the cargo, he expressly debits himself with the amount payable to the pursuer under the charter-party, thus negativing by anticipation the defence now stated. As the defender admittedly settled with Messrs Wauchope, Moodie & Hope without authority from the pursuer, and indeed without communicating with him, he is not in this action entitled to obtain credit for the sum so paid."

The Sheriff (DAVIDSON) adhered.

The defender appealed.

TRAYNER for him.

SCOTT for the respondent.

At advising—

LORD JUSTICE-CLERK—In this case the Sheriff and Sheriff-Substitute have held that the defender Yule was bound to account to the owner and captain of this vessel for the amount of freight which he had collected from the consignees to the extent of the amount stipulated in the charter-party. Although I do not go along with the contention that Yule was only the agent of Broadhead, I think it proved with sufficient clearness that he truly acted both for owner and charterer in collecting the freight, and that he must be held to have done so subject to their mutual rights. This seems clearly implied in the provision of the charter-party, by which the ship was to be addressed to the charterers' agent in Leith. That provision necessarily implied that the charterers' agents were to look after all interests, and it was both a reasonable and a usual stipulation. In many cases the owner may be at a distance from the port to which the vessel is directed, and may have no other means of enforcing his lien on the cargo than through the operation of such a clause. It is also sufficiently clear, however, that Yule was the charterers' agent, and acted for their behoof as regarded the very considerable surplus of the freight above the amount stipulated in the charter-party. I see no reason to doubt that the shipping documents were given over to Yule by the captain on the footing that, to the extent of his interest in the freight, he would collect and hold for him.

In this state of the rights of parties the question is, whether an arrangement made with a consignee without the authority or knowledge of the owner and captain, by way of compensation for goods damaged on the voyage, is binding on them, and whether the amount is a valid deduction in accounting with them? I am of opinion that it is not, and that the owner is entitled to draw from Yule the full amount of the stipulated freight.

The other Judges concurred, and the Court affirmed the judgments of the Sheriffs.

Agents for the Pursuer—D. M. & J. Latta, S.S.C.

Agents for the Defender—Murdoch, Boyd, & Co., S.S.C.

Friday, June 30.

FIRST DIVISION.

STIVEN (PATON, GORDON, & CO.'S TRUSTEE) *v.* SCOTT & SIMSON.

Bankruptcy—Security—Prior Debt—Act 1696, *c.* 5—*Invoice.* On several occasions P. G. & Co. invoiced goods to S. & S. against advances made by the latter. The goods remained in P. G. & Co.'s warehouse, distinguished by mark, but dealt with by them as part of their stock in trade. From time to time they sold portions of the invoiced goods, and invoiced new goods to S. & S. to take their place. Within sixty days of P. G. & Co.'s bankruptcy, S. & S. demanded and obtained delivery of the goods. *Held*, that the delivery was challengeable under the Act 1696, c. 5, the date of the security being not that of the transmission of the invoices, but that of actual delivery.

This was an action by William Stiven, trustee on the sequestrated estates of Paton, Gordon, & Co., merchants and commission agents, Dundee, against Scott & Simson, also merchants and commission agents there. The pursuer sought to reduce certain deliveries of jute made by Paton, Gordon, & Co., within sixty days of their bankruptcy, to the defenders, and also a payment of £237, 1s. 8d. (the price of certain jute), made under the same circumstances by the bankrupts to bank to meet bills current between them and the defenders. The summons further concluded for restitution of the jute so delivered, amounting to 902 bales, and failing restitution for payment of the sum of £2225, 7s. 8d., in addition to the sum of £237, 1s. 8d. The action was laid both on fraud at common law, and on the statute 1696, c. 5, but the challenge at common law was not insisted upon.

The transactions between the bankrupts and the defenders, which were the subject of the present action, were of the following nature:—On several occasions in the years 1869–1870, Messrs Scott & Simson made advances to Paton, Gordon, & Co., "against invoice." These transactions, so far as shown by the letters passing between the parties, appear on each occasion to have been commenced by a letter from Paton, Gordon, & Co., inclosing bills for the acceptance of Scott & Simson, and also invoices of jute, requesting acceptance of the bills against the invoice. It was admitted that no real sale took place. The intention of parties was certainly to give Scott & Simson security for their advances, though what was the precise legal effect of the agreement was a matter of dispute. The goods invoiced remained in Paton, Gordon, & Co.'s warehouse, but were completely identified by marks or brands. On several occasions Paton, Gordon, & Co., notwithstanding that they had invoiced specific goods to Scott & Simson, sold these very goods without their knowledge or consent to other parties. On these occasions, however, they either invoiced new goods to Scott & Simson to take the place of those so disposed, or they paid the price of the goods so sold into bank to meet Scott & Simson's bills which were then current. On the 10th February 1870 Scott & Simson addressed the following letter to Paton, Gordon, & Co.:—"After consideration we have come to the conclusion that the only satisfactory security we can obtain over the jute against which the bills are current between us is that of actual delivery, and we have to ask you to make the necessary arrangements for to-morrow." Paton, Gordon, & Co. proceeded to deliver the jute. As the delivery did not take place so rapidly as Scott & Simson wished, they made repeated applications to hurry on operations. It appears that Paton, Gordon, & Co. had removed a portion of the goods invoiced, but they never denied their obligation to deliver. On the 10th March 1870, they stopped payment, and on the 4th April their estates were sequestrated, and shortly after the pursuer was elected trustee thereon. By the date of their bankruptcy the whole goods had been removed from their warehouse

with the exception of about £80 worth. On the 4th May the trustee raised the present action, concluding for restitution of the jute so delivered, amounting in all to 902 bales, and also of the sum of £237, 1s. 8d., as the price of a quantity of jute, which had been paid into the bank by the bankrupts, to meet *pro tanto* one of the bills current between them and the defenders. The questions between the parties substantially resolved themselves into the following:—What was the precise nature of the agreement made by Paton, Gordon, & Co. and Scott & Simson at the time the invoices were sent, and what was the legal effect of that agreement? The trustee contended that by the transmission of the invoices there was no absolute and unconditional obligation laid upon Paton, Gordon, & Co. to deliver the jute; that, in fact, there was an understanding that delivery should not be demanded unless Paton, Gordon, & Co.'s affairs should become embarrassed; and that, consequently, the delivery of the jute within sixty days of their bankruptcy by Paton, Gordon, & Co. was a further security voluntarily given to Scott & Simson in preference to their other creditors, and therefore challengeable under the Act 1696, cap. 5.

Messrs Scott & Simson, on the other hand, contended that by the transmission of the invoices it was agreed that they should have all the rights of a purchaser; that they were accordingly entitled to demand delivery of the jute at any time; and that the subsequent delivery to Paton, Gordon, & Co. was not a "further security," but implement of a pre-existing obligation.

The Lord Ordinary (GIFFORD) allowed parties a proof. A considerable body of evidence, both documentary and parole, was led. It appeared that the agreement between Paton, Gordon, & Co. and Scott & Simson was not reduced to writing, or even explicitly stated in words, but was left to tacit understanding and the usage of trade. Accordingly the most important evidence in the case was the construction put upon the contract by the parties as shown by their actings. The invoices were in ordinary form, headed by the word "bought," and contained the following note—"The goods above invoiced we hold in our warehouse fully covered by insurance." In regard to the sales of the invoiced goods, which were made by Paton, Gordon & Co., the evidence was not very clear whether it was part of the agreement that Scott & Simson should be consulted as to the persons to whom and the prices at which the goods were to be sold. In point of fact, it appeared that Paton, Gordon, & Co. made sales without consulting Scott & Simson, though on several occasions they intimated the sales to the latter. A circumstance strongly founded on by the trustee was that Paton, Gordon, & Co. made several out and out sales to Scott & Simson of the very goods which had been already invoiced to them.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—"Finds that the various quantities of jute delivered by Paton, Gordon, & Co. to the defenders in February 1870 set forth upon record, and the payment of £237, 1s. 8d. made by Paton, Gordon, & Co. to the Bank of Scotland in Dundee, on behalf of the defenders, on or about 25th February 1870, were so delivered and made in *bona fide*, and were not delivered and made illegally and fraudulently to disappoint the rights of the just creditors of the said Paton, Gordon, & Co.: Finds that the said deliveries and payment were not made in violation of the Act 1696, cap. 5, and are not challengeable either under the said statute or at common law: Therefore assoilzies the defenders from the whole conclusions of the libel, and repels the whole reasons and grounds of reduction, and decerns: Finds the defenders entitled to expenses.

"*Note.*—This is a case of considerable importance in mercantile law, and the questions raised in it are attended with much delicacy and nicety.

"Although the Lord Ordinary has come to be of opinion that the deliveries of jute and the bank payment made in 1870, within sixty days of the sequestration and notour bankruptcy of Paton, Gordon, & Co., are not challengeable either as being fraudulent at common law, or as being in contravention of the Act 1696, still he cannot help feeling that the practice pursued by Paton, Gordon, & Co., whereby they came under obligation to deliver to their creditors, in pledge or in security, special parcels of goods, of which, notwithstanding such obligations, they were allowed to retain actual custody and possession, is a practice inconsistent with healthy trading, and which ought not to be encouraged by the law. The parties have been sailing very near the wind, and it is not without some hesitation that the Lord Ordinary has reached the result, that the right which the creditors succeeded in getting completed in February 1870 was not cut down by the bankruptcy which followed within sixty days thereof, viz. on 4th April 1870.

"Although the transactions between the bankrupts and the defenders took the form of sales, signed invoices as upon sale being delivered to the defenders in return for bills which the defenders granted to the bankrupts, it has been abundantly established in evidence, and is admitted by all parties, that no real sale took place. The goods invoiced to the defenders were not in reality sold to them; but what the parties intended to do was to give the defenders a security for their advances over the goods so invoiced—such a security as might at any time be completed and perfected by the defenders demanding and receiving actual delivery of the specific goods invoiced to them. The invoice was given not as evidence of sale, but as giving the defenders the title of a purchaser at any time to ask and take delivery of specific goods, as if these goods had been sold to them. The tacit understanding was, that the defenders should not actually demand or take delivery unless circumstances should make it necessary or advisable for them to perfect their security. But this was a mere tacit understanding, not reduced to writing, and not even, so far as appears, explicitly stated in words.

"On various occasions Messrs Paton, Gordon, & Co., notwithstanding having invoiced specific goods to the defenders, sold these very goods, without the knowledge or consent of the defenders, to third parties. On these occasions, Paton, Gordon & Co. either invoiced new goods to the defenders to take the place of those so disposed of, or they paid the price of the goods so sold into bank, to meet *pro tanto* the defenders' bills which were then current.

"The advances made by the defenders were always made 'against invoice'—that is, they were always granted *unico contextu* with a counter obligation by Paton, Gordon, & Co. in the shape of an invoice, to give security over certain specific goods. In this sense all the transactions were

nova debita. The advances were not made without any obligation to give security, and then the invoice granted as a security for a debt already contracted. If this had been so, the case, in the Lord Ordinary's view, would have had a different result. His opinion rests on what seems clearly established by the evidence, that in each case the advance was made against, and in exchange for, a sale-invoice of specific goods, which could be easily and at once identified, such invoice constituting an unqualified obligation to deliver the goods on demand. It is in these circumstances that the Lord Ordinary thinks delivery obtained by the defenders of the very goods invoiced to them, completely identified by marks or brands, and requiring no weighing or measuring over, or separation from stock, and said delivery being made before the stoppage of the defenders, and while they were continuing to carry on business in ordinary course, is not struck at, either by common law or by the Act 1696.

"In the first place, the transaction seems unchallengeable at common law. The summons is laid on fraud at common law, as well as on the statute; but after the proof was adduced, it seemed to be conceded by the pursuers that they had not established fraud at common law. At all events, in the Ordinary's opinion, no case of common law fraud has been made out. Full value was given by the defenders for all the goods of which they received delivery. Indeed the goods delivered fell short of the value which the defenders have paid, and the defenders have not succeeded in making good the amount of their advances, but have lost between £400 and £500. It appears also that the defenders took the invoices in exchange for their money, with the view and intention of creating a security over the goods invoiced. This, of course, will not make the security good if it is invalid in law, but it is an answer to the charge of fraud, and establishes the *bona fides* of the parties. Then, lastly, delivery of the goods was obtained long before the actual stoppage of Paton, Gordon, & Co., and while they were carrying on business in the usual way. Paton, Gordon, & Co. did not stop payment in any sense till the 10th of March, when, for the first time, they became unable to meet their bills, and it seems proved that on the 9th of March the Bank of Scotland discounted one of their bills in the usual way, without asking security, and without imposing any condition or restriction. Notour bankruptcy and sequestration did not take place till 4th April.

"No doubt it is true that in February the defenders began to suspect that the stability of Paton, Gordon, & Co. might be affected by certain failures which had taken place in Dundee, and this led to the defenders completing their securities by taking actual delivery of the goods invoiced to them. But a suspicion of this kind is not enough to constitute fraud, or to set aside the delivery of goods taken in virtue of a previous obligation, any more than it would set aside a payment in cash. At common law, therefore, it is thought the transactions are unchallengeable. In the next place, however, the question arises, and it is to this that the argument at the bar was exclusively directed, Are the transactions in question struck at by the Act 1696, cap. 5?

"Now, the decisions on this subject have undoubtedly very much varied, and it is impossible to reconcile them all. The difficulties are fully stated by Professor Bell, and they have been illustrated by a series of cases which have occurred since the Commentaries were written. It may be convenient to note the leading cases:—2 Bell's Coms., 7th (M'Laren's) Ed., pp. 206 and 211; *Inglis* v. *Mansfield*, 28th June 1833, 11 S. 813, affd. (H.L.) 10th April 1835, 1 S. and M'L. 208; *Bank of Scotland* v. *Stewart and Ross*, 7th Feb. 1811, F.C.; *Moncrieff* v. *Union Bank*, 16 Dec. 1851, 14 D. 200; *Taylor* v. *Farrie*, 8th March 1855, 17 D. 639; *Lindsay* v. *Shield*, 19th March 1862, 24 D. 821; *Rose* v. *Falconer*, 26th June 1868, 6 Macph. 960.

"In reference to the earlier conflicting cases, Professor Bell says—'This series of cases will show a degree of uncertainty in the principle to be applied in questions of this kind, which is very distressing in practice. But the fair result seems to be (1) that wherever money is paid or advanced, or property made over in consideration of a general promise of security not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted; and in its true intent and meaning the rule of the statute is understood to apply to the security when it comes to be granted as being truly a security for a previous debt.' After illustrating this, he goes on to say—'But (2) it has also been held that wherever there is stipulated a specific security over a particular subject, in consideration and on the faith of which an advance of money or transfer of goods is made, the completion of that security, although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act.'

"The Lord Ordinary thinks that the doctrine thus laid down by Professor Bell may be held as fully borne out and fairly established by the later cases. The decision of *Moncrieff* v. *The Union Bank* can hardly be saved or reconciled with the principles announced by the whole Court in *Taylor* v. *Farrie*, in which, although the case was one of sale, the Court fixed the general rule, that a deed granted or an act done in specific implement of an absolute obligation undertaken prior to the sixty days, is not a voluntary deed in the sense of the statute. This was also very clearly laid down in *Lindsay* v. *Shield*; and in the late case of *Rose* v. *Falconer*, although it was found in point of fact that there was no prior obligation, the Court seemed clear that if there had been, the payment would have been unchallengeable. In *Lindsay* v. *Shield* the delivery was sustained, whether it was intended to operate as a security or as a sale, it being doubtful what was the true nature of the obligation. With great deference, therefore, it is thought the decision in *Moncrieff* v. *The Union Bank* cannot be safely followed.

"In the present case the Lord Ordinary cannot read the invoices otherwise than as an unqualified obligation to deliver the specific goods invoiced, and that upon demand. It was no doubt powerfully urged that the moment it was established that there was no real sale, the invoice went for nothing, and could not found a demand for delivery. The Lord Ordinary cannot hold this. There is nothing illegal in a lender stipulating for and obtaining an *ex facie* absolute title—the *ex facie* absolute title of a purchaser. Securities are often taken by way of absolute disposition or conveyance with or without a back-bond or back-letter; and, instead of being illegal, such securities are rather favoured by law. Whether the absolute conveyance bears to be as for a price, that is to be the title of a pur-

chaser, or merely bears to be granted for good causes and considerations, it is true that when the real character of the transaction is proved the holder must account for the subject of the security, and for any surplus it may yield after paying his debt; but its *ex facie* absolute form in no way invalidates or affects his security right. The defenders actually stipulated (for so the Lord Ordinary reads the correspondence) for an absolute title to have the same effect as if they were purchasers, and accordingly they got signed invoices. It was 'against' these invoices that they granted the bills, and it must be held that they would not have made the advance unless they had got the invoice, with all the rights which an invoice confers when the price is paid. It cannot well be doubted that, supposing no bankruptcy had occurred, a good action would have lain at the defenders' instance for the delivery of the goods invoiced to them, and that either with or without the true nature of the transaction being disclosed or admitted. If so, it is thought that the deliveries in February cannot be held as voluntary acts in the sense of the Act 1696.

"In short, the Lord Ordinary reads the invoices as express obligations to deliver the invoiced goods, and, whether such delivery is in implement of a sale or in security, in neither case is it a voluntary act struck at by the statute. If indeed it had been a sale, the Mercantile Amendment Act would have applied; but the taansaction not having been a sale, that Act has no application. The specific nature of the goods invoiced has already been adverted to. Not only were the bales numbered and marked with precise marks, but it was proved in evidence that Paton, Gordon & Company had no other goods with the same marks in their possession, excepting the goods specified in the invoices. There could, therefore, be no doubt or difficulty as to identification, and nothing in the way of measurement, weighing, separation, package, or anything else, remained to be done by the debtors. The payment to the Bank of Scotland depends on the same principles as the delivery of the jute. The sum paid was the price of a parcel invoiced to the defenders, but which, notwithstanding such invoicing, Paton, Gordon & Company had sold. They were required to pay the price or deliver the goods, and they paid over the price as a surrogatum for the goods. This was no more 'voluntary' than if the goods themselves had been delivered.

"On these grounds, and although not without some misgivings as to the evil effect which may arise from the recognition of a practice which cannot be regarded as wholesome or commendable, the Lord Ordinary feels himself unable to sustain the pursuer's challenge."

The trustee reclaimed.

WATSON and MACKINTOSH, for the pursuer—What the trustee complains of is delivery made by the bankrupts, in answer to a letter of 10th February, within sixty days of bankruptcy. This is a demand made for the first time for delivery. The defenders seek to take the case out of the operation of the statute by saying that there was a pre-existing obligation to deliver; whereas we contend that the preceding contract did not impose an absolute obligation to deliver. Nothing but an absolute and unconditional obligation to deliver will prevent the application of the statute. This was an arrangement for enabling a man to go on having large quantities of goods in his warehouse and getting credit by selling them as his own, and then when he becomes insolvent another person steps in and claims them as his own in consequence of certain invoices.

The SOLICITOR-GENERAL and GUTHRIE-SMITH, for the defenders—There was no attempt on the part of the bankrupts to dispute that they were under obligation to deliver. The delivery is now sought to be set aside on the ground that it was a voluntary act by the bankrupts in further security of the defenders—that is to say, one not stipulated for in the original agreement. If there was a legal obligation under which the bankrupts were bound to give delivery, it was not a voluntary security, but in implement of a previous obligation. And even supposing there was no obligation to deliver which could be legally enforced, provided it was really stipulated for, the subsequent delivery was not a *further* security, but that agreed upon. There are two things in the statute which it is necessary to distinguish—"voluntary," and "in further security;" "voluntary," *i.e.*, opposed to all security that could be enforced at law; "in further security," *i.e.* in addition to that stipulated for at the time of the original agreement. Where a person is challenged for taking a fraudulent security, he is not limited to prove that he was entitled to get that security by the same evidence that he would have required in order to enforce that security. It is sufficient to establish that the security which he got was one which he originally stipulated for. If so, it cannot be a fraud to take it. The nature of this transaction is fairly expressed in the face of the documents. It is admitted that the transaction took this shape for the purpose of giving a security. But though there was no actual sale, is there any reason why the transaction should not take this form, in order to give the lender all the rights of a purchaser? Suppose an action brought before bankruptcy to enforce delivery, would it have been possible for Paton, Gordon, & Co. to say, "You have got your invoice, that is all you ever stipulated for." The invoice puts Paton, Gordon, & Co. in the position of having to submit to be dealt with as sellers. Having got their consideration (though not that stated in the invoice), they are not entitled to plead that they have not got payment. In short, before bankruptcy the nominal purchasers were entitled to enforce delivery whenever they chose. And it is an important element in the case that they did get delivery whenever they asked it.

At advising—

LORD PRESIDENT—This is a reduction at common law, and under the Act 1696, c. 5, brought by the trustee on the sequestrated estates of Paton, Gordon, & Co. against Messrs Scott & Simson, who received delivery from the bankrupts of certain quantities of jute within sixty days of their bankruptcy. The Lord Ordinary has found that the deliveries were neither fraudulent at common law nor challengeable under the Act 1696. The challenge at common law has not been insisted in. It remains to consider the application of the statute. Many decisions have been pronounced in regard to the application of the Act 1696, c. 5, to transactions of this kind. It is undeniable that the decisions have fluctuated—that they are not consistent with one another. It rather appears to me, however, that the whole of the recent decisions since the case of *Inglis* v. *Mansfield* may be reconciled on one plain ground. But before we consider the law, it is desirable to ascertain the true state of facts in this case.

The defenders and a previous firm of Scott & Bell, who may be considered the same parties, were in use to make advances of money to Paton, Gordon, & Company. The parties arranged what they considered an effectual security for repayment. The transactions were all of the same character, and one example will suffice. I take the letter of 27th February 1869, as this relates to the first transaction in point of date, although not under challenge, and it brings out somewhat more clearly the circumstances. Paton, Gordon & Company write to Scott & Bell, enclosing bills to the amount of £3840, adding "to which please do the needful against the flax, invoice of which we hand you herewith." An invoice is enclosed, of the same date, of certain specified parcels of flax identified by mark, with the number of tons and price, the total value amounting to £4644. A note is added, "The above flax we hold in Borrie's warehouse fully covered by insurance." The invoice is headed in the ordinary way, "Bought of Paton, Gordon & Company." It is admitted that the invoice did not refer to a sale. The object of parties was that Paton, Gordon & Company should have an advance, and that Scott & Bell should in return have a security. To create this security nothing more was done but the transmission of the invoice. The note was to show that the goods were not only in the warehouse, but that in case of accident the value would be forthcoming as a source of repayment of the advances. As matter of law, it is needless to say that this was no security at all. If a pledge was intended, the real contract of pledge cannot be completed without actual delivery. The other transactions were of the same kind. There are three different invoices under reduction. After this course of dealing had been going on for some time, the defenders came to the conclusion that nothing but actual delivery will render the security effectual, and accordingly, on the 10th February 1870, they write to Paton, Gordon & Company to that effect. By this time they had evidently got sound advice. The delivery accordingly takes place, but, unfortunately, it is within the period of constructive bankruptcy. The evidence of Mr Scott as to the transactions between his firm and the bankrupts is given with most commendable fairness and candour, and it is satisfactory to observe that there is no practical difference between his evidence and that of Mr Paton. He says with regard to one of the invoices—"It was intended to be an invoice in security. It was not what we call an out-and-out purchase. It carried the force of a purchase so far that we could ask delivery of the jute at any time. It was not, in point of fact, a purchase, but was intended as a security for the money advanced." He says, further, that after those invoices had been delivered, the goods were looked upon by both parties as pledged. It became necessary to sell. There is no evidence that the consent of the defenders was either required or obtained. Paton, Gordon & Co. dealt with the invoiced goods as part of their stock-in-trade, and as entirely at their own disposal. It is singular that some portions of the goods were actually sold to Scott & Simson. After the goods were invoiced, it appears that a further step was taken, the only additional step. Scott & Simson sent their warehouseman to inspect the goods, and ascertain whether their quality and amount was such as stated in the invoice. The warehouseman accordingly took a rough survey, and reported favourably. Mr Scott goes on to say "My object in taking the invoice in this form was because I believed that under it I could ask delivery at any moment that it pleased me. There was nothing said between myself and Mr Paton as to delivery of the goods, except that it was understood between us—and for that very purpose the invoice was made out in that form—that I could ask delivery at any moment. One reason why that was understood is because it is the custom in Dundee." He afterwards speaks of the transaction as a "security over undelivered goods." This is a very accurate and truthful statement. Taking Scott's evidence as a whole, I gather that nothing was said as to the right to demand delivery, but that he understood that by a prevalent custom the getting the invoice gave him a security, and entitled him to demand actual delivery when he pleased. The difficulty of seeing how a security could be created in this manner is well illustrated by Paton's evidence. He is asked, "Would you have agreed to take the advance subject to any restriction upon your afterwards selling your own goods? Answer—If I had been driven into a corner I might have done it to begin with, but I should soon have completed the transaction by disposing of the goods. Question—In short, that is a kind of transaction you could not have gone on with in carrying on your business? Answer—No; it would not have been very suitable." The conclusion is, that the security was created within the period of constructive bankruptcy. There was no effectual security constituted till delivery, which took place within sixty days.

The Lord Ordinary says that he finds a difficulty in reconciling the decision in the case of *Moncrieff The* v. *Union Bank* with the subsequent decision in *Taylor* v. *Farrie*. I regard the case of *Moncrieff* as an important and leading authority in this branch of the law, and not shaken by the case of *Taylor*, or that of *Lindsay*. The decision in *Tayler* was certainly one of great authority, being pronounced by the whole Court, and if it was inconsistent with that in *Moncrieff*, we should be bound to follow the later and higher authority. But the Court in that case did not intend to shake the authority of *Moncrieff's* case. It appears to me that the propositions quoted by the Lord Ordinary from Bell's Commentaries represent very accurately the general doctrine on the point. It is distinctly laid down that an obligation of a general kind to give security, not applicable to any specific subject until it is made special, cannot be said to be a security. It is only when the so called obligation is fulfilled that there comes to be any security. That is the point of time to which we must look, and if it falls within sixty days of bankruptcy the statute applies. But, on the other hand, if a party subjects himself to an obligation, absolutely and instantly enforceable, the fulfilment, though within the sixty days, is not reducible under the Act, for in this case the security is really granted contemporaneously with the debt. This view received ample confirmation in the case of *Inglis* v. *Mansfield*, in which a clear distinction was drawn between the cases no longer of authority and those which express what is held to be law.

I come now to the case of *Moncrieff*. Six months before bankruptcy the bankrupt received advances from a bank; he gave a promissory note for the amount. At the same time he wrote a letter to the manager, by which he came under an obligation at any time required to assign to the bank in security of the advance a heritable bond and two

policies of insurance. These he deposited with the bank. No assignation was ever required till within the sixty days. The deposit created no security; it was of no value without an assignation. It was held that an obligation to grant an assignation when required was not a security in itself, and therefore that the date of the security was within the sixty days. Lord Ivory, the Lord President, and Lord Fullerton all refer to *Inglis* v. *Mansfield* as conclusive, and give it as their opinion that the obligation to grant security went for nothing, and that the time to be looked at is the granting of the security.

Is *Taylor* v. *Farrie* inconsistent with this doctrine? The circumstances in that case were a little complicated. There were some proposals about a partnership in a brick and tile work, but in the end the arrangements resolved themselves into this —that the other parties sold to one (Farrie) their whole stock-in-trade. Now, that was embodied in a formal written contract of sale—"The said Henry Fergus, in consideration of the price after mentioned, hereby sells to Thomas and Robert Farrie the whole stock of materials, implements, horses, carts, ... and agrees to assign to them the current lease," then and there. It is a present obligation to make over the whole stock of the former partnership, an obligation instantly prestable. Performance was not delayed, for the whole of this extensive stock was delivered within three days of the date of contract. That might be called instant delivery, with reference to such a case. The opinion of the whole Court was asked. The consulted Judges make this statement, which indicates the principles of law present to their minds. —"According to that verdict, therefore, the relative positions of Fergus and the defenders on Monday the 2d of June, when the latter entered into possession of the subjects and effects in question, were, that on the one hand they had a right, which they were entitled to enforce, to enter into exclusive possession of these very subjects and effects in virtue of his sale thereof to them on the Friday preceding; and that, on the other hand, Fergus was then bound to put them into such exclusive possession, but was not owing to them any debt whatever." That I conceive to be the principle of *Taylor* v. *Farrie*, that there was no distinction between the time of the contraction of the obligation and of its performance. It was not the case of a debt contracted at one time and afterwards a security granted. The case was decided upon a special verdict, which I had a hand in drawing, and I was surprised to hear that the decision was inconsistent with that of *Moncrieff*.

In *Lindsay* v. *Shield* the contract was of a very peculiar kind. It was embodied in a letter, "we have this day sold you 100 tons guano at £6 per ton, payment to be made by your acceptance at four months. The guano to remain in our warehouse at our expense and risk, and to be delivered to you as required. We however reserve the right to repurchase the above guano from you at the same price, and at any time during the currency of your acceptance." There were two questions in the case—(1) What was the contract? and (2) What was its effect? The first question was certainly one of difficulty. It was not easy to ascertain what was the right created in favour of Shield as regards delivery and possession of the guano. If the letter is to be read as importing only that the goods are to remain in the custody of the bankrupts, subject to their control and as part of their stock-in-trade, I should have arrived at an opposite conclusion. But the Court construed it differently. Under the contract they held that Shield was entitled to demand instant delivery, and that the bankrupts could not without fraud use it as part of their stock-in-trade. With this interpretation of the contract, the decision is quite reconcileable with that of *Moncrieff*. Lord Curriehill observed—"Delivery of the guano was precisely what Miller was bound to make, and not what it was optional to him to make or not; and I think it is solidly established that when that is the case there is no contravention of the statute 1696." That is just a repetition of the doctrine laid down in the second passage of Bell's Commentaries quoted by the Lord Ordinary. That opinion could only proceed on the interpretation of the contract that it was an obligation to grant instant delivery.

Upon the whole matter, I have come to the conclusion that this case falls under the Act 1696. And I have arrived at this conclusion without throwing the slightest discredit on any case decided since 1833—the date of *Inglis* v. *Mansfield*.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that the Lord Ordinary has arrived at a wrong conclusion in this case. I think the Act 1696, cap. 5, applies to set aside the transference of goods complained of.

I hold the principle to be firmly established that wherever, on an advance of cash, a simultaneous engagement is made to give a specific security for the specific advance, such security may be validly completed within sixty days of bankruptcy, and is not struck at by the Act 1696. And, in the case supposed, I do not think it matters whether the completion of the security is made by the debtor's act or otherwise. The principle is, that the advance and the security are parts of the same transaction; and the completion of the transaction cannot be said to be the giving of a security for a prior debt. But it remains to consider whether the transaction in the present case can be brought within this rule.

The transaction in question was one of a very peculiar nature. What was done by the bankrupts, Paton, Gordon & Co., on the occasion of advances to them by the defenders Messrs Scott & Simson, was simply to hand over an invoice of certain quantities of jute, set forth as bought by Scott & Simson of Paton, Gordon & Co. This made an ostensible sale by the borrowers to the lenders. But it was clearly proved that no sale was intended, but merely a transaction of security. In arranging this security no delivery was stipulated for and none contemplated. The goods were intended to remain, and did in point of fact remain, in the warehouse of Paton, Gordon & Co. Nay more, it was understood between the parties that Paton, Gordon & Co. should have power to dispose of the goods (as they in point of fact did both to others and to Scott & Simson themselves),—they either employing the proceeds in retireing Scott & Simsons' acceptances, or invoicing a new parcel of goods to these gentlemen. This understanding is very clearly shown to have existed by the actual facts which followed. In this way there was neither a delivery nor an obligation to deliver at any one specific time. Delivery of the goods was apart from the contemplation of the parties. What they endeavoured to

accomplish was, under the guise of a sale to give to Scott & Simson a security over goods retained in the possession of the bankrupts. It showed a somewhat strange ignorance of mercantile law to suppose that an effectual security could be thus constituted. But either they supposed this, or were willing to experiment in the matter. I entertain a very clear opinion that, when within sixty days of bankruptcy Scott & Simson asked and received delivery of the jute contained in these invoices, they were asking and receiving a security to which they then for the first time obtained legal right. There was no obligation to deliver the jute at that moment; indeed, the essence of the transaction was not delivery at any moment whatever. The utmost view which the parties could possibly have was, that through the fiction of a sale the goods might be claimed on bankruptcy by Scott & Simson as fictitious purchasers. Delivery in the course of the transactions was neither stipulated for nor intended. I feel it impossible to put this transaction on the footing of a specific security stipulated for at the time of the advance, and given in terms of that stipulation. The delivery of the jute was not implement of a *bona fide* agreement for security, then in operation. It was security without obligation given within the sixty days, and therefore falls under the statute.

I do not, in saying this, rest my opinion on the mere form of the transaction as a sale, and not a transference in security on its face. It is undoubtedly competent to constitute a security in the form of an absolute disposition. And if this ostensible sale had been completed by present delivery to Scott & Simson, the goods might probably have been retained as security for the advances if this had been truly stipulated. The flaw of the transaction lies in its substance, as a transaction under which no delivery was either made or stipulated for. The delivery within sixty days was therefore a delivery without obligation, and so is struck at by the statute.

The Lord Ordinary proceeds on the assumption that the transaction implied an obligation to deliver the jute to Scott and Simson at any time required by these gentlemen, and that therefore the delivery was not spontaneous, but in terms of previous stipulation, and so protected against the statute. I am not prepared to admit the Lord Ordinary's conclusion even if the transaction could be thus read. In my apprehension an obligation to give a security when required is not sufficient to cover a transaction within sixty days of bankruptcy. The obligation to give security which is protected against the statute is, I conceive, a specific obligation, prestable independently of after requirement. It is where the completion of the security follows in natural course on the original transaction. It is not where the requirement brings into effect, within the sixty days, a supervening element, without which no obligation arises. Anterior to the requirement no obligation lay; and so the obligation arose within the sixty days, not previously. An obligation to give security when required is, by force of the term, an obligation to give security within sixty days of bankruptcy equally as at any other time—nay, to give security after bankruptcy has occurred, for all is alike covered by the obligation. Such an obligation I consider wholly inoperative to elude the statute.

But I must now add that I cannot read the transaction in the present case as involving an obligation to give delivery when required. No such thing, I think, was in the contemplation of the parties. The very utmost of the obligation was to give delivery in the event of bankruptcy supervening, or of the circumstances of Paton, Gordon, & Co. becoming such as to threaten insolvency. Construed by the actings of the parties, the obligation cannot, at the utmost, be stretched further than to this effect. Suppose that on the face of the invoice all this was set forth in words—that is to say, that it was expressly declared that no sale was intended, but that under the cover of a sale Paton, Gordon, & Co. should deliver the jute to Scott & Simson for their security, in the event of their bankruptcy occurring or being threatened.—Surely this would be an obligation which the law never would regard as an obligation for security which excluded the operation of the Act 1696. In a question with the other creditors of Paton, Gordon, & Co. it would be no better than no obligation at all. The delivery within sixty days would be a transaction without legal obligation on which to rest, and therefore struck at by the statute.

With regard to the decisions, which were largely discussed before us, I think it unnecessary minutely to examine them. This has been sufficiently done by your Lordship. The decisions are not in all points reconcileable. But the present case has its own peculiarities, which I do not think occurred in any former one.

I would only say, in conclusion, that I think it would be much to be regretted did the Court feel bound to sanction this alleged security. For the result would be simply this, that the whole goods belonging to a mercantile house might be monopolised as security by a single creditor, whilst still retained in the possession of the debtor, and made a fund of credit all round; the single creditor being entitled to seize them for his own behoof whenever bankruptcy seemed inevitable, without any protection from the bankruptcy statutes to the general body. The Lord Ordinary perceived this result, though he thought he could not prevent it. But I think that the law is clear enough, and strong enough, to obviate the mischief.

The Court recalled the interlocutor of the Lord Ordinary; found that the deliveries and payment complained of were not made fraudulently to disappoint the rights of the just creditors of Paton, Gordon, & Co., and are not reducible at common law, but they found that, being made within sixty days of bankruptcy, they are challengeable under the Act 1696, c. 5; and therefore reduced in terms of the reductive conclusions of the summons, and remitted to the Lord Ordinary to dispose of the other conclusions; and allowed the pursuer expenses up to this date.

Agents for Pursuers—Leburn, Henderson & Wilson, S.S.C.

Agents for Defenders—Maclachlan & Rodger, W.S.

Friday, June 30.

NISBET'S TRUSTEES *v.* NISBET.

Insanity—Testament. Circumstances in which a trust-settlement, executed in a lunatic asylum by a person who for some years had been un-