in regard to them, are produced. The Lord Ordinary does not think that the unsupported testimony of the pursuer on this subject can be received as sufficient proof of the existence of a debt by Gibb & Co. for which the defender is liable under his note. Even if parole evidence, and that of a single witness himself the party, could be sufficient, it is in the present case of the most general and unsatisfactory kind. It does not appear either what was the amount of bills due and current at the date of the bankruptcy, nor what sums have been received on them as dividends or from other obligants. The Lord Ordinary does not think that the holder of a note, which he admits to be only a security, is exempted from proving the existence and amount of the debt so secured in respect of the legal presumption of onerosity attaching to such documents. By the admission, the existence of the secured debt is the essential condition and limit of any demand upon the granter of the note. The point seems to have been decided in the case of the *British Linen Company* v. *Thomson*, 15 D. 314. It is true that reference was there made by the Lord President, not only to 'the admitted nature of the case,' but also to the structure of the summons, which set forth the security nature of the transaction. But the Lord Ordinary does not understand that the judgment was rested upon that specialty.

"There is, further, a separate ground on which the Lord Ordinary thinks that the demand in this action must fail. On 2d November 1866 the defender wrote to the pursuer 'to hand to the bearer my promissory-note for £150, which ought to have been returned by Mr Gibb to me, and which you retain unnecessarily.' Delivery of this letter to the pursuer by a clerk of the defender is proved. In the view which the Lord Ordinary takes of the proof, it must be held that the pursuer was entitled to retain the note against any such demand as a security for the whole debt then due, or which might become due on discounts then current. But the defender was entitled to bring his security obligation to an end at any time. By his letter he clearly intimated to the pursuer that he did not consent to his bill being longer held as a security for advances of any kind to Gibb & Co. Such an intimation was effectual against the pursuer to the extent to which the defender was entitled to bring the security transaction to an end. That is, it was effectual to the extent of preventing the pursuer granting further accommodations of any kind to Gibb & Co. upon the security of the note. The consequence was, that any balance which may have then been due by the firm is the debt for which a demand can be made under the note. As the note then ceased to be a continuing security for a fluctuating balance, all payments by Gibb & Co. from that date fell to be applied in payment of the balance secured by the note on the principle recognised in *Lang* v. *Brown*, 22 D. 113, and prior cases. A small balance which was due on the account-current by the firm to the bank on 2d November 1866 was immediately wiped off, and considerable payments were afterwards made into that account. There is no evidence at all as to the state of the discount account at that date, or as to payments to that account subsequently received and fresh discounts granted. The Lord Ordinary thinks that the pursuer was bound to have proved the debt which was due when further transactions on the security of the note were brought to an end by the letter of 2d November 1866. For anything that appears, any debt that was then due may have been paid off by the subsequent operations on the account-current. So long as its existence and amount is not proved, there does not appear to be any *onus* upon the defender to take the initiative by entering into an accounting in order to prove that, if not discharged by the payments into the account-current, it was so by operations in the discount account."

The interlocutor has become final.

Agents for Pursuer—H. & A. Inglis, W.S.

Agent for Defender—Alexander Wylie, W.S.

Wednesday, January 20.

FIRST DIVISION.

MILNE'S TRUSTEES *v.* LORD ADVOCATE.

(*Ante*, v, 629.)

Salmon-Fishing — Barony — Prescriptive Possession — Jury Trial. In a question of prescriptive possession of salmon-fishing on a barony title, a verdict finding forty years' possession by the pursuers was entered up for the defenders, the possession not being sufficient in law, not having been ascribed during the whole period to the barony title.

This case was tried in December 1868 before the Lord President and a jury, on the following issue:—"It being admitted that the pursuers are proprietors of the lands and barony of Muchalls, excepting the parts and portions of the said lands and barony under-mentioned, viz.—(1) the farm of Elrich and others, parts and portions of the said lands and barony disponed by the commissioner of the late George Silver of Netherly to the trustees of the late George Symmers, by disposition dated 8th and 9th August 1842, and that the same do not adjoin the sea or seashore; (2) the following parts and portions of the said lands and barony disponed to Dr Keith: The mill and mill lands of Muchalls, and those fields forming part of the home farm of Muchalls, which are situated on the east side of the turnpike road leading from Aberdeen to Stonehaven, and south of the road leading therefrom eastward toward the seashore, which lands above described are bounded from the other parts of the said lands and barony of Muchalls as follows, viz.—by the said turnpike road leading from Aberdeen to Stonehaven, and by the said road leading from the said turnpike road eastward towards the broad shore of Muchalls till the said road reaches the top of the cliffs, where two march stones have been placed, and thence by the gully directly opposite into the sea, being the first gully south of the broad shore, the line of march passing in the direction of the centre of said two stones and along the south side of a small sharp pointed rock, and along the north side of a rock partly covered by the sea, according to the state of the tide:

"Whether, for forty years prior to 16th April 1862, or for time immemorial, the pursuers and their predecessors and authors have, as proprietors of the said lands and barony of Muchalls, possessed the salmon-fishing in the sea and sea coast opposite to the said lands and barony of Muchalls belonging to the pursuers?"

After evidence was led for the parties, it was arranged between them, on the suggestion of the Court, that, as the true question was, whether the possession had by the pursuers and their pre-

decessors was in law sufficient possession for forty years within the meaning of the issue, a verdict should be taken for the pursuers, subject to the opinion of the Court on the said question, and with power to the Court to enter up the verdict for the defenders if they should be of opinion, on a consideration of the notes of the evidence and of the documents put in evidence, that the possession proved to have been enjoyed by the pursuers and their predecessors during forty years preceding 16th April 1862 was not in law sufficient possession within the meaning of the Issue.

A verdict was returned accordingly.

Both parties now claimed the verdict.

T. IVORY (Lord-Advocate MONCREIFF with him) for defender.

HALL (CLARK with him) for pursuer.

The Court held that, for some portion of the prescriptive period, the possession by the pursuers could not be ascribed to their barony title. In 1821 Silver, the then proprietor, had applied for a Crown grant, which he would hardly have done if he had supposed that he had in his barony title a sufficient right to the fishings. Again in 1824, and lastly in 1859, the possession was not ascribed to the barony title, and therefore the possession had by the pursuers not being in law sufficient possession, the verdict had not been entered up for the defenders.

Agents for Pursuers—Tods, Murray, & Jameson, W.S.

Agent for Defender—Andrew Murray, W.S.

Wednesday, January 20.

COURT OF LORDS ORDINARY.

STRICKLAND & CO. *v.* NEILSON & MACKINTOSH.

Ship — Deviation from Charter-Party — Power of Shipmaster — Bill — Re-exchange. Shipowner *held* not liable (1) for disbursements made by the shipmaster on account of a deviation from the charter-party, he having no authority to make such deviation; or (2) for re-exchange on bills for these disbursements.

In April 1859 a charter-party was entered into between the respondents, Neilson & Mackintosh, owners of the ship "Tornado," and Wilson & Chambers, merchants in Liverpool, whereby the "Tornado" was chartered for a voyage from Liverpool to the ports of Auckland and Wellington, New Zealand. Strickland & Co. were consignees at Auckland. The "Tornado" having arrived at Auckland, and discharged, the shipmaster deviated from the charter-party, for, instead of proceeding to Wellington, he entered into an agreement with the advocators to transhipthe passengers and cargo for Wellington, and to get the same forwarded by other conveyances. This was a claim now made by the advocators for a balance due on disbursements made by them for the "Tornado," they alleging that the disbursements made by them on behalf of the ship having been necessary disbursements, and having been made at the request and with the approval and sanction of the master who acted as agent for and otherwise represented the defenders, they, the pursuers, were entitled to repayment thereof from the defenders, the owners of the vessel.

The Sheriff-substitute (H. G. BELL) on 18th March 1867, pronounced this interlocutor:—"Finds that the balance sued for, conform to the accounts annexed to the summons, is £961, 4s. 8d., which balance is brought out by debiting the defenders with various sums, amounting *in cumulo* to £2882, 3s. 10d., and crediting them with payments to account, amounting to £1320, 19s. 2d.: Finds that the defenders deny that any such balance is resting-owing, and state objections to a number of the items of charge as contained in the accounts sued on, and in the detailed accounts of inward and outward disbursements Nos. 6-1 and 6-2: Finds that, as regards the more important of the charges so objected to, the accountant has not expressed any opinion, but left them to the decision of the Court, in respect they involve questions of law: Finds that the first two charges of the above description are the items of £40 and of £314 respectively, amounting together to £354, for forwarding passengers and cargo from Auckland to Wellington, in New Zealand: Finds that under the charter party, No. 11-1, entered into between the pursuers, Wilson & Chambers, and the defenders, the former chartered the defenders' ship 'Tornado' for a voyage to two ports in New Zealand, the ports ultimately fixed on being Auckland and Wellington: Finds that the ship proceeded accordingly to Auckland with passengers and cargo, carrying also some passengers and a portion of cargo for the more distant port of Wellington: Finds that, after discharging at Auckland, the shipmaster, instead of proceeding with his ship to Wellington entered into an agreement with the pursuers, O. R. Strickland & Co., the agents for the charterers at Auckland, to tranship the passengers and cargo for Wellington, and to obtain the same forwarded to that place by other conveyances to be provided by said pursuers: Finds that the grounds on which this deviation from the charter-party are stated to have been made, are that a large number of the crew became disobedient to the master's orders, and were paid off by him at Auckland, and also that the passage to Wellington, which is five or six hundred miles from Auckland, is often a tedious one, and evidence in support of these statements was led before the accountant, and also on commission in London; but finds that said evidence at the same time instructs that new hands were shipped at Auckland in room of those who left, that there was nothing in the condition of the vessel to make the continuation of the voyage to Wellington impossible or imprudent, and generally that, in the words of the witness John Craig, who was second officer of the 'Tornado,' 'there was nothing to prevent her from going to Wellington:' Finds, in point of law, that as the failure to go to Wellington was a deviation from the terms of the charter-party, the master had no power to enter into an agreement for such deviation which would bind her owner; for, in the words of Lord Ellenborough in *Burgon*, Dec. 17, 1810, 2d Campbell Reports, p. 529, 'The captain was captain for the voyage originally agreed upon, and on which the vessel sailed from England; everything out of that voyage was out of the scope of his authority as captain; as such he had no power to change that voyage for another;' see also Maude and Pollock on Shipping, p. 114, and Abbot on Shipping, 10th edition, p. 95, who says, 'If the owners themselves have made a special contract for the employment of their ship, the master cannot, by the general and implied authority of his character as master only, annul such a contract and substitute another for it with the other contracting party:' Finds, that if any other view was sanctioned the owners would be at the mercy of the