Counsel for Pursuer—Alison. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defender King—Jamieson and Crichton. Agents—Waddell & M'Intosh, W.S.

Counsel for Defender Shaw—Brown & Guthrie-Smith. Agent—A. J. Dickson, S.S.C.

Tuesday, February 23.

FIRST DIVISION.

[Sheriff of Midlothian.

APPEAL—W. T. DOW & CO. IN HENRY JACOBSEN'S SEQUESTRATION.

Bankrupt—Affidavit—Principal Officer of Bank—Marginal Addition.

Held that an affidavit claiming in a sequestration might be sworn by the assistant manager as a principal officer of a bank within the meaning of the Bankruptcy Act 1856, sec. 25, and that a marginal addition subsequently made on the said affidavit was duly authenticated by the initials of the deponent and the Justice of Peace before whom it was sworn.

Bankrupt—Voucher—Decree in Absence—Conjunct and Confident.

Held that a decree in absence obtained against a bankrupt by a conjunct and confident person was not a sufficient voucher of debt.

Bankrupt—Arrestment in Security—Bankruptcy Act 1856, sec. 108.

Held that it was not necessary for a creditor who had used arrestment in security within sixty days of bankruptcy to value such security in his affidavit, seeing that it was transferred to the trustee by sec. 108.

Henry Jacobsen, grain and commission merchant, Glasgow, having become insolvent, his estate was sequestrated, and a general meeting of his creditors was held on January 5, 1875, for the election of a trustee. There were proposed Messrs Carstairs and Balgarnie as trustee and trustee in succession and Mr James A. Robertson, and the former gentlemen were declared to be elected by a majority in value of the creditors present. In the competition which thereupon arose for the office of trustee both parties lodged notes of objection to the votes of certain creditors. Messrs Carstairs and Balgarnie objected to the vote of the Union Bank in respect of an affidavit by John Affleck, designing himself banker in Glasgow and one of the principal officers of the said bank. The objectors objected to the said affidavit as inept, in respect that it was not made by the secretary, manager, cashier, clerk, or other principal officer of the bank, as required by the "Bankruptcy (Scotland) Act 1856," section 25. They further objected to the validity of the said vote, in respect that there was no designation in the mandate of the party at the meetings of creditors on whose sequestrated estates the mandatories were authorised to attend and vote. The affidavit was in the following form:—

"At Glasgow, the 4th day of January 1875 years,—In presence of Joseph Alexander Wright, Esq., one of Her Majesty's Justices of the Peace for the county of Lanark. Compeared John Affleck, banker in Glasgow, and one of the principal officers of the Union Bank of Scotland, incorporated under Act of Parliament, who being solemnly sworn and interrogated, depones, that Henry Jacobsen, sometime grain and commission merchant, Hope Street, Glasgow, and presently residing at Holyrood Lodge, Edinburgh, was at the date of the sequestration of his estates, and still is, justly indebted and resting-owing to the said Union Bank of Scotland the sum of Five hundred and seventy-seven pounds two shillings and fivepence (£577, 2s. 5d.) sterling, conform to state of debt annexed, and extract decree herewith produced. Depones, that no part of said debt has been paid or compensated to the said bank, and that they hold no other person than the bankrupt bound for the debt, and no security for the same∧.—All which is truth, as the deponent shall answer to God.

JNO. AFFLECK, *Deponent.*
JOSEPH A. WRIGHT, *J.P.*

(Written on margin.)

∧ other than arrestment of the sum of £50 in the hands of the Royal Bank of Scotland, being sum in deposit-receipt, dated on or about 3d December 1874, J. in name of the said Henry Jacobsen, A. conform to execution of arrestment, dated 18th December 1874. Further depones, That the deponent and said bank put no value on said arrestment J. in security, so that it cannot be deducted from the said sum of £577, 2s. 5d. A. W., *J.P.*

Mr Robertson objected to, *inter alia*:—

"I. Oath by Frederick Jacobsen, merchant, Bernard Street, Leith, claiming to be ranked and vote for the sum of £590, 7s. 5d.

"The claimant's debt is alleged to be constituted by a decree of the Court of Session, obtained at his instance against the bankrupt, dated 19th and extracted 30th December 1874, for—

"(1) The sum of £438, 5s. 6d. sterling, with £65, 10s. interest from 30th December 1871.

"(2) The sum of £80, with 10s. 11d. of interest from 6th November 1874.

"(3) The sum of £5, 7s. the expense of said decree; and—

"(4) The sum of 14s. the expense of extract.

"The objector objects to this vote on the following grounds:—

"(1) This decree was obtained by the claimant, who is the brother of the bankrupt, in absence of the bankrupt. It was instituted during the dependence of a process of *cessio* raised by the bankrupt, with the sole apparent object of enabling him to obtain sequestration in the event of said summons being dismissed, as was done by the First Division of the Court.

"(2) Neither the oath nor the decree set forth how or for what the sums decerned for became due to the claimant.

"(3) No account or voucher showing the nature, origin, or constitution of either of the two first sums of principal set forth in this claim, were produced in the process in which the decree was obtained, nor is any such produced with the oath.

"(4) The sum of £80 set forth in the claim was stated in the summons, on which the decree followed to be vouched by an acknowledgment of debt granted by the bankrupt within sixty days of bankruptcy.

"(5) The claimant and the bankrupt had joint transactions prior to the said 30th December 1871, which the trustee will have to go carefully into. There is good reason to believe, and the objector avers, that the debts founded on are not truly due."

At the above mentioned meeting it was moved that personal protection should be granted to the bankrupt for six months, and for this motion there voted John Wright, law agent, as mandatory of—

(1) Messrs William T. Dow & Company, Leith, . .	£63	0	7
(2) Peter Drummond, clothier, Edinburgh, . . .	7	6	6
(3) Frederick Jacobsen, merchant, Leith, . . .	590	7	5
(4) Lauder & Hardy, clothiers, Edinburgh, . . .	6	8	3
	£667	2	9

It was also moved that the protection be not renewed. For this motion their voted George F. Scott, S.S.C., mandatory for the Union Bank of Scotland, ... £577 2 5

The first motion was declared to be adopted.

The Union Bank appealed to the Sheriff, who pronounced the following interlocutor:—

"*Edinburgh, 15th January* 1875.—The Sheriff-Substitute having resumed consideration of the foregoing note of appeal, and having heard counsel, for the reasons contained in the note to the interlocutor of this date pronounced in the competition for the office of trustee, Sustains said appeal: Recals the resolution whereby protection was renewed to the bankrupt for six months, said resolution not being supported by a majority in value: Finds the appellants entitled to expenses, which modifies to the sum of £2, 2s., and decerns.

"*Note.*—The result of the vote on the question of protection to the bankrupt, and on the competition for the trusteeship, both depend on Frederick Jacobsen's right to take part in it. The Sheriff-Substitute's opinion is against this creditor's claim, and the practical result of that opinion is to recal the resolution of protection, and to declare Mr Robertson to be trustee.

"It is fixed law that a bill or other document of debt granted by a bankrupt to a conjunct and confident person on the eve of bankruptcy is an insufficient voucher in a question of voting—*Anderson* v. *Guild*, 13th June 1852. The question here is whether the same principle applies to a decree in absence. The debtor was sequestrated on 26th December; the decree in absence on which his brother claims to vote was obtained on 19th December.

"There is, in the case of a decree, the element of judicial authority which is absent in the case of a bill. But that element, if sufficient, could easily be adjected to a bill by taking summary diligence upon it. Though this is a decree, no judicial mind was applied to the creditor's claim; and the danger of collusion by simply abstaining from defending a groundless claim seems quite as great in the case of a decree in absence as in the case of a bill.

"In *Turnbull* v. *M'Naughtan*, 27th June 1850, it was held that a decree *cognitionis causa tantum* was not a sufficient voucher to support a vote. Distinction was made in that respect between such a decree against an estate and a decree in absence against a debtor; and counsel at the discussion in the present case relied upon that distinction. But the question of conjunct and confident did not there arise."

Messrs W. T. Dow & Co. appealed to the First Division.

Argued for them—(1) The addition to the affidavit for the Union Bank which had been allowed to be made by the Sheriff was inept, on the ground that 1, it was not made on oath; 2, it was not signed by the creditor, but only initialed. If that were so it must be disregarded; and then the affidavit itself was bad, because it put no value on a security held by the Bank, viz., an arrestment of the sum of £50 belonging to the bankrupt. It was imperative by section 59 that every security should be valued, or if it were valueless that ought to be stated in the affidavit. (2) The affidavit was sworn by the assistant manager of the Bank, who was not one of the principal officers of the bank in terms of section 25. (3) The decree in absence produced by Frederick Jacobsen was a sufficient voucher. Being the decree of a competent court regularly pronounced, it was not possible to enquire into the grounds on which it was granted, which must be held to have been sufficient. At any rate the only way of getting rid of it was by an action of reduction.

Authorities—*Gibson* v. *Greig*, Dec. 17, 1853, 16 D. 233; *Woodside* v. *Esplin*, July 15, 1847, 9 D. 1486; *M'Ewan* v. *Cleugh*, Dec. 7, 1842, 5 D. 273: *Hay* v. *Durham*, Feb. 5, 1850, 12 D. 676; *Anderson* v. *Monteith*, July 7, 1847, 9 D. 1432; *Campbell* v. *Myles*, May 27, 1853, 15 D. 685; *Turnbull* v. *M'Naughtan*, June 27, 1850, 12 D. 1097.

Argued for the Union Bank—(1) The addition to the affidavit was made in the usual way, and was authenticated by the initials of the person who emitted it, and of the Justice of Peace before whom the affidavit was sworn. It was not necessary that the marginal addition should be signed with the full names of the parties. Even if the amendment had not been made, the affidavit would have been good, as by section 108 the bank's arrestment in security was transferred to the trustee. (2) The assistant manager was an official included in the term "other principal officer" in section 25. (3) The Court intimated that they did not desire any argument on the question whether decree in absence obtained against the bankrupt by a conjunct and confident person was a sufficient voucher of debt.

Authorities—*Millar* v. *Lambert*, June 27, 1848, 10 D. 1419; *Dykes* v. *Paterson*, Dec. 19, 1846, 9 D. 310.

At advising—

LORD PRESIDENT—The question decided by the Sheriff-Substitute refers to the claim of Frederick Jacobsen, who is a brother of the bankrupt, and in regard to that claim I agree with the Sheriff.

It is settled law that a bill or other document of debt granted by a bankrupt to a conjunct and confident person on the eve of bankruptcy is not a good voucher in a question of voting. But the claimant here founds on a decree of this Court for the debt, and he produces an extract of the decree without anything else. I do not think such a decree is better, but in some views worse, as a voucher, than a bill or other document signed by the bankrupt, because in that case there is at least an ac-

knowledgment by the bankrupt that the debt exists, but here there is not even that in respect of the decree founded on, which only shows that the bankrupt did not resist the action in which decree was obtained. The ground of action is in no way indicated. So I think that the decree founded on is as imperfect a voucher of debt as could be.

The claim of Jacobsen being disposed of, the next question refers to the claim of the Union Bank of Scotland, which is said to be liable to serious objection. Several objections are taken, some having regard to technical matters, but all bearing upon the value of the affidavit, which bears to be made by "John Affleck, banker in Glasgow and one of the principal officers of the Union Bank of Scotland" and he signs the deposition. Now it is said he is not one of the principal officers of the bank, and the evidence of that is a mandate by him authorising Mr Scott or Mr Murray to vote in the sequestration of Henry Jacobsen, and in which he signs himself as assistant manager, which shows that there is a manager over him. Whether he is qualified to make the affidavit for the Union Bank depends upon the 25th section of the Bankruptcy Act, which provides—"When the creditor is a corporation, an oath of verity made as aforesaid by the secretary, manager, cashier, clerk or other principal officer of such corporation shall be sufficient, although the person making the same be not a member of such corporation, or in the case of other companies an oath by a partner shall be sufficient." The argument under this section is that in every bank there is one principal officer, and that he is the only person who can make an affidavit of this kind. Now that is too strict an interpretation of the section. There are many officers in a bank who, though all under one head, are nevertheless to be deemed principal officers, for example the cashier and secretary. In the Bank of Scotland the treasurer is the head, but in that case would the secretary not be considered as a principal officer? So one of the principal officers, whether treasurer, secretary, or assistant manager, is what is meant by the section. So I think this objection is not well founded.

The next question is whether the affidavit is good with or without the marginal note, which was added with the authority of the Sheriff, under the provisions of section 51 of the Act, which provides—'When it shall appear to the Sheriff or to the trustee that the oath or claim of any person produced with a view to voting or ranking and drawing a dividend on the sequestration, is not framed in the manner required by this Act, the Sheriff or trustee, as the case may be, shall call upon such person, or his agent or mandatory, to rectify his oath or claim, pointing out to him where it is defective." The object of this provision is to prevent creditors from being rejected on matters of form easily set right. So the Sheriff, finding an arrestment made by the Union Bank, thought it necessary to mention it in the affidavit as a security, and so he directed Mr Affleck to make that addition to his affidavit, which was done in the marginal addition now before us. That marginal note is initialed by the deponent John Affleck, and by the magistrate, Joseph A. Wright. It is said that that marginal note has not the sanction of the deponent's oath. That I think is a bad objection. The addition is inserted in the body of the affidavit by the party making it, and so makes part of the oath, and there is no doubt that Mr Affleck intended that it should be so. Certainly it was not necessary that a new oath should be administered before making the marginal addition, as it is only an explanation. But another question arises. Is the note sufficiently authenticated? I think it is. It is not disputed that the initials were put there by Mr Affleck and Mr Wright, but it is said that the note can't be incorporated in the affidavit if only initialed. But this affidavit is in the same position as any other judicial proceedings in which every day it is customary to authenticate marginal additions by initials, and to enforce a contrary rule would be at once severe and unnecessary. The cases of *Mackenzie* and *Millar*, which were founded on, were in a very different position. In the former case the marginal addition was not authenticated at all, and in the latter case the marginal addition was signed by the party making the affidavit, but not by the magistrate. In these cases also the additions were not made under the 51st section of the statute, but when there was no power of amending the affidavit.

But is this affidavit with the marginal addition a good affidavit under the Act of Parliament? The only objection taken to it is that it does not put a value on the security. Now it must be kept in mind that the first deliverance in the sequestration was on 26th December 1874, and the arrestment by the Union Bank was on 8th December, so that it was of no use to the Bank, being transferred to the trustee by the 108th section of the Act. If there is any difficulty as to securing the funds, arrestment is useful for that purpose, and the provision that arrestment within sixty days shall go to the trustee for behoof of the creditors is not a mere matter of form, but is often of great practical importance. The 108th section provides that "the sequestration shall as at the date thereof be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding executed of the funds or effects of the bankrupt on or after the 60th day prior to the sequestration shall be effectual; and such funds or effects, or the proceeds of such effects if sold, shall be made forthcoming to the trustee."

Now it cannot admit of dispute that the first deliverance in the sequestration has the effect of depriving creditors arresting within sixty days of the benefit of their diligence. The arrestment is transferred to the trustee, and therefore the funds carried by the arrestment are the property of the trustee disburdened of the arrestment in favour of the creditors. So it is impossible to say that the arrestment here is at the date of the affidavit still a security which the creditor is bound to value, and to deduct the value from his claim. The security is no longer a security to him at all, but is for the benefit of the creditors as represented by the trustee. This is no new doctrine, but was laid down in the case of *Allan & Son* v. *Fyffe*, Nov. 28, 1835, 14 S. 80, in which it was held that where arrestments were used within sixty days of a sequestration the arresters were under no obligation to loose their arrestments, and if called on to do so by the trustee might exact such conditions as to expenses as they thought fit. Lord Mackenzie in that case says—"I think the trustee committed a mistake in asking Allan & Son to loose their arrestments. So far from the trustee desiring to have the arrestments loosed, I think he should have desired them to be held as standing good for the benefit of all

concerned. If they were loosed the subjects arrested might be exposed, perhaps, to hazard of different sorts, whereas the benefit of the diligence just accrues to the bankrupt estate if it be not loosed. Besides, it might raise a question, if a creditor consented to loose his arrestments, whether he did not thereby forfeit the benefit of the provisions regarding his expenses. Such expenses are provided to those only who shall be "deprived of the benefit of their respective diligences," and it seems not to be free from doubt, whether a creditor consenting to loose his diligence, did not place himself out of the reach of these words."

That doctrine is precisely applicable to the matter with which we are dealing here, and section 59 is inapplicable to this case. The object of the proceedings there provided for is (1) that the creditor may not claim for any portion of his debt which he gets payment of preferably out of the estate; (2) That the trustee may take him at his word and give him the value, with 20 per cent.

But what would have been the use of doing so here? The trustee could not ask for an assignation of the security which was his already. So the 59th section is inapplicable to an arrestment within sixty days of sequestration.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the note of appeal and proceedings, Affirm the deliverance complained of; refuse the appeal, and remit to the Sheriff to proceed, and decern; finds the appellants liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellant—Dean of Faculty (Clark) Q.C. and W. A. Brown. Agent—John Wright.

Counsel for Respondent—Lancaster and G. S. Dundas. Agents—J. & F. Anderson, W.S.

Saturday, February 27.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

STEPHEN AND OTHERS *v.* AITKEN.

Interdict — Property — Usage — Fishing — Right of Beaching Boats.

Circumstances in which the Court interdicted the proprietor of an estate from preventing the fishermen of a village situated thereon beaching their boats on a particular part of his lands.

Private Act of Parliament—Construction—Boddam Harbour Act 1845 (8 and 9 *Vic.*, c. 25).

Observed (*per* Lord Mure) that Private Acts are to be dealt with on the footing that there is a contract between the individual who obtains the Act and the community for whose benefit, as well as that of the proprietor, the Act must have been supposed to have been passed.

This was an action of suspension and interdict at the instance of William Stephen and others, fishermen in Boddam, Aberdeenshire, as individuals, and also as a committee elected by the fishermen of Boddam for transacting the fishing affairs of the village, against William Aitken of Boddam.

The prayer of the note was as follows:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondent, and all others acting under his authority, from troubling, molesting, or interfering in any way with the complainers and the other fishermen belonging to the village of Boddam in laying up for the winter season, beaching or taking their boats above high water mark at or near the harbour of Boddam, upon the ground coloured blue and green in the plan or sketch herewith produced and referred and marked as No. 7 of process, or otherwise to do in the premises as to your Lordships shall seem proper."

The action was brought in the following circumstances:—The village of Boddam was a fishing village, and the proprietors of the estate of Boddam, on which the village was situated, being desirous to develope and increase the trade, had always done what they could by liberal agreements to induce fishermen to build and settle there. From time immemorial the fishermen had been in use to beach their boats on the ground in dispute. They did not aver that they or any of the fishermen in Boddam had ever obtained from the proprietor, or any of his predecessors, any written grant entitling them to use the ground for beaching their boats, but they maintained that they had the right under their written titles to their houses as explained and defined by immemorial usage. The so-called titles were merely minutes of agreement for leases, entered into from time to time between the fishermen and the successive proprietor of the estate. In 1839 the Earl of Aberdeen acquired by purchase the estate of Boddam, and in 1845, being desirous of improving the harbour, he obtained an Act of Parliament (8 and 9 Vict., c. 25) for that purpose. Clause 7 of the Act was in the following terms:—"And be it enacted, that it shall be lawful for the said Earl and his heirs and successors to demand and receive for every vessel which shall enter within the limits of the said harbour any sum not exceeding the several rates and duties on tonnage specified in the schedule (A) hereunto annexed."

The schedule (A) here referred to was *inter alia* as follows:—

For herring boats:—

For all herring boats engaged at the fishery at Boddam, for the period of their fishing season, to be paid at the commencement of the fishery, and that in lieu of all tonnage duties payable for such herring boats, ...	£0 5 0
For all other boats under 25 tons, coming into said harbour, for any purpose whatever, . .	0 0 7
And all above 25 tons to be charged the same as coasting vessels,	
For all boats laid up at Boddam for the winter season, . .	0 5 0

The payment of 5s. for beaching boats specified in this schedule was never levied by the Earl of Aberdeen. In 1865 the respondent purchased the estate from the Earl of Aberdeen, and thereafter