the failure to furnish a full cargo. It is so described in the English authorities. It is so in Professor Bell's Commentaries. It is particularly so described in Professor Bell's Principles. It is a name which has obtained a place both in our mercantile authorities and in our law authorities. Now in this charter party there was an obligation to load a full cargo, and that obligation was not fulfilled, hence arises this claim which is made by the subsequent proofs in the case.

But the important question here is whether, in respect of this claim for dead freight, there is a right of lien? Now there may be a claim for dead freight where there is no right of lien. I think it is quite clear that where there is merely a failure to fulfil the obligation of furnishing a full cargo there is a claim for dead freight, but no right of lien. On the other hand, I think it is equally clear, both on principle and on authority, that if there be a stipulation in the charter-party that dead freight shall be exigible, and that there shall be a lien for it on the cargo, then there is a lien constituted by contract. Lien is not properly a contract in the strictest sense of the law, because lien is more properly a right which the law gives without contract, but it may be constituted by contract. I think in that respect we have plenty of authorities—we have the authority of Mr Bell; we have the authority of the Law Dictionary I have referred to,—whether it be a lien arising out of the usages of trade, or out of express stipulation, it is all the same. I adopt the words of Sir William Grant in the case of *Gladstone* v. *Burley*, where he says—"Taken either way, however, the question always is, whether there be a right to retain goods till a given demand is satisfied?" The right must arise from law or contract. The question is, whether any such right exists here? This charter party says in so many words that there shall be a lien for freight. That is the contract. We are told that these words are in print and not in manuscript. I do not think that affects the question. The words being in print were allowed to remain, and the stipulation is a very natural one. It is quite plain that the words are introduced there because it does happen not unfrequently that there is a stipulation for dead freight; and that being so, and the contract being so expressed, I can entertain no doubt that it is a valid contract. The circumstance that the precise amount is not specified does not affect the principle. In almost any case that might happen there might be some inquiry raised as to the amount of the dead freight. It may be alleged on the part of the charterers that other goods were received, or it may be alleged that certain things have to be deducted, and so forth, but still the contract is there. It may be inconvenient or not that it should receive effect, but still there it is, and it is binding on the parties. But in this case I see no difficulty at all. It was not pleaded in the Court below that the claim of 210 tons was an exorbitant claim, or a claim which ought to be subject to any deduction. It is clear upon the evidence that the vessel was capable of carrying a great deal more, and there is no allegation that from that anything ought to be deducted.

I therefore think, upon the whole aspect of the case, that the judgment of the Court below was right, and that this appeal should be dismissed.

Interlocutors affirmed, and appeal dismissed, with costs.

Agents for Appellants — Millar, Allardice, & Robson, W.S., and Simson & Wakeford, London.

Agents for Respondent—Henry & Shiress, W.S., and W. & H. P. Sharp, London.

Monday, March 20.

VICKERS *v.* HERTZ.

(*Vide ante*, vol. vi. p. 417, for parallel case of *Pochin & Co.* v. *Robinow and Marjoribanks.*)

Mandate—Delivery Order—Sale—Pledge—Fraud—Factors Act, 5 *and* 6 *Vict. c.* 39, §§ 1 and 4.

Where A had purchased iron from the Carron Company, and held the company's ordinary delivery note for it, and employed B Brothers to dispose of it for him, sending them delivery orders upon the company in the ordinary form as if to purchasers; and B Brothers, instead of selling it, fraudulently gave it in pledge to C for advances made on it to themselves, and transferred to him the delivery warrants, which transference he, in *bona fide* and ignorance of the fraud, intimated to the company, and had the iron placed to his credit in their books, and upon B Brothers' bankruptcy sold it to cover his advances to them:—*Held*, affirming the judgment of the Court of Session, that B Brothers had been placed by A in a position effectually to make over the right to the iron to C in security of his advances to them, and that he was entitled to sell it, and recover these advances—the ground of their Lordships' judgment being, that the Factors Act, 5 and 6 Vict. c. 39, applied to Scotland as well as England; that it applied to goods not specific as well as specific, if the goods were deliverable on demand; and conferred on B Brothers a power to deal as they had done with the documents of title.

This was an appeal from the judgment of the First Division of the Court of Session in a case parallel in all respects to, and decided at the same time with that of *Pochin & Co.* v. *Robinow and Marjoribanks* (*vide ante*, vol. vi, p. 417; and Macph. vii, p. 622). The present case, however, was the one taken to the House of Lords to try the question involved in both. The main circumstances of the case, which will be more fully gathered from the report in the case of *Pochin & Co.*, above referred to, were as follows:—In 1866 the pursuer Vickers had purchased from the Carron Company a quantity of pig-iron of the quality called No. 1 Carron pig-iron. For this iron Vickers held the usual delivery note of the Carron Company in his favour, but had received no actual delivery. Wishing to dispose of it he employed Messrs Campbell Brothers, iron brokers and merchants in Glasgow, to sell it for him at 67s. 6d. per ton. He accordingly sent to Campbell Brothers delivery orders upon the Carron Company, authorising delivery to them in the usual terms, as though they had been themselves the purchasers. On receiving these orders, Campbell Brothers took them to Hertz, a merchant in Glasgow, who advanced a sum of £2400 upon them on receiving the orders indorsed in his favour to the Carron Company. In this transaction Mr Hertz was acting quite in *bona fide*, and without any knowledge of the fraud which was being committed by Campbell Brothers. Hertz immediately intimated the delivery order to the Carron Company, who returned an acknowledg-

ment that the iron had been placed to his credit in their books. Campbell Brothers shortly after became bankrupt; and Mr Hertz sold the iron to recover his advances.

Mr Vickers raised the present action in the Sheriff-court of Lanarkshire, whence it was brought by advocation to the First Division of the Court of Session. He claimed restitution of the iron, or at any rate of its value, on the ground that Campbells had fraudulently transferred the delivery warrants, and that their pledge of it was consequently invalid. It was held by the Judges of the Court of Session that Vickers, by his transmission of an unqualified order to Campbell Brothers, had put them in a position to go into the market as owners of the iron, and effectually to make over the right to it to a *bona fide* lender or purchaser.

The pursuer appealed to the House of Lords against this judgment.

The LORD ADVOCATE, with him Mr J. BROWN, Q.C., and Mr DICEY, for the appellant.

SIR ROUNDELL PALMER, Q.C., and Mr JESSEL, Q.C., for the respondent, were not called upon in reply.

At delivering judgment—

LORD CHANCELLOR—This is a case in which the appellant having certain pig-iron to sell, employed Messrs Campbell of Glasgow to sell it, and sent them delivery orders on the Carron Company to enable the sale to be effected. Messrs Campbell, instead of selling it, fraudulently pledged it with the respondent, who now keeps the iron in order to satisfy the advances he had thus made. The case has been argued at great length, but the point lies in a small compass. The Lord Advocate took no notice of the Factors Act, 5 and 6 Vict. c. 39, which has a material bearing on the case, and he relied on general principles as to the right of property as represented by the possession of the delivery orders, and argued that as Campbell Brothers, who were merely agents or mandatories, had no right of property, so Hertz was in no better situation. Mr Brown, however, argued the case on the Factors Act, and contended that the Act applied only to specific goods, whereas here, he said, the goods were not specific. It might have been difficult to say whether these delivery orders could have passed the property to Hertz if the question had turned on the construction and effect of those instruments, but it is unnecessary to decide that point, for the Factors Act seems to confer on agents, such as Campbell Brothers were, a right to deal as they have done with the documents of title. The Act applies to goods not specific as well as to specific goods if the goods are deliverable on demand. That being the case here, the decision of the Court below is right, and must be affirmed.

LORDS CHELMSFORD, WESTBURY, and COLONSAY concurred.

Appeal dismissed.

Agents for Appellant—A. Kelly Morison, S.S.C.

Agents for Respondent—Hamilton, Kinnear & Beatson, W.S.; and Grahames & Wardlaw.

Tuesday, May 9.

CARTER (PENDREIGH'S TRUSTEE) *v.* M'LAREN & CO.

(*Ante*, vol. vii, p. 27; also see *ante*, vol. vi, p. 606.)

Bankruptcy Act—Creditors—Discharge—Forfeiture—Penalty—Preferential Payment—Good Cause.

B. & Co., creditors of C. & Co., refused to agree to the offer of composition made by the latter when sequestrated; but being pressed by some of the other creditors to accept a preferential payment and give their consent, they eventually did so, on the understanding that the additional payment was to be made by the friends of C. & Co., and not by any of the creditors. On learning that the transaction was illegal, they at once refunded the money. *Held* (reversing a judgment of the First Division) that the forfeiture and penalty which sec. 150 of the Bankruptcy Act imposes had been incurred; and *observed* that the words of the clause "if no cause be shown to the contrary," do not give the Court any discretionary power in the infliction of the penalty, if the facts are proved.

This was an appeal from the First Division of the Court of Session.

J. & G. Pendreigh carried on business as grain merchants in Edinburgh and Leith, and as brewers at Abbeyhill, Edinburgh; but the firms were different—the partners being different—and the creditors of each firm were different. The estates of each firm were sequestrated, and Mr Carter, the petitioner, was elected trustee in each sequestration. At a meeting of the creditors on 27th April last, the bankrupts made offer of a composition of 3s. 7½d. per pound on the debts of each estate—it being understood that for this purpose the two estates should be massed in one.

The respondents, who were creditors of the grain firm only, refused to accede to this composition, believing that the estates, if properly worked, should yield a dividend of 10s. per pound, and that the massing of the two estates was illegal. As they were overruled, and the composition accepted, they brought an action of reduction of this agreement, and succeeded in getting it set aside.

Meanwhile, as the other creditors were anxious for an immediate settlement, the respondents were pressed to accept a composition on their debt of 10s. per pound. They however refused to receive any snm that came out of the pockets of the creditors, but expressed their readiness to agree to 9s. per pound if the 1s. 9d. per pound of difference was paid by the Pendreighs' friends. On receiving an offer of this sum, amounting, after deduction of 2½ per cent. discount, to £226, 9s. 3d., through a Mr Weir, they, on 12th May, acceded to the offer.

The respondents made no secret of this agreement, openly telling it to other creditors and merchants. Hearing, however, that it was objected to, they, on 22d May, printed and issued a circular, with a copy of their correspondence in the matter, in which they stated—"We are informed that an opinion had been expressed that our object in opposing a private settlement was to do injury to some of the younger houses who are creditors, and it was for the purpose of disproving such an unfounded charge that we agreed to take 9s. per pound, provided that composition came from the Pendreighs, or their friends, not being creditors,