in connection with that proposal, and to report. Mr Salmond's report was in these terms:—

"In obedience to the remit contained in the interlocutor, of which a copy is prefixed, the reporter has examined the subjects proposed to be feued, and inquired into the facts and circumstances set forth in the petition, and he begs leave to report as follows:—

"The estate of Dudhope is wholly within both the parliamentary and municipal boundaries of the burgh of Dundee. Its extent is 382 acres imperial or thereby, and of this about 80 acres have been already feued, and that principally since the year 1869.

"Previous to that date the building extension of the town consisted mainly of erections upon vacant spaces lying nearer to the centre than the estate of Dudhope, but these being almost all now built upon, the lands of Dudhope are at this present time the most centrally situated ground for feuing purposes within the burgh, and are much sought after.

"Lochee, a large and prosperous suburb, being now continuously joined by buildings to Dundee proper, is immediately on the west of Dudhope, and as almost all the ground on the east of Dudhope has been taken up and built upon, the natural extension of the town has been rapidly closing-in upon Dudhope on the south, east, and west boundaries thereof. . . . . .

"The ground has been feued for various purposes—the better sites for villas and self-contained houses, others for shops and workmen's houses, and a few of the sites for public works.

"It is my decided opinion that it would be a very great inconvenience to the public of Dundee were this property to be withdrawn from the market for a considerable time as a feuing subject, and also a very great loss for the estate itself.

"Excepting some of the southern portions of the lands, which are let at about £4 per acre, the greater portion is of a very inferior description for agricultural purposes, bringing rents of from £1 to £2 per acre, while the rates obtained for the portions feued have varied from £16 to £64 per acre, the rate of feu-duty depending upon the situation. The average rate for some of the better class villa lots nearest to the centre of the town may be stated at from £40 to £50 an acre, while in other less favourable localities a smaller rate is to be expected, varying from the minimum rate of £24 per acre upwards."

The Lord Ordinary, holding that Mr Salmond's report showed that the case was of the class of which *Alexander*, June 26, 1857, 19 D. 888, and *Lord Clinton*, October 30, 1875, 3 R. 62, were illustrations, reported that he was of opinion that power to feu might be granted, and that the minimum rate of feu-duty should be £24 per acre per annum. His Lordship further reported that "it appears to require consideration whether the conditions and provisions should be left to the discretion of the petitioners, or whether a form of feu-charter should be adjusted and approved of by the Court. The Lord Ordinary may mention that in the case of *Clinton* (as appears from the prayer of the petition) the Court was asked to approve of a form of feu-charter or feu-contract."

At advising—

Lord President—The granting of feuing powers always raises a very delicate question, and requires to be very particularly attended to. As my brother Lord Deas observed in the case of *Clinton*—"It is clear enough from the case of *Vere* that our authority is not an absolute protection to a tutor against subsequent responsibility, so we must be careful not to mislead the tutor." Now, I entirely agree in that observation, and I think we also gather from the case of *Clinton* that the true test of the safety and propriety of granting such an application is the consideration whether there is an urgent necessity for the step in order to avoid loss, it not being sufficient in order to justify our granting the power that it will procure an advantage to the estate. Now, taking that test, I am quite clear that a case for granting the powers asked for has been made out here. The estate is surrounded by houses on three sides, and is not fitted for any other purpose than building. It is plain therefore that any attempt to apply it to any other use would result in loss. I think that the petition should be granted.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court granted authority to feu as craved, at a minimum feu-duty of £24 per acre per annum, without approving of any special form of feu-charter.

Counsel for Petitioner—Asher—Kirkpatrick. Agents—Pearson, Robertson, & Finlay, W.S.

Friday, July 2.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LINDSAY (MACGREGOR'S TRUSTEE) *v.* ADAMSON & RONALDSON.

Bankruptcy—Statute 1696, *c.* 5—*Reduction.*

On November 3, 1877, Messrs A. accepted bills from Messrs M., who were part-owners and ship's husbands of a vessel, against her freight "Cronstadt to London," the freight being assigned to them, with power to collect the same on arrival. The vessel's destination was subsequently altered to Leith, and the freights on her arrival there, early in December, were collected by Messrs M., who placed the amount at their bank account, and sent cheques to Messrs A. to the amount of the bills. Messrs M.'s estates were sequestrated on 11th January 1878. In an action by Messrs M.'s trustee against Messrs A., for reduction of the cheques and payment of the amount of the bills, *held* that though payment was made within 60 days of bankruptcy, it was not struck at by the Act 1696, having been made in implement of the original agreement; and the defenders assoilzied accordingly.

Messrs Donald R. Macgregor & Co., merchants and shipping agents in Leith, were part-owners and managing owners and ship's husbands of the steamer "Mikado," which was to sail from Cron-

stadt to London. On November 1, 1877, they wrote to their correspondents in London, Messrs Adamson & Ronaldson, asking them to accept enclosed bills to the amount of £2000 against her freight from Cronstadt to London. Messrs Adamson & Ronaldson accepted the bills to the extent of £1709, 16s. 10d., and on 3d November Messrs Macgregor wrote them as follows:—"Dear Sirs,—In consideration of your having made advances to us by your acceptance of our draft upon you for £1029, 11s. 6d. at three months, from 1st November 1877, and due 4th February 1878, and of Messrs La Cour & Watson's draft upon you for £680, 5s. 4d. at three months from same date, making together £1709, 16s. 10d. on account of freight of the steamer 'Mikado,' Cronstadt to London, we hereby place the steamer in your hands to collect the amount of freights, and thereout to repay yourselves the amount of your advances; and we agree to assign the said freights to you for that purpose. You will also retain the policies of insurance, and we also agree to assign the same to you for your further security in case of need." By letter of the same date, addressed to the captain of the "Mikado" and to the consignees of the freight, Messrs Macgregor instructed both the captain and the consignees of the cargo that Messrs Adamson & Ronaldson would collect the freight and that their receipt would be a sufficient discharge thereof. The "Mikado" having got a cargo at Cronstadt, left that port on 25th November for Leith, and not, as originally intended, for London, the agents at Cronstadt having power to alter the port of destination at their discretion. The freight was collected at Leith by Messrs Macgregor, and the amount placed to the credit of that firm's bank account in Leith, cheques to the amount of £1705, 16s. 10d. being granted on that account in favour of Messrs Adamson & Ronaldson. On 11th January 1878 Messrs Macgregor's estates were sequestrated, and on 11th February Mr T. S. Lindsay was appointed trustee thereon. He brought an action against Messrs Adamson & Ronaldson for reduction of the said cheques and repayment of the said sum of £1705, 16s. 10d.

The pursuer averred—"The said firm of Donald R. Macgregor & Co., and the said partners thereof, as such and as individuals, were insolvent at the said 4th day of December 1877," (*i.e.*, at the date of the "Mikado's" arrival at Leith), "and were so from that date down to the foresaid date of their sequestration on 11th January 1878, and the foresaid cheques under which the defenders obtained payment, amounting to £1705, 16s. 10d., made by them to the defenders on or about the said 4th and 5th days of December 1877, were so made and granted for the satisfaction or further security to the defenders of the debt or debts then due to them by the said Donald R. Macgregor & Co., in preference to prior creditors, within the space of 60 days before the said Donald R. Macgregor & Co. and the partners thereof became bankrupt, and are void and null in terms of the Act of Parliament 1696, cap. 5."

The defenders averred that the freight had been collected by Messrs Macgregor in the capacity of the defenders' trustee; and that until sequestration was announced they were not aware of Messrs Macgregor's financial position.

The pursuer pleaded—"(1) The transactions, cheques, and payments challenged are reducible, as being entered into, granted, and made in satisfaction or security of a prior debt within sixty days of bankruptcy, contrary to the Act 1696, cap. 5. (2) The payments challenged having been made prematurely and by anticipation, on account of a debt then not yet due, within sixty days of bankruptcy, and at a time when the debtors were insolvent, the pursuer is entitled to repetition of the sums so paid. (3) The pursuer, as trustee foresaid, in virtue of the facts and circumstances, writings, and statute libelled, is entitled to decree in terms of the conclusions of the summons."

The defenders pleaded—"(3) The defenders ought to be assoilzied (1st) because the payment made to them in December 1877 by the said D. R. Macgregor & Co. was in implement of a distinct obligation undertaken by the latter on the 3d November previous; and (2d) because the said payment was a payment in cash of a debt then due to the defenders; and (3d) because the bills by which the money was raised on the joint credit of the parties were a mere collateral transaction, and not of the essentials of the contract between the parties. (4) Messrs D. R. Macgregor & Co. being entitled to implement all their obligations as they became due, even within sixty days prior to notour bankruptcy, and the payment in question having been truly a cash payment in virtue of a specific contract to that effect, the transaction is not reducible, and the petitory conclusions are untenable."

The Lord Ordinary (Rutherfurd Clark) after proof led assoilzied the defenders. His Lordship added this note:—

"*Note.*—The bankrupts were owners to the extent of 2/64ths of the 'Mikado,' and were ship's husbands. When she was in Cronstadt, in November 1877, they obtained an advance from the defenders of £1705, 16s. 10d., which was raised on bills falling due on 4th February 1878. Against this advance they granted the letter of 3d November 1877, in which they 'place the steamer in your (the defenders') hands to collect the amount of freight, and thereout to repay yourselves the amount of your advances.'

"When the transaction was entered into it was expected that the 'Mikado' would sail to London. In point of fact she sailed to Leith, and on being informed of the change of voyage the defenders requested the bankrupts to collect the freight as their trustees. This the bankrupts undertook to do. They collected the freight, and paid it into their account with the British Linen Company. On 4th December 1877 they gave the defenders cheques on the British Linen Company for the amount of the advance, which was less than the amount of the freight. These cheques were duly paid.

"On 4th December the bankrupts were insolvent, and they were sequestrated on 11th January 1878. The payments made to the defenders on 4th December 1877 are challenged both under the Statute 1696, c. 5, and at common law. In the argument addressed to the Lord Ordinary the case was confined to the statute.

"The pursuer is of course vested with the estate of the bankrupts, and represents all creditors. But it is not said that the owners of the

'Mikado' are creditors, nor is it proved in the evidence led by the pursuer that the bankrupts had any right to the freight either as owners or as creditors of the owners. It appears, however, from the evidence of Mr Macgregor, who was examined for the defence, that he was an owner to the extent of 2/64ths; and on re-examination for the defenders he says that his 'firm was in advance to the "Mikado" to an amount considerably in excess of the cheques.'

"Unless it be shown that the freight formed part of the estate of the bankrupt, the case of the pursuer fails. The fact that it was paid into the account of the bankrupts and drawn out by cheque does not afford any ground of challenge other than that which would have been available to the pursuer if the freight as it was actually collected had been handed over to the defenders.

"But as it appears that Mr Macgregor was a part-owner of the 'Mikado,' and as he says that his firm was in advance to the owners of the 'Mikado,' the case may assume another complexion. His ownership would give him a right to a proportionate part of the freight, and as creditors of the ship the bankrupts might have right to the whole of it. But the right of the pursuer, in this latter respect at least, is not well cleared up.

"Assuming that the bankrupts had right to the freight, the pursuer is not, in the opinion of the Lord Ordinary, entitled to prevail. It was a condition of the transaction under which the advance was obtained that the defenders should be paid out of the freight. In a question with the owners, it is, to say the least, very doubtful whether the bankrupts were entitled to impledge the freight for an advance obtained for their own use; but the title to object would be with the owners only, and not in the pursuer, and if, as is assumed, the freight belonged to the bankrupts, they could deal with it as they chose. If, then, the original transaction cannot be challenged by the pursuer, it seems to have been carried out according to the terms in which it was originally arranged, and the employment of the freight in paying the advance was not in satisfaction or security of a prior debt, but in specific implement of the original agreement. It is true that it was intended that the ship should sail to London and not to Leith, but in the opinion of the Lord Ordinary this does not make any difference. The real meaning of the transaction was that the advance should be paid from the inward freight, and this and no more was done."

The pursuer reclaimed, and argued—A ship's husband had no power to impledge freight, and the bankrupt had acted *ultra vires* in so doing. The ship's husband's right to draw the freight was exclusive and unassignable; and the bankrupts had no right to authorise the defenders originally to collect it. The freight when collected belonged absolutely to the ship's husband, subject to his liability to account for it subsequently to the owners in the ship's accounts, and when placed to the credit of the bankrupts' account it was in no way earmarked or to be distinguished from any other part of their general estate. Assuming the money to have belonged to the bankrupts, they were not entitled to prefer the defenders to their other creditors, as they had practically done. There had been here no specific implement of a previously subsisting agreement, but a new security created within the sixty days, for the altered destination of the vessel virtually made a new contract. Where a security has failed, a substituted security granted within the sixty days was struck at by the statute, and this was the present case.

The defender replied—The transaction here was not struck at by the statute. No new security had been granted, the designation of the voyage as "from Cronstadt to London" being merely descriptive, and not an essential condition. The arrangement as to the collection of the freight was simply a matter of convenience, and the employment of the bankrupts to collect it was purely accidental. They had acted as trustees, and the freight collected was thereby impressed with the character of a separate trust-fund. There was here a specific implement of an antecedent obligation, and as such the transaction did not fall under the statute.

Authorities—MacLachlan on Shipping, p. 175, and case of *Guion* v. *Trask* there, 29 L.J., Ch. 337; 1 Bell's Com. 552-3 (M'L's. ed.) 503-4 (5th ed.); *Sims* v. *Brittain*, 1832, 4 Barnewall & Adolphus 375; *Ex parte Gribble*, 1833, 3 Deacon & Chitty 339; *Moncrieff (Tod & Hill's Trustee)* v. *Union Bank*, Dec. 16, 1851, 14 D. 200; *Inglis* v. *Mansfield*, April 10, 1835, 1 S. & M. 203; *Stiven* v. *Scott & Simson*, June 30, 1871, 9 Macph. 923; *Gourlay* v. *Hodge*, June 2, 1875, 2 R. 738; *Loudon Bros.* v. *Reid & Lauder's Trustee*, Dec. 7, 1877, 5 R. 293; *Taylor* v. *Farrie*, Mar. 8, 1855, 17 D. 639; *Gibson* v. *Forbes*, July 9, 1833, 11 S. 916; *Lindsay* v. *Shield*, Mar. 19, 1862, 24 D. 821.

At advising—

Lord President—Every question that arises under the Statute of 1696 is a question of more or less difficulty and importance, but I may say that that difficulty only arises in applying the statute to the particular circumstances of each case, for the construction of the statute is very well settled by a series of cases which have been thought at first sight to be not altogether consistent, but which, notwithstanding, I think are perfectly reconcileable, and all support the doctrine which I think we must apply in the present case. The reading of a statute must always be stated in different language according to the nature of the transaction which is stated to be challenged under the statute, but I should be disposed to state the statutory rule as applicable to acts like the present as this—If the security challenged be granted by the bankrupt before the sixty days, and he does no voluntary act to complete the security within the sixty days, it will not let in the operation of the statute that the creditor has done something to complete the security within the sixty days, or that the debtor does something to give effect to the security which he was legally bound and could have been compelled to do. In applying that rule to the circumstances of the present case, I think what was done by the bankrupts within the sixty days was not challengeable, because it was what they were legally bound to do for the benefit of their creditors in fulfilment of an obligation undertaken by them beyond the period of constructive bankruptcy. The facts are in some respects peculiar, but still I cannot doubt that the transaction took place in the ordinary course of business, and that there is nothing

remarkable in the circumstance of a part-owner and managing owner and ship's husband of a vessel impignorating the freight earned by that vessel in a current voyage, and that is the foundation of this case. Messrs Donald R. Macgregor & Co., the bankrupts, were part-owners and managing owners and ship's husbands of the "Mikado." The "Mikado" was just about commencing a voyage from Cronstadt to London, and in those circumstances they wrote to their correspondents in London mentioning that fact—and I may notice in passing that the ship had apparently been in their management at the port of London (the port of destination) on a previous occasion—in the important letter of 1st November 1877, and adding, "Against this freight we would be obliged by your accepting the enclosed bills amounting together to £2000." But they agreed to accept only two of the bills which were sent to them, one for £1029 and another for £680, making together £1709, and they sent these bills accepted on 3d November to Messrs Donald Macgregor & Co. Now, of that same date the bankrupts wrote this letter to the defenders:—"Dear Sirs,—In consideration of your having made advances to us by your acceptance of our draft upon you for £1029, 11s. 6d. at three months from 1st November 1877, and due 4th February 1878, and of Messrs La Cour & Watson's draft upon you for £680, 5s. 4d. at three months from same date, making together £1709, 16s. 10d., on account of freight of the steamer 'Mikado,' Cronstadt to London, we hereby place the steamer in your hands to collect the amount of freights, and thereout to repay yourselves the amount of your advances; and we agree to assign the said freights to you for that purpose. You will also retain the policies of insurance, and we also agree to assign the same to you for your further security in case of need." Now, this was not formally an assignation to the freight, but it was a mandate to the defenders to collect the freight on the arrival of the vessel in London, and to apply that freight when so collected to the retiring of the bills which they had accepted for the advances. On the same date the bankrupts wrote two other letters, one addressed to Captain Barclay, the master of the ship "Mikado," in these terms:—"On your arrival from Cronstadt please place your steamer in the hands of Messrs Adamson & Ronaldson, who will collect your freight, &c., as on the previous occasion." And another letter addressed to the consignees of the ship, in these terms—"Please pay to Messrs Adamson & Ronaldson the freight on your cargo p. above steamer, and their receipt shall be your sufficient discharge." On the 5th of November they wrote again acknowledging receipt of the letter of the 3d of November written by the defenders, with the two drafts for £1709 duly accepted, "for which we thank you," and the accepted drafts were accordingly discounted. Now, I cannot entertain any doubt that if Messrs Donald Macgregor & Co. had power to grant this mandate to the defenders to collect the freights and apply them to the particular purpose indicated in that letter of authority, the letter of the 3d of November 1877 did create in favour of the defenders a good security for the freight, because I do not see who could interfere with them. The consignees when that letter was presented to them would not have been in safety to pay freight to anybody else. The captain, in like manner, would not have been entitled to interfere in any way with the defenders in collecting the freight on the arrival of the ship at the port of destination, and so the authority that the defenders thus obtained would have been perfectly effectual to them if the ship had arrived at London as her port of destination.

But it remains to be considered, first, whether the bankrupts could effectually grant such an authority, and, in the second place, whether the alteration in the destination of the ship invalidated this security so as to prevent its operating without some further or additional security being granted.

Now, as regards the first of these questions, I confess I do not think it free from doubt. The managing owner or ship's husband has full and absolute authority to collect the freight of the vessel. That is beyond all dispute and doubt. The obligation which he undertakes towards his co-owners when he receives that money is that he shall faithfully account for it in settling the accounts of the ship, and with his co-owners it is for the present his own money. It just enters his account with his co-owners as an item of debt, nothing more. The ship's husband will always be more or less in advance for the ship's account, and it will depend upon the state of the account for the time whether the money will remain with him or fall to be accounted and paid over to his co-owners. Now, we have no evidence here that at the time when this transaction was carried through the bankrupts Macgregor & Co. were in advance to the ship to a larger amount than the freight she earned on this voyage, or, at all events, to a larger amount than this £1709. Therefore the bankrupts, as it appears to me, were quite *in titulo*, in the first place, to treat this claim and use it as their money, and if so, in the second place, to impignorate that freight if it was necessary for the ship's use to do so. I use the word "impignorate" in perhaps a loose sense, but this contract was in effect the same thing as an impignoration.

But it remains to be considered what was the effect of the change in the destination of the vessel. It appears that the ship's agents at Cronstadt had it in their power to change the destination of the vessel, and the question whether she should go to London or to Leith depended upon the view which these agents should take as to which was the most convenient port for the consignees of the greater part of the cargo, and it was expected that the cargo for the most part would belong to London consignees. But it turned out otherwise, so the agents altered the destination and sent the vessel to Leith. The necessary alterations were made on the insurances through the defenders on the application of the bankrupts as ship's husbands. The vessel completed the voyage to Leith, when there arose this difficulty, that whereas the defenders carried on business in London and they expected under the arrangement of 3d November to be able to collect the freight there, it turned out that the freight would require to be collected at Leith. Now, the question is, Did that destroy the security which the defenders had obtained by means of the documents which I have described? I think not, because as I read the letter of 3d November it is an authority to collect the freight earned by the vessel in the voyage referred to. I do not think

it was a condition of the authority that the vessel should go to London. It certainly was contemplated in the letter of authority that she should do so, but the special words of authority are not so limited — "We hereby place the steamer 'Mikado' in your hands to collect the amount of freights, and thereout to repay yourself the amount of your advances." My opinion is, upon the true construction of the contract embodied in the letter of 3d November, that the defender had right to collect that freight whatever the port of destination of the vessel turned out to be, and although it may have caused them some trouble, and although it might even turn out that they would require to employ some person to act for them in the collection of the freight at the port of destination, I do not think that affects the security they obtained, and whatever was actually done was merely equivalent to the defenders employing an agent to act for them in the collection of this freight at Leith. The bankrupts themselves undertook that duty, and in doing so I think they acted simply as agents of the defenders. There is a phrase used no doubt by the defenders in one of their letters—that of the 23d November—in which they ask the bankrupts if they will "receive it (the freight) as our trustee." But that is a mere inaccuracy of expression. There is no proper trusteeship—no fiduciary character beyond the trust that is reposed in an ordinary agent. Now, what was done between the defenders and the bankrupts thereafter? The bankrupts in undertaking to collect and transmit the amount of the freight to the defenders, were doing nothing more than facilitating the defenders' collection of the freight which they held as security for their advances, and helping the holders to make that security good. If they had not done so, it is perfectly obvious that the defenders would have employed somebody else. But it was quite natural for the bankrupts to do so, because they were the defenders' ordinary agents in Leith at any-rate, and therefore I think that what was done by the bankrupts in the way of collecting the freight within the sixty days was not within the meaning of the statute a voluntary act done by them to grant a new security in favour of a creditor, and for that reason I think the judgment of the Lord Ordinary is well founded.

Lord Deas—I have had occasion in former cases to review all the previous decisions, and to have formed the deliberate opinion that there is no inconsistency in principle among them. I do not require to go over them again. The principle, I think, is, that if there is an obligation validly undertaken before the sixty days, implement of that obligation in the course of the sixty days is not an undue preference. Now, here I agree with your Lordship in thinking that there was a valid obligation undertaken by the ship's husband, acting in his capacity of ship's husband, before the sixty days. I think that obligation was to pledge the inward freight for the advance which was made without reference to whether the arrival of the vessel and cargo was to be at London or Leith. Then the obligation in the letter of 3d November 1877 bore—"We hereby place the steamer in your hands to collect the amount of the freights and thereout to repay yourselves the amount of your advances." I think the freights there referred to, are, as I have said, the inward freights, whether the cargo might arrive at the one port or the other. Now, it did arrive at Leith, the destination having been changed from London, to which port it was intended to send it, by those who had power to change it at Cronstadt. I think there was nothing more in substance that was done here than to pay out of the freights so placed at the defenders' disposal for collection the amount of their advance to the ship's husband. That necessarily leads me to think as the result that there was here no undue preference.

Lord Mure—The only question, as I understand, appears to be, whether this transaction is struck at by the Act of 1696—whether the transaction embodied in the letter of 3d November 1877 was entered into within sixty days of Messrs Macgregor & Co.'s bankruptcy?

The transaction is challenged on two grounds. It is said, in the first place, that it was beyond the power of a ship's husband to make any such arrangement as we have here in regard to the disposal of the freight, and, in the second place, it is said that by certain proceedings that took place with reference to the change of destination of the vessel there was something done which brought the transaction within the rule of the sixty days.

I am of opinion that both of these objections are not well founded, and I agree substantially with the views expressed by your Lordship in the chair, and the grounds on which your Lordship has based these views.

With regard to the law of this case, we were referred to Mr Bell's Commentaries in support of the first of these objections as to the power of a ship's husband. But I cannot read Mr Bell as laying down any rule to the effect that what was done here was beyond the power of the managing owner, who was as managing owner acting for all the owners. He says—"It is chiefly in the case of one of the joint-owners taking the management that the powers of ship's husbands are constituted without written authority. But both in that case, and even where a stranger acts in the capacity of ship's husband, the owners will be bound to reimburse and to recompense him, and his contracts in the proper line of a ship's husband's duty will bind them, provided the nomination or the accrediting of the ship's husband be clearly proved." That almost amounts to a description of this very case. Now, it is said that a ship's agent has the power to pay himself out of the freight, holding it as a security for advances he has made for the ship, and if he has that power, he has power to enter into a transaction such as that of 3d November, and it is plain from the authorities quoted by the Dean of Faculty that it is quite a common transaction to give loans or advances to parties who are in the position of ship's husbands, which the bankrupts occupied here, and it is just as common for ship's husbands to pledge freight to be earned in security of such advances. I am therefore led to think that this first objection is not well founded.

But assuming that the ship had gone to London, and so had come within the reach of the defenders in terms of the letter of 3d November, I do not think any question could have been raised about this transaction under the Statute of 1696, because that letter was clearly beyond the statutory period of sixty days. Well, then, was the change of the

destination of the vessel from London to Leith the creation of a new security? I cannot look upon it in that light. It was a mere matter of change of arrangement as to whether the defenders should receive delivery and payment of the freight at London or at Leith. These letters of 3d November to the captain and the consignees did not restrict the right of the defenders to receive payment of the freight for the vessel on her arriving at the port of London only. The letter to the consignees is—"Please pay to Messrs Adamson & Ronaldson the freight on your cargo p. above steamer, and their receipt shall be your sufficient discharge." There is nothing there of the nature of a restriction upon the defenders' right to obtain payment of the freight in repayment of their advances. That letter is quite general in its terms, and it seems to me that its intention was that the defenders should be paid their advance out of the freight at the port of discharge, wherever that might happen to be, and there is certainly nothing in it that restricts the payment or delivery to the port of London, The transaction was all completed with the intention of giving delivery at the port of London, where it was expected the vessel would discharge, but although this was altered to Leith, I do not think that would give rise to any question in regard to the freight, and at all events I do not think that that alteration can in any sense of the term be viewed as a proceeding which makes such a radical change on the transaction as to create a new transaction with the effect of bringing the Act of 1696 into operation, and I am therefore disposed to adhere to the view taken by the Lord Ordinary.

Lord Shand—I confess that throughout the course of this argument I have never entertained any doubt that the interlocutor of the Lord Ordinary was sound.

It is settled by a series of authorities that the Statute of 1696 does not apply to a transaction where in the ordinary course of business a creditor within sixty days of bankruptcy receives payment of a debt in specific implement of the agreement under which that debt was incurred, and I think this case is one of that class. There was a good deal of discussion—particularly the first part of the argument—but I do not think my friend Mr Kinnear dwelt much upon it latterly, upon the question whether Messrs Macgregor & Co. were entitled to pledge this freight before the arrival of the vessel. It appears to me to be very clear upon that question that Mr Lindsay, Macgregor & Co.'s trustee, has no power or right to raise it, because he as Macgregor & Co.'s trustee does not represent the owners of the vessel, who, I think, are the only persons who can raise a question upon that point. Lindsay represents Macgregor & Co., and he cannot repudiate their actings. He represents the general body of creditors of Messrs Macgregor & Co. in this question as to that firm's power to impledge the freights of this vessel. I do not think that the general creditors of Macgregor & Co. have any higher rights than Macgregor & Co. would have had themselves. It is true that a question might be raised by other parties—I mean by the owners of this vessel—with the ship's husbands, Macgregor & Co., to pledge the freights. But we have no such question here. And I can only say that if that question were raised upon the evidence we have here, it would appear to me that Macgregor & Co. were quite entitled to impledge that freight. And then we have the direct evidence of Mr Macgregor to the effect that at the time when he placed the vessel in the hands of the defenders as agents to receive the freight, and to retain out of it the amount of their advance, the ship's owners were largely in his debt, and I have no doubt that Macgregor & Co. in a question with the owners of the vessel were entitled to pledge the freight.

I do not think it necessary here to express any opinion on the general power of ships' husbands to give such security, for in many cases that power must depend upon the particular circumstances of each case. Taking it, however, that in a question with Lindsay the employment of the freight was perfectly lawful, I think the decision of this case then rests upon, and is to be determined by, the meaning of the agreement of 3d November 1877, and upon the meaning of that agreement alone. Now, in regard to that agreement I have only to say that the transaction appears to have been one of a class that occurs in the ordinary course of business between shipowners and ship-agents, and, in the next place, that the authorisation or mandate which Donald Macgregor & Co. granted to Adamson & Ronaldson was not of a gratuitous nature. It was given for value—Adamson & Ronaldson having advanced £2000, the steamer was placed in their hands to collect the amount of the freights, and thereout to repay themselves the amount of their advances. The mandate was therefore not revocable by Macgregor & Co. The only condition on which they could have recalled that authority to the ship's agents was by refunding this advance. What, then, were the rights of the shipping agents under that letter? They were, I think, that they should collect these freights and retain the amount thereof in repayment of their advances to the owners through the ship's husbands.

It is true that the letter refers to the voyage as one from Cronstadt to London, but I cannot regard it as an essential of this agreement that the vessel should arrive at the port of destination mentioned therein. I think it is clear that this letter puts the ship into the hands of the defenders for collection of the freights and repayment of their advances in the view of her arriving at any port within the United Kingdom. The parties were really dealing with a ship that was on her way to Cronstadt and was coming home, and with a view to the return voyage; and I read this agreement substantially as the Lord Ordinary has done, as meaning—"you have hereby authority to draw the freights of the homeward voyage from Cronstadt." In that state of matters, suppose the ship had come to Hartlepool or Glasgow, Who were the parties entitled to collect the freight? I am clearly of opinion that Macgregor & Co. had no right to collect that freight, because they had parted with it. The moment you settle that it is really an agreement for the freight of the homeward voyage, you settle that question of right, and therefore, unless by arrangement with Messrs Adamson & Ronaldson, Macgregor & Co. in my opinion could not even have touched this freight until they repaid the advances. It so happens that instead of the vessel going to any of the ports I have mentioned, or to the port of

London, she came to Leith, where Macgregor & Co. carried on their business, and in consequence of that Messrs Adamson & Ronaldson, who carry on their business in London and not in Leith, agreed to make them their agents for the collection of the freight. Perhaps the expression "trustee" used by the defenders is not strictly speaking applicable to such circumstances, but considering the popular sense in which this word is often used, I do not wonder at their using it to authorise Messrs Macgregor & Co. to collect these freights until this advance was repaid. Macgregor & Co. accepted, as I think they were bound to accept, the position of agents for the defenders in the collection of this freight which belonged to them, and I therefore agree with the Lord Ordinary when he says in the last sentence of his note—"The real meaning of the transaction was that the advance should be paid from the inward freight, and this and no more was done."

A point was made upon the fact that Macgregor & Co. having collected the freight, placed the money in bank to the credit of their general account, and had drawn it out thereafter by means of cheques. It is not of the slightest consequence how they dealt with the money before remitting it. The footing on which they were employed to collect the freight was, that they as agents were to transmit the freight to the defenders, or at least to the extent of the amount of their advances. There was nothing unusual in their transmitting the freight to the defenders, nor was there anything unusual in placing the money in bank the one day and until all the freight was collected and then drawing it out the next. Therefore I agree in thinking that the judgment which the Lord Ordinary has formed is right. In the view which I take of this case it does not appear to me that it would make any difference that the original transaction had even been within the sixty days. If a merchant advances money to another a month before bankruptcy, on the footing that it will be repaid within a fortnight or so, and at the same time gets a security that will enable him to recover the amount of his advance, and if he recovers the amount through that security, it appears to me to be unchallengeable under the statute.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Kinnear—Trayner — Jameson. Agent — H. B. Dewar, S.S.C.

Counsel for Defenders (Respondents)—Dean of Faculty (Fraser), Q.C.—Brand. Agent—Robert Finlay, S.S.C.

Saturday, July 3.

FIRST DIVISION.

[Lord Lee, Ordinary.

URQUHART (DEMPSTER'S TRUSTEE, PETITIONER).

Bankruptcy — Trustee — Discharge — Unclaimed Dividends—Expenses—Statute 54 *Geo. III. c.* 137 (19 *and* 20 *Vict. c.* 79).

A petition for exoneration and discharge by a trustee appointed in a sequestration awarded under the Act 54 Geo. III. c. 137, set forth that the estate in his hands consisted of unclaimed dividends, the interest arising thereon, and a cash balance; that the only provision of the said Act relating to the disposal of unclaimed dividends was contained in section 45—"that the shares of creditors not called for at the time of distribution shall again be forthwith deposited, as before, on their risk, at such interest as can be got for the same;" and that a meeting of creditors held in terms of sections 72, 75, and 76 of the Act had approved of the petitioner's actings and intromissions and authorised the petition. The petition accordingly craved (1) authority to charge the expenses of the proceedings for discharge (so far as not covered by the cash balance) against the interest accrued on unclaimed dividends; (2) authority to deposit the unclaimed dividends and balance of interest thereon in bank in terms of the Bankruptcy (Scotland) Act 1856, section 153 (according to which no creditor is entitled to interest on unclaimed dividends, but such interest is carried to a general account and ultimately applied to public purposes); (3) decree of exoneration and discharge; (4) that the Court should (in terms of the said Act 54 Geo. III. c. 137, section 76) fix a reasonable time, at the expiry of which the sequestration should be held to be at an end. The Court remitted to the Lord Ordinary, who, on a report made by the Accountant in Bankruptcy, verbally reported to the Court that the prayer of the petition might be granted, one year being fixed as the reasonable time for the closing of the sequestration, and a declaration being added in terms of section 3 of the Bankruptcy (Scotland) Act 1856, that the proceedings in the sequestration should thenceforth be regulated by the provisions of that Act. The last-mentioned declaration was for the purpose of enabling creditors to apply in terms of section 153 of the Bankruptcy Act 1856.

Counsel for Petitioner—W. C. Smith. Agents—Mackenzie, Innes, & Logan, W.S.