possession of the vessel, and the appellants having retired the bills from the bank, the vessel was again registered in the name of the appellants; (8) that the appellants then sold the vessel without prejudice to the rights of parties, and the proceeds of the sale (£4457, 18s. 2d.) were received and held by the appellants—who paid all expense at Bahia—and fall to be dealt with as a *surrogatum* for the vessel; (9) that the bill No. 7/1 of process, drawn by Captain Graham, was granted in favour of Messrs Miller, Brothers, & Co. of Paramaribo, who indorsed it to the respondents (pursuers in the Sheriff-court); (10) that at the date of these repairs the appellants were in possession, and had control of the vessel, and were in the position of being the employers of the master, and responsible for his legal contractions for the ship: Therefore recal the interlocutors complained of, and of new repel the defences, and decern against the appellants (defenders) in terms of the conclusions of the libel," &c.

Counsel for Pursuers—Dean of Faculty (Watson)—Asher. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Defenders—Balfour—Macintosh. Agents—J. & R. D. Ross, W.S.

Tuesday, November 16.

SECOND DIVISION.

[Lord Young.

ROSS, SKOLFIELD, & CO. *v.* STATE LINE STEAMSHIP CO. (LIMITED.)

Principal and Agent—Company—Manager, Powers of—Bill.

The sub-agents of a company accepted two bills drawn upon them by the managers of the company in anticipation of the freight of one of the company's steamers. The bills passed through the managers' books, were discounted by them, and were retired at maturity by the sub-agents. The managers ceased to hold that office during the currency of the said bills, and were sequestrated the day after they came to maturity, and the sub-agents brought an action against the company for the amount due to them in respect of the above transaction. The Court *assoilzied* the defenders, in respect that the pursuers had failed to prove (1) that the bills were granted by the managers under the powers conferred upon them by the terms of their appointment; (2) that the managers had, subsequent to their appointment, received from the company authority, either direct or implied, to borrow money; and (3) that the proceeds of the discount of the bills had been applied for the behoof of the company.

This was an action raised by Ross, Skolfield, & Company, shipping agents in Liverpool, against the State Line Steamship Company (Limited). The amount sued for was £3731, 19s. 6d. (being a sum of £4000 less £268, 0s. 6d. admitted to be standing at the defenders' credit in the pursuers' books.) The circumstances under which the case arose were as follows:—The State Line Company was established for the conveyance of goods (1) between Glasgow and New York; (2) between Liverpool and New Orleans—the registered office of the company being at 65 Great Clyde Street, Glasgow. Under the powers conferred on them by their Articles of Association, the State Line directors, in October 1872, appointed Lewis T. Merrow & Company, merchants, Glasgow, to be managers of the company. The leading terms of that appointment were as follows:—"*First.* Messrs Lewis T. Merrow & Coy. are hereby appointed the principal agents or managers of the company's trading business and affairs both at home and abroad, the whole of which shall be under their management, they being bound, however, to carry out any instructions which the directors of the company may at any time see fit to give in the conduct of the business. *Second,* The managers shall be bound to devote their whole time and attention to the company's business, and on no account shall they be entitled or allowed to engage in other business, or to undertake other employment of any kind whatever, which can interfere with or be detrimental to the company. *Third,* The managers shall be entitled to a commission at the rate of ten per cent. on the gross freights, passage-money, or other earnings of the ships of the company, the managers paying all expenses incident to the management of the business of the company or its affairs, including the maintenance of the different agencies both at home and abroad, and travelling and advertising expenses, and guaranteeing the due payment of all freights, passage money, or other earnings. *Fourth,* The managers shall provide themselves with suitable offices in Glasgow, and it shall be imperative on them to keep a proper set of books, showing the whole of their transactions, and all sums received or disbursed by them, which books shall be open at all times to the inspection of the directors of the company, or any party employed by them to examine the same, and shall form the property of the company. The directors shall be entitled to make such provision for the control of the finances of the company as they see fit."

The pursuers were, under the powers thus conferred on Merrow & Co., appointed by them agents at Liverpool in 1872 "for the State Line Co.," as they alleged in their condescendence; and they further averred that "it was the pursuers' duty as agents aforesaid to attend to the loading and unloading of the company's steamers at Liverpool, to collect the homeward freight, to pay such portion of the ships' disbursements as they might be directed by the managers to do, and generally to attend to the company's business in Liverpool. Regularly after each voyage the pursuers rendered their accounts to the company's managers in Glasgow, and accounted to them for the balances of money arising thereon, and all their business with the directors was transacted through the managers Messrs Merrow & Company, by whom all instructions were communicated to the pursuers, and to whom also the pursuers wrote all letters relating to the company's affairs."

This the State Line Company denied, and averred that Merrow & Co. did not carry on the whole business of the company, and that they

simply managed the trading business, subject to the control of the Board.

From the month of April 1873 a system of bills was carried on which led ultimately to the present action. The mode in which this was done was by Merrow & Co. drawing in Glasgow on the pursuers in Liverpool "on account of freight per ss.," and bills so drawn were accepted by the pursuers, discounted by Merrow & Co., and retired at maturity by the pursuers out of State Line freights collected by them in the interval. Prior to the two bills, the proceeds of which formed the subject of the action, there were in all, between April 2, 1873 and October 1874, twenty-one of such bills, amounting to £49,050, of which £13,800 were drawn against the freights of four voyages of the ss. "State of Alabama," one of the company's vessels. All these bills were retired by the pursuers at maturity, as above described. On 30th September 1874 Merrow & Co. intimated to the pursuers the arrival at New Orleans of the 'State of Alabama,' and advised them of their intention to draw upon them as they had done before. Accordingly the pursuers, on October 2, 1874, accepted two bills in identical terms, each for £2000, as follows:—

"*Glasgow*, 1*st October* 1874.

"£2000, 0s. 0d. stg.

"Sixty days after sight pay to our order the sum of Two thousand pounds sterling on a/c of freight, per ss. 'State of Alabama.'

"Lewis T. Merrow & Co.

"To Messrs Ross, Skolfield, & Co.,
9 Chapel Street, Liverpool."

Merrow & Co. ceased to be managers on October 19, 1874, and were sequestrated on December 5 of the same year. The pursuers retired the bills in question at maturity on 4th December 1874, but the company repudiated liability for them, and refused to allow the pursuers credit for the amount, and this action was accordingly raised. The summons, as originally laid, was for payment of £3731, 19s. 6d., "being the amount contained in two bills, each for the sum of £2000," after deduction of the sum of £268, 0s. 6d., but upon a joint-minute it was amended to the effect of striking out all reference to the bills. By the same minute the parties consented that the Court should determine whether or not the bills were drawn by Merrow & Co. with the authority and on behalf of the defenders.

The pursuers pleaded—"1. The pursuers are entitled to decree as concluded, in respect that the bills sued on were drawn by the defenders' managers in the execution of their business, and with their authority, and that the said bills were and are the bills of the defenders. 2. The pursuers are entitled to decree, in respect that (1) The said bills were drawn in pursuance of the course of dealing above condescended on; (2) That the actings of their managers in drawing bills in their own name were homologated and adopted by the defenders; and (3) That the proceeds of the discount of the said bills were applied to the purposes of the defenders."

The defenders pleaded—"The defenders should be assoilzied, in respect the bills sued on were not granted with their authority, or on their behalf, and the proceeds were not received by them."

A proof was led, the result of which sufficiently appears from the opinion of the Judges.

The Lord Ordinary pronounced the following interlocutor:—

"9*th June* 1875.—The Lord Ordinary having heard counsel for the parties," &c.—"Sustains the amendments now made by the pursuers, in terms of the minute No. 18 of process: Finds that the two bills mentioned in the 5th article of the condescendence were not drawn by Messrs Lewis T. Merrow and Company with the authority or on behalf of the defenders: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses."

His Lordship also delivered tbe following opinion:—

"It was desirous that the parties in this case should come to some arrangement, if possible, because my judgment is very much against my inclination. I am of opinion upon the evidence that it has not been proved that these bills were drawn with the authority and on behalf of the defenders. In the management of a company the authority to draw or accept bills is not an authority to be implied; it is not usually possessed, and it requires to be conferred. It does not arise from the office. Now, Mr Merrow himself, who gave very candid evidence, acknowledged that there was no authority conferred upon him. It is said that in pursuit of an effort, in which they ultimately failed, to carry on the business of the States Line Company without applying to the directors for money, Merrow & Co. drew and accepted bills; but there was no authority to do so. It is further said that there was no secret about it, that is to say, that the bills were entered in the books which were kept for the company's business by himself and his partner as managers, but Mr Merrow could not say that they were aware of the fact, and he certainly had never mentioned it to them. Two of the directors were called, one of whom was actually examined, and the other dismissed without examination, being held as concurring, and they were corroborated by the secretary, that they were totally ignorant of such a thing. I cannot therefore hold that there was authority; and even had there been authority to draw bills, or to accept bills, in the one case for money due to the company, and in the other for money due by the company, I should not by any means have held that that imported authority to anticipate freights. I cannot take the view that was urged by Mr Smith, that the managers were quite at liberty to take as much pre-payment of freights to be earned hereafter as any agent in Liverpool or elsewhere was willing to give him. It is a serious matter to pledge the earnings of the company's ships for the future, and put the money into the hands of the managers. That is a trust which it is for every company to determine for itself whether it will repose in the managers or not. It does not affect the question that the managers did so, and that the directors by a scrutiny of their books might have ascertained it.—I mean the books kept by them as managers of the Company, because the information recorded in those books is the managers' information, and not necessarily the knowledge of their employers, unless it was their duty, which I cannot hold it was, to make a searching examination of the books in order to see whether there was not evidence of some irregularity, which they had

had no reason whatever to suspect. Therefore, though for all purposes I regard these as the books of the Company itself, as much so as the books of any company kept by the manager and under his superintendence, I do not hold that the directors are to be held as sanctioning this practice, which the managers had addicted themselves to, of drawing bills, not only for money due, but also in anticipation of money to be earned. Therefore, though firmly believing that the bills were accepted, and the money paid, in the honest belief entertained by the pursuers that the money was for the accommodation of the States Line Company, the managers having power to take advances on account of the Company,—while thoroughly believing that that was their state of mind, and that their case was a hard one—I cannot upon the evidence arrive at the conclusion that the practice was sanctioned by the Company so as to bind them; and my judgment will be to that effect, and assoilzieing the defenders from the conclusions of the present action, with expenses."

The pursuers reclaimed, and argued—(1) Merry & Co. did nothing to exceed their powers in drawing to account of freight, which was only a mode of getting in the money which under their appointment they had to do, and the pursuers were in paying thus to them only doing what they were bound to do, viz., remitting the freights. Had they done so in cash, that would certainly have discharged them; so also should this mode of remittance. (2) The course of dealing evinced by the numerous bills in similar transactions extending over a period of eighteen months—bills which were known, or at least should have been known, to the directors had they properly investigated the company's affairs. (3) The application of the proceeds of these discounted bills was for the behoof and benefit of the State Line Company, and they having been thus obtaining the solid advantage, must now recoup the pursuers.

Authorities quoted—*London and Mediterranean Bank*, 3 L. R. Ch. 651; *Turnbull* v. *M'Kie*, Feb. 26, 1822, 1 S. 393; Smith's Mercantile Law, p. 120; *Longharan*, 15 Vesey 432 (and Lord Eldon there, at p. 435); *Overend*, 4 L. R. Ch. 460; *Foley* v. *Hill and Others*, 2 Clark & Finnelly, 28; *Eyre* v. *Burmister*, De G. J. & S. Ch. 435, 33 L. J. Ch. 6.

The defenders argued—The only ground upon which they could be found liable was that there had been a course of dealing such as to imply authority, but there was nothing in the position occupied by Merrow & Co. to lead to the inference that they enjoyed a delegated authority such as to entitle them to draw to account of freight. On the contrary, the actual facts were—(1) Merrow & Co. were due large sums to the company on account of unpaid calls on shares held by them. (2) Being such large shareholders, they did not want calls made any further. Hence the financing so as to enable them to dispose of the shares, and yet not to lead to further calls.

Authorities—*North British Railway Co.* v. *Ayr Iron Co.*, 15 D. 782; Smith's Mercantile Law, p. 127.

At advising—

LORD JUSTICE-CLERK — As originally framed, this action was laid upon two bills of exchange. When the case came to be tried by the Lord Ordinary, the reference to the bills in the summons was struck out, and it became an action simply for payment of money. The question tried before the Lord Ordinary was whether or not the bills mentioned in article 5 of the condescendence were drawn by Merrow & Co., with the authority or on behalf of the defenders; and from the language of the joint minute I should not have gathered that any other question was in the contemplation of the parties who signed it. But the real question is, whether Merrow & Co. could anticipate an expected asset of the States Line Company in the shape of freight, and give a receipt for it. If they could do so, it is of no moment how payment was made, whether by a draft on the agents accepted by them, or by a remit of money.

The affirmative of this question can only be maintained on the grounds—*first*, that it was within the province of Merrow & Co. to anticipate freight from the nature of their employment; *secondly*, if that be not sufficient, that it was warranted by the course of dealing sanctioned by the States Line Company; and *thirdly*, if neither of these grounds avail, that it was the fact that the money was applied to company purposes, and therefore that the company received substantially payment of the freight.

On the first of these questions, viz., whether Merrow & Co. had right to anticipate freight, I am very clearly of opinion that in the case of an ordinary agent no such powers can exist. This was nothing but borrowing money on the security of expected freight from the person into whose hands the freight would come, and that is a power which an ordinary agent does not possess. But it was maintained for the pursuers, and to some extent not without soundness, that Merrow & Co. were not ordinary agents, and that the manager of a joint stock company, who has the whole charge of a business, who is not only entitled to manage to the exclusion of any other member of the company, but is also liable for the fund to be realised in the course of his administration, does not stand in the same position as an ordinary agent. In this case Merrow & Co. were appointed managers on the widest possible terms. They were to transact the whole leading business of the company. The shareholders, who were not necessarily men of business at all, are not to manage the business, not even the directors, unless they choose to interfere. The managers are to appoint agents, and to guarantee the freight. Merrow & Co. are thus responsible for the whole profits, and I am not inclined to say that they were not entitled to regulate to a very large extent the manner in which the funds were to come into their hands. I can conceive cases in which it would be very beneficial to the company that agents so appointed should be entitled in some degree to regulate payment of freight before it became due. But there is one element in this appointment which must not be overlooked, and which is patent on the face of it, that the position of Merrow & Co. was temporary. If their powers of management ceased before the freight became an asset of the company at all, the expected security necessarily fell, and reduced the whole transaction to a money advance on the acceptance of the Liverpool agents without any security. On the first matter, then, I hold their

bills to be nothing more than receipts for prepayment of freight, and I think that it was not within the powers of Merrow & Co. to bind the expected freight.

The next question is whether anything in the course of dealing sanctioned by the company had the effect of enlarging the powers of Merrow & Co. in this particular; and this raises the question, how far the books kept by Merrow & Co. are evidence for the pursuers. If the books did disclose such a course of dealing, I should be of opinion that, although Merrow & Co. did not comply with the conditions of their appointment in keeping proper books,—as these were the only books kept,—and that in the knowledge of the company itself, — and seeing that they were audited by the company's auditor, who was certainly bound not merely to go over the calculations and figures, but to report the whole state of the company's affairs and examine the vouchers, and seeing also that the auditor had access to these books, and did examine the accounts relating to the steamers, I should be of opinion that the books were perfectly good evidence as they stand to bring home knowledge to the directors of what they contain, provided they did contain evidence of a course of dealing of this kind, especially as the question arises not with Merrow & Co., but with a third party. I think that third party is entitled to hold the books of Merrow & Co. to be the books of the company to every effect. If there is any defect in these books, that was the fault of the company. I went along entirely with the argument for the pursuers, that whatever might be said in a question between Merrow & Co. and the States Line Company, it is out of the question for the directors of the States Line Company to say that Merrow & Co. did not keep the accounts in the way in which they instructed them.

But then comes the question, what did the books indicate? They contain no evidence of the usage which is alleged. I should say that Merrow & Co. did not consider that they were dealing on behalf of the company in the drafts which they made, but apparently the reverse, for the entries of the proceeds of the bills are reported not as the result of prepayment of freight, but of cash payment by Merrow & Co. It is the fact that in some twenty instances in the course of the company such bills were drawn, but they were not so entered as to disclose their true character. You can perhaps find it out if you examine very minutely; but in order to establish implied authority for a course of dealing, it is necessary to have something much more distinct.

The third question is one on which I have more difficulty, viz., whether this money was truly applied to the purposes of the company. I should not consider it absolutely conclusive that Merrow & Co. were indebted to the States Line Company at the time when the bills were discounted, for if it was clearly apparent that, although in debt to the company, Merrow & Co. had no other funds to apply to a purpose for which the States Line Company were responsible, I am not prepared to say that their being indebted to the company would be conclusive against the pursuers' contention. My difficulty is rather to find any materials on which that result can be arrived at. We do not know whether the debt due to the company arose on shares alone which were held by Merrow & Co., or on the company's business. The whole matter is left in perfect darkness. At the date when these bills were discounted there were payments made by Merrow & Co. on behalf of the company, but I am not able to say that these payments were made from funds provided by the bills. The payments were made out of a general account, and the money was paid into that general account, and that is all that can be said.

On these grounds I concur in the result at which the Lord Ordinary has arrived.

Lord Ormidale—My Lords, this was, I think, just a case of borrowing money by this peculiar mode of drawing and accepting bills. The question then comes to be, whether the managers Messrs Merrow & Co.—whether even the directors themselves—had under the Articles of Association power to borrow money in such a way. I am of opinion that they had not. Every presumption is against the idea that the Board conferred such a power on their managers, and certainly I cannot find anywhere in the proof any evidence of a direct authority. When we look at the proof we find two of the directors who are examined, and who say that Merrow & Co. could get and did get money from the Board whenever they needed it. It has been, however, argued to your Lordships that there was here an implied authority. Of that also I am unable to find evidence. The only witness put forward to bear on this part of the case is Mr Duncan, the auditor, who examined and checked the books of the company; he did so, and that was all it could be expected that he would do, for it was no part of his duty to say whether the business of the company was being properly conducted or not.

The point—indeed the only one—upon which I felt some difficulty, was as to whether the States Line Company were to be taken as bound by the books of Merrow & Co. As between Merrow & Co. and the States Line Company these books are not evidence at all, and the question is how far they are so in a question with the sub-agents. I have considerable difficulty as to their being admitted between the firm of Ross, Skolfield, & Co. and the States Line Company, but I am inclined to think that the Court may look at these books as in a question with third parties. But on the whole I am not able to distinguish between Merrow & Co. and the pursuers, who are just the hand of Merrow & Co. in carrying out their arrangements.

There appears to me to be no other point of any importance in which your Lordships could hold that the pursuers have succeeded in making out their case. As regards the proceeds of the discount of these bills, I am unable to find that the Company were *lucrati*, and I agree with your Lordship in the chair in the view that anyhow there is a total absence of evidence that their moneys were applied for the benefit of the States Line Company.

Lord Gifford—I have come to the same conclusion, and upon the same grounds. The substance of the action as originally laid comes to be whether the pursuers, the sub-agents under Merrow & Co., are entitled to sue and recover from the States Line Company the amount of an advance to account of freight made by the pursuers

to Merrow & Co. Had the managers in point of fact power to borrow £4000? For in fact that sum was lent by Ross, Skolfield, & Co. to Merrow & Co. The position is exactly the same as if there had been no bill transaction at all, as if Ross, Skolfield, & Co. had handed over £4000 in hard cash to Merrow & Co., to account of freight. If Merrow & Co. had power to borrow, then the pursuers must prevail; if such a power was not theirs, then the defenders are entitled to absolvitor. Now, we may inquire what was the position held by Merrow & Co., what was their appointment, and what were their powers, and I think the result of that inquiry will enable the Court to answer the question I have suggested. We see by the minute of agreement appointing Merrow & Co. to be managers that they were "the principal agents" of the company. [*His Lordship quoted the terms of appointment given above.*] That appointment does undoubtedly involve a very wide power, but does it give power to borrow? If it do not, then clearly there is not given any power to impignorate. No doubt an agent who has not the power to borrow may make advances for his principal, and if he does so he will have, as against that principal, a direct claim for the advance. But it comes to be a matter of much greater difficulty when the money has not been applied to the principal's business, and he has not been *lucratus* by the advance. If therefore I am right in thinking that there was no power to borrow or to pledge under the appointment given to the managers, we come to inquire whether their powers so conferred were subsequently increased. To answer this inquiry there are two sources open—(1) evidence of a course of dealing; (2) evidence of the books. Now a man cannot increase the powers granted him simply by claiming further powers, however often he do so, unless his principal know of his claim and by non-interference tacitly acquiesces in such a course of dealing, and looking to these two sources of information, I agree with your Lordship in the chair, although not perhaps on quite the same grounds, that there was no power afterwards conferred to borrow or to impledge.

It is said, however, that the sums obtained in this manner were applied for the benefit and behoof of the company. But is that at all proved? The proceeds of these bills are found in the "private column" of the ledger, while the bills themselves appear in the "steamer's" column. Merrow was at the time largely indebted to the company, and he used funds to meet the calls on his shares. I am unable to distinguish between a debt arising from dues and one from unpaid calls.

On the matter of the books, I rather think that those of the agent would be good evidence against him, but not good as against a sub-agent.

Therefore, on the short ground that this action is one for a loan, and that the managers had no power to borrow, I am for assoilzieing the defenders from the conclusions of the summons.

Lord Neaves was absent.

The Court adhered.

Counsel for Pursuers—Dean of Faculty (Watson)—Guthrie Smith—J. J. Reid. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders — Asher — Jameson. Agents—Webster & Will, S.S.C.

Saturday, November 20.

FIRST DIVISION.

[Lord Shand.

STAFFORD (PETITIONER) *v.* M'LAURINS (RESPONDENTS).

Arrestment—Competency—Recall—Reduction—Personal Diligence Act, 1 and 2 Vict. cap. 114.

Held (1) that it is incompetent to use arrestments on the dependence of an action of reduction or of any other action containing no petitory conclusion other than that for expenses; (2) that a conclusion for expenses is not a "conclusion for payment of money" within the meaning of the Statute 1 and 2 Vict. cap. 114, sec. 16.

This was a petition praying for the recall of arrestments used upon the dependence of an action at the instance of Mrs M'Laurin and her husband against Mrs Stafford and her husband. The summons in that action concluded for reduction of a disposition granted by the pursuers in favour of Mrs Stafford, and of a ratification of the disposition by Mrs M'Laurin, both dated the 12th November 1874. The summons contained no further conclusion except for expenses.

Upon the 6th October following, the pursuers, by virtue of letters of arrestment purporting to be on the dependence of the action of reduction, arrested in the hands of John Sinclair, merchant, Oban, and Robert Lawrence, writer, Oban, all sums of money due by them to the petitioners.

The petitioners presented this petition to the Lord Ordinary under the Act 1 and 2 Vict. cap. 114, sec. 20, praying that the arrestments might be recalled on the ground that they were incompetent and without warrant, and further, that they were nimious and oppressive, and used for the purpose of embarrassing the petitioners.

The Lord Ordinary pronounced the following interlocutor:—

"19*th October* 1875.—Having heard counsel, recals the arrestments complained of, except to the extent of £100 sterling, and decerns, reserving the question of expenses."

The petitioners reclaimed, and argued—The action was one of reduction, and contained no pecuniary conclusion except for expenses. A conclusion for expenses was not a "conclusion for payment" falling under 1 and 2 Vict. c. 114, sec. 16; and apart from the statute, did not warrant arrestment. Moveable property could not be attached unless in respect of a debt already due. It was true that arrestment covered expenses, but these were incidents of the general claim, and followed it. If the case of *Ross* v. *Renton*, M. 690, were held to govern, the matter was already decided.

Authorities—*Ross* v. *Renton*, M. 690; Erskine's Inst. iii. 6, 10; Bell's Comms. (MacLaren's edition) ii. 67; *May* v. *Malcolm*, June 7, 1825, 4 S. 76; *Telford's Exr.* v. *Blackwood*, Feb. 3, 1866, 4 Macph. 369; *Dove* v. *Henderson*, Jan. 11, 1865, 3 Macph. 339; *Weir* v. *Otto*, July 19, 1870, 8 Macph. 1070; Statute 1592, cap. 144; Shand's Practice, 226; *Wilkie* v. *Tweedale*, Feb. 25, 1815, F.C.

The respondents argued—Arrestment covered expenses, and therefore arrestment upon a con-