Friday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

ROY'S TRUSTEE *v.* COLVILLE & DRYSDALE.

Bankruptcy—Illegal Preference—Act 1696, *cap.* 5—*Security Granted in Exchange for Another Security—Novum Debitum—Bankruptcy* (*Scotland*) *Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 6.

Where the holder of a security surrenders it and takes from the debtor a new security over different subjects, this transaction, even although it takes place within sixty days of the bankruptcy of the debtor, is not reducible under the Act 1696, cap. 5.

In consideration of a loan, A granted to B a disposition and assignation of his *pro indiviso* right in a trust estate which had vested in him but was subject to a liferent, and particularly conveyed his rights in heritable subjects at X, which formed part of the trust estate. This disposition was not recorded. Subsequently, with the knowledge and consent of B, who acted as law-agent in the transaction, A granted a disposition and assignation of his rights in the said trust estate to C, which was recorded in the Register of Sasines. On the expiry of the liferent the trust estate was realised, the heritable subjects at X were assigned to another beneficiary, and A obtained certain other heritable subjects at Y. B, in the knowledge of this realisation, did not oppose it, but obtained from A an *ex facie* absolute disposition of the Y subjects. The former disposition and assignation was not discharged, and remained in B's hands. The disposition of the Y subjects was recorded in the Register of Sasines, but within sixty days of the date of recording A became bankrupt. *Held* (*aff.* judgment of Lord Low, Ordinary) that the disposition of the Y subjects was not reducible under the Act 1696, c. 5, and sec. 6 of the Bankruptcy Act 1856.

The Act 1696, c. 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 his creditor, either for his satisfaction or farder security, in preference to other creditors, to be null and void."

The Bankruptcy Act 1856 enacts (sec. 6)—"The date of a deed under this Act, or under the Act 1696, c. 5, shall be the date of the recording of the sasine, where sasine is requisite, and in other cases, of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall in the particular case be requisite for rendering such deed completely effectual."

On 31st July 1896 Charles Roy, cattle dealer in Crieff, in consideration of a loan of £100 from Messrs Colville & Drysdale, solicitors there, granted in their favour a disposition and assignation by which he assigned to them "the rights of succession, shares, claims, benefits, and interests" belonging to him, under a trust-disposition and settlement granted by his deceased father Alexander Roy, and disponed his rights and interest in a certain tenement in High Street, Crieff, which formed part of the trust estate, and which was particularly described. The deed contained a consent to registration for preservation, but was never recorded. By arrangement between the parties the £100 was not actually advanced until June 1897.

The trust-disposition and settlement of Alexander Roy, above referred to, conveyed his whole estates to his wife in liferent, and to his sons William Roy and the said Charles Roy, equally between them in fee. By a codicil he declared that William Roy should have the right of acquiring the subjects in High Street, Crieff, at the price of £1000.

In November 1897 Charles Roy applied to Messrs Colville & Drysdale for a further advance. This they refused, but obtained for him a loan of £300 from a client of theirs, Dr Stuart. In security of this advance Roy granted to Dr Stuart a disposition and assignation, drawn by Messrs Colville & Drysdale, by which he assigned his right under his father's settlement, and particularly conveyed, subject to the rights of his mother and brother, the subjects in High Street, Crieff, and also a cottage situated next to the property of the North of Scotland Bank, Crieff (hereinafter referred to as the Bank Place subjects). This deed contained a consent to registration for preservation, and was recorded in the Register of Sasines on 18th November 1897.

In March 1899, in consequence of the death of Mrs Roy, the liferentrix, Alexander Roy's estate came to be realised and divided between his sons. By the terms of the division William Roy acquired the High Street subjects and Charles Roy the Bank Place subjects. On this realisation the debt to Dr Stuart was paid and the disposition in his favour discharged.

On 10th July 1899 Charles Roy executed a disposition, by which "for various good and onerous causes and considerations" he disponed to Messrs Colville & Drysdale the Bank Place subjects. This disposition was not recorded until 5th October 1900. The prior disposition and assignation held by Messrs Colville & Drysdale was not cancelled or given up.

Meanwhile Charles Roy's affairs had become embarrassed, and on 14th November 1900 his estates were sequestrated, and George Rorie, C.A., Perth, was appointed trustee.

The trustee then brought the present action against Messrs Colville & Drysdale, concluding for reduction of Charles Roy's disposition to them of the Bank Place subjects.

In this action the pursuers pleaded—"(1) The disposition under reduction, in so far as completed, having been voluntarily

granted to the defenders in satisfaction or security of a prior debt within sixty days of bankruptcy, to the prejudice of the other lawful creditors of the bankrupt, is illegal, and falls to be reduced in virtue of the Act 1696, c. 5, and 19 and 20 Vict. c. 79."

The defenders pleaded, *inter alia*—"(2) The disposition referred to not having been granted voluntarily in satisfaction or security of a prior debt within sixty days of bankruptcy, is not subject to reduction under the Act 1696, c. 5. (3) The disposition under reduction having been granted in respect of obligations immediately undertaken, and having been delivered to these defenders of the date it bears, it is not subject to reduction. (5) The transaction in question having been a *novum debitum*, the pursuer is not entitled to decree."

Proof was allowed and led.

With regard to the circumstances under which the disposition under reduction was obtained, Mr Colville, a partner of the defenders' firm, deponed—"In order to permit of the estate being divided it was necessary for Charles Roy, the bankrupt, to repay the loan of £300 to Dr Stuart, and that was done on 31st May 1899. The money was paid to me by Alexander Macdonald in exchange for a reconveyance by Dr Stuart. At that division of his father's estate Charles Roy, the bankrupt, bought his brother William's *pro indiviso* half of the heritable subjects in Bank Place. These subjects had been left to the two brothers equally. Charles Roy bought the one-half at the price of £200. That transaction was carried through by Mr Macdonald. The bankrupt asked me to obtain a loan over that property for him, and I arranged a loan, I think for £264, two-thirds of the property. (Q) At that time did you make an arrangement with the bankrupt to renew the £100 loan that you had given?—(A) At the date when the £300 was called up I arranged with him to renew the loan of £100 on the security of the reversion of the Bank Place property. (Q) When the division of the father's estate took place, of course your assignation of the expectancy would have stood in the way?—(A) Yes. (Q) And in substitution for that did you take the security over the heritable property?—(A) I did. I told the bankrupt that he must either repay the £100 or give me security in substitution, and the conveyance sought to be reduced in this case, the reversion of the Bank Place property, was in substitution of the assignation of the expectancy. The loan was allowed to continue."

Charles Roy deponed—"I saw Mr Colville about the time of my mother's death or shortly afterwards. (Q) What passed with reference to the £300 loan and the £100 which you had?—(A) He wished the money paid up. I paid him the £300 bond up, and I wished him to leave the £100 over and I would be in a position perhaps shortly to pay it up, which Mr Colville did, and the £300 was paid by Mr Macdonald out of my share in my father's estate. The arrangement as regards the £100 was that it was to lie over, and I was to pay Mr Colville as soon as possible. I gave him the Bank Place property as security. (Q) Did Mr Colville stipulate that you should grant some new security?—(A) Yes, certainly he did. (Q) And the security you did grant was the Bank Place property?—(A) Yes." . . .

On 30th July 1902 the Lord Ordinary (Low) pronounced an interlocutor whereby he assoilzied the defenders from the conclusions of the action.

Opinion.—"The material facts in this case are as follows:—

"In July 1896 the bankrupt Roy, who was then carrying on an apparently successful business as a cattle-dealer, asked Messrs Colville & Drysdale (whom I shall refer to as the defenders) to advance him a hundred pounds for the purposes of his business.

"The defenders agreed to make the advance on receiving from the bankrupt a disposition and assignation of his interest in his father's estate. The latter had left a settlement whereby he disponed his estate (which seems to have consisted chiefly of house property) to his wife in liferent and his two sons, the bankrupt and William Roy, equally between them in fee.

"The bankrupt accordingly granted to the defenders the disposition and assignation of 31st July 1896. The money was not actually advanced until the following June. The reason why the security was granted so long before the advance was made was that the bankrupt when he applied to the defenders for assistance did not know when he would actually require the money, but he wished to have it at call so that he might uplift it at any moment, and it seems to have been a mere accident that he did not in fact require the money until nearly a year after the security was granted.

"Towards the end of 1897 the bankrupt required a further advance of £300, and he again applied to the defenders. They declined to advance any more money themselves, but arranged that the loan should be given by a client of theirs, Dr Stuart.

"The security given to Dr Stuart was a general disposition and assignation of the bankrupt's rights in his father's estate, and it also contained (differing in this respect from the disposition and assignation in the defenders' favour) a special disposition of certain heritable subjects under reservation of the rights of the widow and of the bankrupt's brother. This was a warrant for registration (which the defenders' security did not contain), and accordingly the disposition to Dr Stuart was recorded in the Register of Sasines.

"Dr Stuart's security thus obtained priority (so far, at all events, as the house property was concerned) over the defenders' security, but the latter, when they carried out the transaction, were satisfied that the bankrupt's interest in his father's estate was amply sufficient (which it seems in fact to have been) to meet both advances.

"Mrs Roy, the widow, died about March 1899, and the estate then became divisible between the bankrupt and his brother, and it became necessary for the bankrupt

to arrange for the loans which he had obtained upon the security of his interest in the estate. He intimated to the defenders that he was prepared to pay the amount due to Dr Stuart, but asked them to allow the loan which they had made to continue. They agreed to do so upon the condition that the bankrupt should give them security, and accordingly he granted the disposition under reduction of certain heritable subjects which had belonged to his father, and to which by an arrangement with his brother be had acquired full right.

"The defenders did not record the disposition at the time, because they expected that the bankrupt would repay the loan shortly, and they did not want to incur unnecessary expense. Further, the defenders did not hand back to the bankrupt or formally cancel the disposition in security which they held. They seem to have regarded it as being superseded by the new security, and as being no longer of any importance. The defenders and the bankrupt seem to have had full confidence in each other, and there is no doubt that the whole transactions between them were conducted in perfect good faith.

"In October 1900 the bankrupt became insolvent, and he employed the defenders to prepare a trust-deed for behoof of his creditors. That deed was executed upon the 4th of October, but it was found to be impossible to wind up the bankrupt's affairs under the trust, and his estates were shortly afterwards sequestrated under the Bankruptcy Acts. The defenders recorded the disposition sought to be reduced on the 5th of October.

"In these circumstances the question is, whether the disposition is reducible under the Act 1696, c. 5.

"It was argued for the pursuer that the disposition and assignation granted to the defenders in 1896 was worthless as a security, being defeasible by the bankrupt; that accordingly the defenders never had a valid security until they obtained the disposition of 1900; that that was security for the prior debt incurred in 1897; and that as it was not completed by registration until bankruptcy, it was reducible under the Act.

"I am unable to give effect to that view. I think that by the disposition and assignation the defenders acquired, in a question with the bankrupt, right to the beneficial interest in his father's estate. No doubt the bankrupt might have given to a third party a right which by registration would be preferable to that of the defenders, as he did in the case of Dr Stuart. But except in a question with a third party who had in good faith acquired such a preferable right, I think that the defenders' security was quite good, and I apprehend that it might have been enforced by adjudication.

"Now, when Mrs Roy died and the estate became divisible, the period of payment of the loan arrived, or at least the bankrupt had then either to repay the loan or to suffer the defenders to enforce their security, or to enter into a new arrangement with them. He adopted the latter course, and offered that if the defenders would renew the loan he would give them in return as security a disposition of property to which he had then acquired full right. The defenders accepted that offer, the loan was renewed, and the disposition granted in security thereof. I do not think that that is a transaction which is struck at by the Act. The disposition was not granted in security of the prior loan but of the loan which was made of new in consideration of the disposition being immediately granted.

"I shall accordingly assoilzie the defenders."

The pursuer reclaimed, and argued—Under the provisions of section 6 of the Bankruptcy Act 1856 the date of a security was the date at which it was completed, and therefore the disposition under reduction must be held to have been granted by Roy within sixty days of his bankruptcy. Admitting that it would have been good if it had been granted for a debt instantly contracted, although not recorded till within the sixty days, there was no new debt contracted by Roy to the defender at the date when the disposition was granted. No doubt the defenders might at that time have called up their prior debt and granted a new loan, but they had not done so. On the most favourable view for them, the subsisting loan was then renewed, but a renewal of a subsisting loan was not a new loan. There was no authority for the contention that one security could be exchanged for another within sixty days of bankruptcy without making the transaction challengeable under the Act 1696. Even if that contention was admitted in the case where the prior security was as complete and specific as the new one, that was not the case here. The original disposition and assignation was not a good security, it was merely an obligation to give security. It was merely a personal obligation of the debtor. It did not vest the creditor with any real right to any specific subjects. Even assuming, without admitting, that it could have been made into a real right over the High Street subjects by some conveyancing expedient, that could also have been done however general the security right was, even if it had been merely a general assignation of all Charles Roy might possess. Though it might not be possible to reconcile all the cases under the Act 1696, yet the general rule was established that a mere obligation to give security, left the security, when granted, open to challenge, whereas security over a specific subject, although it might require to be completed by some formal act, such as registration or intimation, was good. The disposition and assignation here fell under the former class—Bell's Coms., ii., 211; *Mansfield* v. *Walker's Trustee*, June 28, 1833, 11 S. 813, *affd.* in H. L. as *Inglis* v. *Mansfield*, April 10, 1835, 1 S. & M'L. 203; *Moncreiff* v. *Union Bank*, December 16, 1851, 14 D. 200; *Taylor* v. *Farrie*, March 8, 1855, 17 D. 639; *Lindsay* (*Miller's Trustee*) v. *Shield*, March 19, 1862, 24 D. 821; *Stiven*

v. *Scott & Simson*, June 30, 1871, 9 Macph. 923; *Gourlay* v. *Hodge*, June 2, 1875, 2 R. 738, 12 S.L.R. 481; *Gourlay* v. *Mackie*, January 27, 1887, 14 R. 403, 24 S.L.R. 295. Another test, which could be applied in most of the above cases, was whether the debtor could or could not have honestly disposed of the subjects after the original obligation to give security. If he could not, the fulfilment of that obligation by a specific conveyance within the sixty days was not challengeable; if he could, any further deed was challengeable. That principle had been applied in another branch of bankruptcy law in *Heritable Reversionary Company* v. *Millar* (*M'Kay's Trustee*), August 9, 1892, 19 R. (H.L.) 43, 30 S.L.R. 13. Here the disposition and assignation left Roy in a position to dispose of his share in his father's trust estate, and if he had done so he would not thereby have committed any fraud on the defenders.

Argued for the respondent—The disposition was granted for a new debt, in respect that new consideration was granted for it. That consideration was that the defenders allowed the debtor's father's estate to be realised, instead of insisting on their debt being paid. The bankrupt's estate was thereby *lucratus*. Alternatively, this was simply a case of exchanging one security for another—both being equally good. To such a transaction the Act of 1696 did not apply, because the creditor obtained no new or additional right at the expense of the general creditors of the bankrupt. Assuming that both securities were equally valid, and both sufficient to secure the debt, the unsecured creditors neither lost nor gained by the exchange, and therefore had no title to object to it. That was the present case. The original disposition and assignation was a good security. The Lord Ordinary was mistaken in saying that it contained no special disposition of heritable subjects or consent to registration. It contained both. No doubt it required to be completed. But it contained a disposition of the High Street subjects, on which the creditor could have made up a proper title either by an action of adjudication or by expeding and recording a notarial instrument. That is to say, the creditor was placed in a position in which he could, without the aid of the debtor, have completed a security over a specific subject. In such circumstances it was settled that the Act 1696 did not apply — *Gibson* v. *Forbes*, July 9, 1833, 11 S. 916; *Smith* v. *Smyth*, February 3, 1889, 16 R. 392, *per* Lord Young, 26 S.L.R. 301; *Scottish Provident Institution* v. *Cohen*, November 20, 1888, 16 R. 112, 26 S.L.R. 73; *Guild* (*Kettle & Company's Trustee*) v. *Young*, November 7, 1884, 22 S.L.R. 520. Although it was true that the disposition and assignation was not formally discharged when the new disposition was granted, still it became mere waste paper, because the defenders allowed Roy, in dividing the trust estate, to convey away the subjects over which the security was granted.

At advising—

Lord President—The question in this case is whether the pursuer has established grounds for reducing a disposition, dated 10th July 1899, and recorded in the Division of the General Register of Sasines applicable to the county of Perth on 5th October 1900, by which Charles Roy, the bankrupt, assigned and disponed to the defenders Charles Eliezer Colville and Swanston Drysdale, solicitors in Crieff, and the survivor of them, and the heir of the last survivor, a piece of ground in Crieff with a cottage, stable, and other conveniences thereon, as having been granted by Charles Roy voluntarily in satisfaction or security of a prior debt, within sixty days of bankruptcy, when he was insolvent, so as to fall within the provisions of the statute 1696, cap. 5.

In July 1896, Roy, who was a cattle dealer in Crieff, requested Messrs Colville & Drysdale to lend to him £100 for the purposes of his business, and they agreed to do so upon receiving from him a disposition and assignation of his interest in his father's estate, which interest had already vested in him, and he accordingly granted to the defenders a disposition and assignation, dated 31st July 1896, in consideration of their agreeing to make this advance. The money was not actually paid until the month of June 1897.

In the latter part of that year Roy desired a further advance of £300 from the defenders, but they declined to make it, and arranged that it should be made by Dr Stuart, a client of theirs, upon the security of a disposition and assignation of Roy's rights in his father's estate. This disposition and assignation in favour of Dr Stuart was recorded in the Register of Sasines, and the bankrupt's interest in his father's estate seems to have been quite sufficient to meet both the loan of £100 and the loan of £300. Roy's mother died about March 1899, and his father's estate then became divisible between him and a brother. Roy on 31st May 1899 repaid to Dr Stuart the £300 which he had borrowed from him, in exchange for a reconveyance by Dr Stuart, and the defenders at Roy's request agreed to renew the loan of £100 on the security of the reversion of certain property which belonged to him. He thereupon granted to them the disposition now sought to be reduced. It is dated 10th July 1899, and was recorded on 5th October 1900. The reconveyance or renunciation of the prior security by Dr Stuart to Roy, and the granting of the new security to the present defenders were carried out simultaneously, and the disposition sought to be reduced was delivered on the date it bears, and was thereafter held by the defenders as their writ.

The contention of the pursuer is that the disposition and assignation of 1896 is of no value as a security because it was liable to be defeated by the bankrupt, and that consequently the defenders never had a good security until they got the disposition of 10th July 1899, which they maintain was a security for a prior debt, and not having been completed by registration until after

bankruptcy, was, they allege, reducible under the Act 1696, cap. 5.

The important question thus comes to be, whether the disposition of 10th July 1899 was granted in security or satisfaction of a prior debt, in which case it would be reducible, or whether it was granted in respect of some new or additional consideration, and I agree with the Lord Ordinary in thinking that the latter is the true view. In consequence of the death of Mrs Roy the estate had become divisible, and if the bankrupt did not repay the loan which he had obtained from the defenders they would have been entitled to realise or enforce their security. Instead, however, of leaving the defenders to do this, Roy entered into a fresh arrangement with them, that in consideration of their renewing or extending the period of the loan he would grant to them a disposition of certain specific property to which, in consequence of his mother's death, he had acquired an unburdened right. The defenders agreed to this and the arrangement was carried out. The arrangement appears to me to have been entered into in consequence of new and adequate consideration, and I therefore concur with the Lord Ordinary in thinking that the disposition was not granted in security of the prior loan but as the counterpart of the consideration stipulated under the new arrangement.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD ADAM concurred.

LORD M'LAREN — This case has raised considerable difficulty in my mind, and I have come to be satisfied that this is a good security, chiefly on the ground that when the original security for a debt is given up and a new and equivalent security is accepted in its place it may be said that the latter is a security for a new debt, or at least that it is not a security or satisfaction of a prior debt. In a proper case of a substituted security the consideration for the security is not simply the old debt but that debt together with the surrender of the original security. In the case of a bank which held securities for an overdraft consenting to the debtor realising these on condition that the price should be applied in the purchase of other securities to be held by the bank, I think it would be a complete misapprehension of the principle and provisions of the Act of 1696, and of the Bankruptcy Act 1856, to affirm that the creditor had thereby obtained satisfaction or further security for a prior debt. Applying this distinction to the facts of the present case, I begin by observing that the respondents had originally a good security over the borrower's interest in his father's trust estate. When in consequence of the death of the borrower's mother that estate came to be realised, it was in the power of the lender to object to that realisation, or at least to insist on being paid out of the first proceeds of the estate. He assented to the realisation of the trust estate upon an undertaking by the borrower that in place of the general right over the borrower's share in his father's estate he should receive a specific security over certain heritable property. On the best consideration I have been able to give to the case I have come to the conclusion that the creditor here did not surrender his rights over the general estate except upon the condition of obtaining the specific security which he in fact obtained, and I therefore agree with your Lordship that the case does not fall under the statutory regulations annulling securities for prior debts granted within sixty days of the debtor's bankruptcy.

LORD KINNEAR—I am of the same opinion. I agree with Lord M'Laren that it is not quite accurate to say that the security which is here attacked was given for a new loan. It would be more accurate to say that it was the substitution of a new for an old security, the debt remaining the same. It was a new transaction, the true consideration for which was not the discharge of the original debt but the surrender of the original security. It was an arrangement to leave the loan standing but change the security.

That was a perfectly honest transaction, and could not prejudice the other creditors, and it does not in my opinion fall within the words of the statute because it was not "a further security," and the consideration for it was not the existence of a prior debt.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. K. Mackenzie, K.C.—Hunter. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defenders and Respondents—Wilson, K.C.—D. Anderson. Agents—Alex. Campbell & Son, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

STEVENSON *v.* HUNTER.

Public-House—Appeal to Quarter Sessions — New Certificate — Licensed Premises Rebuilt — Publicans' Certificates (Scotland) Act 1876 (39 *and* 40 *Vict. cap.* 26), *secs.* 4 *and* 5.

The Publicans' Certificates (Scotland) Act 1876 provides (section 5) that the decision of the magistrates in refusing any application for a new certificate shall be final and not subject to appeal to Quarter Sessions. By section 4 a "new certificate" is defined as meaning "a certificate granted" . . . "to any person in respect of any premises which are not certificated at the time of the application for such grant, but shall not apply to the rebuilding of certificated premises which have been destroyed by fire, tempest, or other