors to the Bank to the amount of £179, 2s. at the date on which the assignation was granted, it was granted in security of a prior debt. Accordingly it was null and void—Act of 1696, cap. 5; *Robertson* v. *Ogilvie*, (1798) M. *voce* Bill of Exchange, App., Part I, No. 6. The assignation was cut down when the debt for which it was granted was extinguished, and it could not be revived for later debts. The Bank could not hold the assignation to secure later debts. In *Hamilton* v. *Western Bank*, (1857) 19 D. 152, the Bank did not hold on the same title as in the present case. Other cases cited were—*Stein* v. *Forbes*, (1791) Mor. 1142; *Mann* v. *Reid*, (1704) M. 1183; *Black* v. *Cuthbertson*, F.C., December 15, 1814; *Roy's Trustee* v. *Colville & Drysdale*, (1903) 5 F. 769, *per* Lord President Kinross and Lord M'Laren, 40 S.L.R. 530.

The defenders, the Union Bank of Scotland, Limited, argued—The Bank held an *ex facie* absolute assignation which was admittedly in security. It was to be used as security for the sum of £200 which was advanced subsequently to the 5th March 1915, *i.e.*, for a subsequent not a prior debt. The transaction held good and was not void under the Act of 1696. The assignation was only reducible in so far as it was being used to cover a prior debt. The prior debt having been wiped out, that was not the case here. The Bank could hold a security for any purpose that was lawful—*Hamilton* v. *Western Bank* (*cit.*). At any rate the

assignation could only be reduced properly by an action of reduction—*Drummond* v. *Watson*, (1850) 12 D. 604, *per* Lord Justice-Clerk Hope at p. 607, and *per* Lord Moncreiff at p. 611. The present case was really decided by the case of *Robertson* v. *Ogilvie* (*cit.*).

LORD JUSTICE-CLERK—In this case I am quite content with the judgment of the Sheriff. I think that he puts the point exactly as it ought to be and that the authorities he refers to warrant the conclusion at which he has arrived.

The Bank were creditors of the bankrupt as holders of a promissory-note for £180 granted by the bankrupt which was falling due and which he was anxious to meet. There was a sum of £200 due to the bankrupt by the burgh of Paisley, and he took to the Bank an assignation of £200 and a cheque for £180, and giving these to the Bank they handed him over his promissory-note. I think that closed that bill transaction.

If bankruptcy had supervened and the Bank had sought to take advantage of the assignation for the purpose of liquidating the amount due under the promissory-note, it may be that a question would have arisen. But that is not the case here, because what took place was that after the date of the note transaction the debit balance on the bank account was converted into a credit balance, and thereafter the Bank being still in possession of the assignation, which they duly intimated, made advances to the bankrupt, which ultimately produced a debit balance of £200.

The result of that is that this case falls precisely within the judgment in the case of *Robertson* v. *Ogilvie*, the soundness of which has not been impugned, although counsel sought to distinguish it from the present. I think it was a sound judgment.

I am therefore for refusing this appeal.

LORD DUNDAS—I agree with your Lordship and the learned Sheriff, and do not desire to add any words of my own.

LORD SALVESEN—I am of the same opinion. The Bank here holds an assignation, absolute in its terms, for a sum of money admittedly due to the bankrupt by the Paisley Corporation. The question is—on what grounds do they claim to hold it? If they claimed to hold it in satisfaction or security of a debt prior in date to the assignation, *prima facie* the assignation would be cut down by the bankruptcy. But they claim to hold for advances subsequently made on the faith of the absolute assignation which remained in their possession—in short, for a *novum debitum* and to the extent of the *novum debitum*.

In these circumstances I see no reason for doubting the soundness of the Sheriff's decision. The Bank are entitled so to hold and to apply the proceeds of the assignation, and that is the only question that arises in this case.

LORD GUTHRIE—I am unable to distinguish this case from *Robertson* v. *Ogilvie*, which is not referred to by the Sheriff-Substitute, and which does not appear to have been before him.

The Court adhered to the judgment of the Sheriff.

Counsel for the Defender Whyte—Christie, K.C.—Wilton. Agent—Walt. M. Murray, S.S.C.

Counsel for the Defenders The Union Bank of Scotland, Limited—Anderson, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, June 12.

SECOND DIVISION.

[Sheriff Court at Peterhead.

BUCHAN *v.* SCOTTISH STEAM HERRING FISHING COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Workman—Seaman—Fishing Vessel—Share of "Scum" and "Stoker"—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 7, *sub-sec.* 2.

By section 7 of the Workmen's Compensation Act 1906 the Act applies to seamen, but by sub-section 2 "this Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or gross earnings of the working of such vessel."

The widow of a fireman on board a steam drifter sought to recover compensation from the owners in respect of the death of her husband by a fatal accident which happened to him in the course of his employment. *Held* that as the fireman was entitled to share in the profits realised from the "scum" and "stoker," and thereby participate in the gross earnings of the working of the vessel, she was not entitled to compensation under the Act.

An arbitration was held in the Sheriff Court at Peterhead, under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between Mrs Christina Strachan or Buchan, 7 High Street, Buchanhaven, Peterhead, *appellant*, and the Scottish Steam Herring Fishing Company, Limited, *respondents*, to fix the amount of compensation payable by the respondents to the appellant in respect of the death of the husband of the latter in consequence of an accident sustained whilst in their employment.

The appellant being dissatisfied with the decision of the Sheriff-Substitute (YOUNG) brought a Case for the opinion of the Second Division of the Court of Session.

The Case stated—"This is an arbitration instituted by initial writ before the Sheriff at the instance of the appellant against the respondents, under which the appellant, for herself as an individual and as tutrix and administatrix for her said pupil children, craves an award of compensation in respect of the death of her husband George Buchan