REPORTS.

WINTER SESSION 1866-67.

EXTRA SITTINGS.

Thursday, Nov. 1.

FIRST DIVISION.

BLACK AND CO. *v.* BURNSIDE
(*ante*, vol. i. p. 75).

Bank Cheque—Proof—Liability of Drawer. A. drew a cheque for B.'s accommodation on a bank in which he had at the time no funds. B. got the cheque cashed by C. The cheque was afterwards dishonoured. Held, *inter alia*, in an action by C. against A. for its amount, that the proof failed to show that when he cashed the cheque, C. was aware of the state of A.'s bank account, or that he did not rely on A.'s credit, and judgment against A. accordingly.

This was an action for payment of the contents of a cheque. The defender had drawn a cheque upon his bankers, with whom he had no funds, for the accommodation of one Nisbet, that he might raise money upon it. The defender was not at the time indebted to Nisbet. Nisbet got the cheque cashed by the pursuers. The cheque was afterwards dishonoured, and the pursuers brought the present action for its amount. The defender resisted payment upon various grounds. The Court allowed a proof of the circumstances. This was taken, and the case came up for determination upon the effect of the proof.

CAMPBELL SMITH (with him A. R. CLARK), for the defender, maintained that the proof showed—(1) that the cheque was an accommodation to Nisbet; (2) that the pursuers were aware of this, and did not rely on the defender's credit in cashing the cheque; (3) that the pursuers did not give the defender timeous notice of the dishonour to enable him to recover from Nisbet (who afterwards became bankrupt); and (4) that the cheque had been paid by Nisbet to the pursuers.

SCOTT (with him FRASER), for the pursuers, while admitting the first of the defender's propositions, contended that the remaining three were not supported by the proof.

The Court then gave judgment.

The LORD PRESIDENT said—I cannot say that I feel much difficulty about this case. I have listened to all the points that have been urged for the defender, but they have not convinced me that he is free from liability. It would appear that the defender drew a cheque upon a bank with which he kept an account, but in which at the time he had no money, or at least none to speak of; that he put this cheque into the hands of Nisbet, not for the purpose of his taking it to the bank, but that he might get money for it where he could. Nisbet being acquainted with the pursuers, got them to cash the cheque, which, on being sent to the bankers upon whom it was drawn, was dishonoured. It appears from the proof that nothing was said to the pursuers of the nature of the cheque—as having been drawn upon a bank in which the drawer had no funds. On the contrary, it appears that Nisbet told the pursuers that the defender was a responsible party. The cheque having been dishonoured, I think it appears that the defender was made aware of this almost immediately. It also appears that the pursuers came into personal contact with Nisbet, by whom they were told that the cheque would be honoured—meaning that the defender would in due time pay the same. There is some evidence, too, that before the bankruptcy of Nisbet, there was a meeting between the pursuers and the defender at which the latter was told that payment of the cheque would require to be made. Now, is there any reason why that cheque, which the defender would have been bound to have paid had the pursuers taken it to him immediately on its being dishonoured, should not now be paid? I can see none. It is said that there has been so much delay, the defender has been unable to get payment of the cheque from Nisbet or his estate. It appears to me that after he got notice of the dishonour of the cheque, it was the defender's duty to have looked after receiving it from Nisbet. But it is still further said that this cheque has been truly paid to the pursuers by Nisbet in the arrangement of some bill transactions. I think the evidence goes to show that the amount of the bills granted by Nisbet to the pursuers was due to them altogether irrespective of the cheque. Upon the whole, therefore, I think we must give decree in favour of the pursuers.

Lords Deas and Ardmillan concurred.

Lord Curriehill absent.

Decree accordingly, in terms of the libel, with expenses.

Agents for the Pursuers—Macgregor & Barclay, S.S.C.

Agent for the Defender—Alex. Morison, S.S.C.

Tuesday, Nov. 6.

Poor RICHARDS *v.* CUTHBERT.
(*ante*, vol. i. p. 128.)

Title to Sue—Assignee—Bankruptcy of Cedent. A person sued for payment of an I O U, in virtue of an assignation granted by the creditor in it after he had been sequestrated and discharged without composition, but before the sequestration was at an end—*Held* that she had no title to sue.

The summons in this case concluded that the defender should be "ordained to make payment to the pursuer of the sum of £100 sterling, being the amount contained in an I O U, or acknowledgment of debt granted by the defender, the said John R. Cuthbert, to and in favour of William Cuthbert, commission merchant and insurance agent in Greenock, dated the 3d day of August 1855; and in virtue of an assignation thereof by the said

William Cuthbert, in favour of the pursuer, the said *poor* Ann Wilson or Richards, dated 15th April 1863, with interest on said sum, from said 3d day of August 1855 until payment."

The defender pleaded, *inter alia*, that the pursuer had no title to sue. The assignation was not granted until the year 1863; but in 1858 the estates of William Cuthbert (the cedent), were sequestrated under the bankruptcy statute, and although in 1861 he had been discharged, this was done without payment of a composition, and a discharge so obtained had not the effect of reinvesting the bankrupt in his estate. Besides, the trustee had never been discharged, and the sequestration process was still in dependence.

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"*Edinburgh, 1st February* 1866.—The Lord Ordinary having heard counsel and made avizandum, and considered the Closed Record, Productions, and whole Process, Finds that the I O U, founded on by the pursuer against the defender, is addressed by the latter to William Cuthbert, and that therefore the same could not be transferred to the pursuer by mere delivery thereof to her by the said William Cuthbert: Finds that the said William Cuthbert was sequestrated as a bankrupt on or about the 31st of May 1858, previous to the date of the assignation (No. 10 of process), granted by him on the 18th April 1863, in favour of the pursuer: Finds that, in these circumstances, the I O U, and any debt thereby acknowledged to be due to the said William Cuthbert by John R. Cuthbert, the granter thereof, had been carried by virtue of the sequestration to the trustee on the estate of the said William Cuthbert, and that the said assignation was and is, consequently, ineffectual as a title to the pursuer to insist as in right of the said I O U in the present action: Therefore sustains the first plea in law for the defender—dismisses the action and decerns: Finds the pursuer liable to the defender in the expenses of process, of which allows an account to be lodged, and remits the same to the auditor to tax and to report."

The pursuer reclaimed.

Couper, for her, argued:—1. The pursuer avers that this I O U was handed to her by the creditor in it long previous to his sequestration for an onerous cause. She is therefore entitled to a proof of the circumstances under which the transference took place. Such inquiries have been allowed in regard to deposit receipts and bank cheques. 2. When the formal assignation was granted in 1863, the sequestration was practically at an end; the bankrupt was discharged, and although the trustee was not, he intimated that he did not intend to sue for payment.

Pattison and Burnet, for the defender, replied:—An I O U is not transferable by delivery, and parole proof on the subject is inadmissible. Accordingly, this action is expressly laid upon a written assignation; but the party who granted it had no power to do so. The debt had passed by the sequestration which was still in dependence. Although the trustee resigned and has since died, the Bankruptcy Act provides a mode of appointing a new trustee. But the defender is not bound to take steps for that purpose.

The Lord President—It appears that on 3d August 1855, the defender granted an I O U to William Cuthbert, his brother and partner in business. It also appears that William Cuthbert became bankrupt in 1858, and a trustee was appointed. The present pursuer raises this action founded upon that I O U and an assignation by William Cuthbert, the creditor in it, dated in 1863. The defender says, among other defences, that the party who has right to this I O U is the trustee on the sequestrated estate. The pursuer shows no title of an earlier date than 1863. She says she was in possession of it from a much earlier date, but there is no writing to prove this. The defender says that the I O U, if due at all, belongs to the sequestrated estate, and that the pursuer has therefore no title to sue. One answer made to this is that in the circumstances this sequestration has no effect; that the bankrupt has been discharged without a composition, and that the trustee is dead. But the sequestration still subsists. *Ex facie*, therefore, the estate is the creditor. The question is whether we are in a position, without the estate being represented here, to deal with this demand against the defender. I think not, unless we have some evidence that the estate is not or does not claim to be the creditor. It was perhaps possible to have put that in shape. The trustee was alive when this action was raised, and it is a pity that he was not called as a defender. Then, is anybody to be brought here now to represent the estate? Either party might remove the difficulty by asking the appointment of a new trustee, but who is to do that—the defender or the pursuer? The defender says it is for the pursuer to put herself right—that obtaining the appointment of a new trustee would be attended with expense—and that he does not wish to lose more money than he has already done. I think that, being here as a defender, he is not bound to incur that expense in order to help the pursuer, and I don't understand that the pursuer proposes to do anything to remove the difficulty. In these circumstances, I think the Lord Ordinary's interlocutor, in so far as it sustains the first plea and dismisses the action, is sound. I don't think it necessary to give any opinion as to his other findings.

Lords Deas and Ardmillan concurred.

Lord Curriehill absent.

The interlocutor of the Lord Ordinary, in so far as it sustained the first plea in law for the defender, and dismissed the action with expenses, was adhered to, with additional expenses.

Agent for Pursuer—R. P. Stevenson, S.S.C.

Agent for Defender—William Mason, S.S.C.

Wednesday, Nov. 7.

M.P.—KER'S TRUSTEES *v.* WELLER AND OTHERS (*ante*, vol. i. p. 188).

Assignation—Trust—Marriage-Contract—Alimentary Provision. A person in his mariage-contract conveyed an estate to trustees, the leading purpose of the trust being to pay over the rents to himself during his life, and these payments were declared to be alimentary only. He afterwards conveyed, for an onerous cause, the estate and all his interest in it to another. Held—(1) that the first conveyance being for the benefit of the party himself, he was entitled to grant the second; (2) that the second was in competition preferable to the first; and (3) that the declaration as to the alimentary character of the payments was ineffectual, having been made by a person as to his own property.

The late Robert Ker of Argrennan died in 1854, leaving a trust-deed by which he directed his trustees to convey the estate of Argrennan to his