Act of 1860 (23 and 24 Vict. cap. 33)—[*reads as above*].

Now, it seems to me that that enactment leaves it in the discretion of the Court, Lord Ordinary, or Sheriff, to grant or refuse a discharge after two years have elapsed, and even if unopposed, and the grounds for refusal are suggested in the statute. It is an unpleasant discretion, but we are bound to exercise it to the best of our ability.

The Sheriff-Substitute has refused to grant a discharge, and the petition being presented to the Lord Ordinary on the Bills, he has reported the case to us. I confess I am not willing to interfere with a discretion once exercised. The Sheriff was applied to, and he, after consideration, refused the discharge. His decision is of course subject to revision; but where a judge has given his mind to a case, and exercised his discretion in such a way that no one can say he has acted wrongly, it is a very strong step to alter his decision, and I am the less disposed to do so here as this is a very bad case. The one point in favour of the bankrupt is the lapse of time since the sequestration, but I can by no means say that that is always sufficient to justify a demand for discharge. If we look at the report, we must be struck by the unfavourable view the Accountant has taken of the case. There can be no doubt the bankrupt was guilty of the very offence contemplated by the statute; in fact he is a fraudulent bankrupt, and might have been prosecuted criminally. The Accountant says that if the evidence had been before him earlier he would have suggested to the proper authorities the propriety of criminal proceedings being taken. It is a circumstance in the case that there has been no punishment, and that is a consideration against taking a favourable view of the application. The trustee not only records this, but goes on to say that he cannot hold that the bankruptcy was the result of innocent misfortune or losses in trade. That is not further explained, and all we can take is that the bankruptcy was due to something else. Considering all the circumstances, I cannot say I think the Sheriff-Substitute has decided either wrongly or too hardly, and therefore I am of opinion that the application should be refused.

Lords Deas and Mure concurred.

Lord Shand concurred, and added—At the same time, I should like to say, that of course we can only deal with the case as we know it at present, and I am not prepared to say that if this application is again brought forward after a long interval, or if additional mitigating circumstances can be shown by the bankrupt, or if the creditors were to join him in his application, I might not be disposed to treat the matter differently.

The Court adhered, and refused the prayer of the petition, intimating that it was open to the bankrupt, if so advised, to renew the application at some future date.

Counsel for Bankrupt (Appellant)—M'Kechnie. Agent—R. Finlay, S.S.C.

Friday, November 16.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

VEITCH *v.* KALNING AND OTHERS.

Ship—Master—Bottomry Bond—Cargo—Power of Shipmaster to include Cargo in a Bond of Bottomry.

Circumstances *held* sufficient to take a case out of the general rule of law that where a master of a vessel in a foreign port is unable to communicate with the owners of the vessel or the owners of cargo, and finds it necessary to raise funds by means of a bond of bottomry, and to include the cargo therein, he is entitled to do so.

Process—Multiplepoinding—Claim.

A party whose claim in one character in a multiplepoinding had been rejected, *allowed* to lodge a claim in a different character upon payment of expenses found due in the former branch of the action.

The "Anna Alida" was chartered to proceed with a cargo from Newcastle to Libau. In leaving the former port she came into collision with another vessel, for which her owners became liable in damages. Notwithstanding of this occurrence she continued on her voyage, but in consequence of bad weather she was disabled, and was forced to take refuge in the port of Leith. While she was at Leith an action of damages was raised against the master in respect of the collision, on the dependence of which she was arrested on 22d January 1876. The arrestments were not withdrawn till 10th March.

On her arrival at Leith it was found that she needed considerable repairs. The cargo was discharged. Mr Becker was employed by the master as shipbroker, and he took charge of the cargo, and also saw to the repairing of the ship. Including the damages for the collision, amounting as paid to £106 or thereby, an account was incurred to him of £580, of which by much the larger part fell on the ship and freight exclusively. But even this account did not include the whole cost of the repairs which were executed on the ship.

The charterer William Scott, and the owners of cargo Thiedemann & Company and Schulte & Schemmann, raised an action against Kalning, who was captain and part-owner of the ship, for repetition of the freight and damages, on the ground that the ship was unseaworthy when she started, and that the repairs executed on her at Leith were insufficient. The defender was assoilzied, but the same parties made application to the Sheriff of Midlothian, on the ground that their adventure had been defeated by these delays, to grant warrant for the unshipment and sale of the cargo and consignation in the hands of the Clerk of Court. This warrant was granted, and the proceeds, £888, 11s. 10d., were lodged with the Clerk of Court, the nominal raiser of this action, which was a multiplepoinding for division of that fund, and by him placed in the Royal Bank.

While the ship lay at Leith, Kalning, who with his mate was owner of the whole ship, had re-

pairs executed on her, and to pay for these he borrowed £500 from William Philip Dymond, Falmouth, granting a bond of bottomry therefor, in which, besides binding himself and the vessel, he bound her cargo and freight. Before executing this bond, his agent Mr Becker, the shipbroker, had gone to Newcastle to see the charterer and owners of cargo. The result of the evidence (in the proof ultimately led in the case) as to what passed between them was, that although Mr Becker intimated to them that there was an intention of granting such a bond over the cargo as well as the ship, he received no encouragement from them.

Mr Dymond accordingly, in virtue of his bond of bottomry, claimed on the fund for its amount; Kalning claimed to be ranked in respect of freight for £124, 15s. 4d; and Scott and the owners of cargo claimed the fund in medio and expenses.

Scott and others pleaded—"(1) The claimants being owners of the cargo are entitled to the price obtained therefor when it was sold under judicial warrant. (2) The freight to which the master was in the circumstances entitled having been already paid, and the voyage not having been further prosecuted, the said cargo is not subject to any lien in favour of the ship. (3) Nor has it been well hypothecated under the bottomry bond, and the competing claims ought to be repelled, with expenses."

The Lord Ordinary after proof found that the owners of the ship were entitled to freight to the amount of £89, 1s. 7d., and that under the bond of bottomry this was payable to Mr Dymond: *Quoad ultra* repelled Dymond's claim, and found the claimants Scott and others entitled to the whole fund. He further found Dymond liable to the claimants Scott and others in the expenses incurred by them. He added the following note, in which, and in the opinions of the Court, the facts as proved are sufficiently brought out:—

. . . . "The master and mate were the owners of the ship. Beyond £80 which they obtained from Riga they had no money and no credit. They could not provide the money necessary for the repairs, and the ship, which was one of a very inferior class, was ultimately sold for £130—a less sum than the cost of the repairs.

"In January 1876 Mr Becker went to Newcastle and saw two of the owners of cargo, and the agent for the underwriters of part of the cargo. Nothing was arranged. The Lord Ordinary cannot rely on the accuracy of the account given by Mr Becker; but he takes it as clear that no proposal was made to pledge the cargo for the expenses which had been incurred at Leith.

"In these circumstances the master, at the instance of Mr Becker, granted, on 6th March 1876, a bond of bottomry for £500 over ship, freight, and cargo. This was done without any notice to the owners of cargo. If they had notice of it, it is plain that they would not have consented to it. As prudent men they could not have been expected to give their consent; for the Lord Ordinary does not see how they could have expected to derive any advantage from it.

"The owners of the ship were bound to complete their voyage, and to pay for the repairs which the ship needed in order to enable this to be done. But they could not do so. It seems to the Lord Ordinary that the only reasonable course was to put the cargo in another ship, which according to the evidence could have been easily procured. If this had been done, the owners of cargo would have been bound to pay a new freight. But it would not have been larger than that of which they would have been relieved by the failure of the 'Anna Alida' to complete her voyage. To charge the cargo with the repairs and other costs which were necessary to enable the ship to proceed on her voyage, was, in the opinion of the Lord Ordinary, to throw the costs of the ship on the owners of the cargo without any benefit to them. The owners of cargo may have been remiss in not declaring what they proposed to do. But this did not, it is thought, justify the master in granting the bottomry bond. If it could be justified at all, the Lord Ordinary conceives that they must have had special notice.

"For these reasons the Lord Ordinary is of opinion that the bond of bottomry does not constitute a valid obligation against the owner of the cargo.

"The Lord Ordinary has found that the master is entitled to freight. This right has not been disputed by the owners of cargo. But the reason is, that they arrested the ship after the repairs had been executed, and by that arrestment prevented her from completing her voyage. It is not questioned that the bottomry bond is good against ship and freight."

Dymond reclaimed, and argued—This doctrine had been established, that where information had been given to owners of goods of the disablement of a vessel and they did nothing, the captain was entitled to raise money to enable him to proceed. Silence implied consent on their part that the captain should use his discretion—Lord Stowell's opinion in the case of the "Gratitudina," 3 Rob. 240; followed by Dr Lushington in the case of the "Lord Cochrane," 2 W. Robinson 333; the "Buonaparte," 8 Moore P. C. Reps. 459; the "Onward," Jan. 28, 1873, 4 Law Rep., Adm. and Ecc. 38 (Sir Robert Phillimore's opinion); case of the "Kamak," *Droege & Co.* v. *Stuart & Simson*, June 14, 1869, 2 Law Rep., P. C. App. 505; the "Lizzie," 2 Law Rep., Adm. and Ecc. 254; "Sultan," 2 Swabey's Adm. Reps. 504; *Glasscott* v. *Lang*, 2 Phillip's Chanc. Cases, 321 (opinion of the Lord Chancellor). Now here, even although there was not any notice given of the execution of this bond by advertisement, yet there was an equivalent. The specialty of this case, viz., that the master was also owner of the ship, whereas in all the cases quoted the owners of the ships were absent, made no difference, for there was the same reason here to justify the hypothecation of the cargo, viz., necessity.

The claimants Scott and others argued—There was no such notice given here as was required in the cases quoted, nor was there any benefit likely to arise from the course adopted. This was an attempt to convert a personal liability into a bottomry debt, which was incompetent. This was not a case where the shipmaster had bonded the cargo to enable him to complete the voyage for its benefit, but rather an attempt to make the cargo pay for the ship's debts—*Jacobsen and Others* v. *Hausen and Others*, Feb. 22, 1850, 12 D. 762; *Kleinwort, Cohen, & Co.* v. *Cassa Maritima of Genoa*, Jan. 18, 1877, 2 Law Rep., App. Ca., 156.

At advising—

Lord President—This is a claim under a bottomry bond against the owners of a cargo made under very peculiar circumstances. It appears that the "Anna Alida," which was a Russian vessel, was chartered for a voyage from Newcastle to Libau. As she was leaving Newcastle, but while she was still in the Tyne, she came into collision with another vessel, receiving and inflicting considerable damage. It turned out that the fault lay with those who were in charge of the navigation of the "Anna Alida," and accordingly that vessel was found liable in damages. She proceeded on her voyage, but having met with bad weather was obliged to put into Leith for repairs. At Leith the vessel was arrested on the dependence of an action by the owners of the damaged vessel; and in the end was found liable in the sum of £106, the whole sum disbursed being £120, 14s. In Leith the captain found the vessel must receive extensive repairs, and therefore he discharged the cargo, and employed Mr Becker to take charge of the repairs. He thereby incurred an account amounting to £580, which included the claims arising out of the collision. As regards the details of that account, it is sufficient to say that the general average amounted to £128, 9s. 8d., the share of which falling to cargo was £112, 8s. 6d. The owners of the cargo never disputed their liability for their share of general average, and they never disputed their liability for an amount of particular average, which was, however, no more than £7, 12s. 10d.

In these circumstances, the master granted a bottomry bond, and in doing so he included the cargo as well as the ship and freight. The question is—Was he justified in that? Now, there is no doubt that the master of a vessel in a foreign port, where there is no possibility of communicating with the owners of the vessel, the owners of the cargo, or the various persons interested, is the representative of these various parties, and it is his duty to do his best for all of them. If he has no funds, and cannot proceed on his voyage without raising money by way of bottomry, and if it be necessary to include the cargo in the bond, he is entitled to do so. The reason why that is allowable is obvious. If he could not do so he would be unable to prosecute his voyage, and he would have the very unpleasant alternative that he must either abandon his voyage or bring his ship to sale with the cargo in what might be the most disastrous circumstances. That is the kind of case where a master is justified in granting a bond of bottomry over the ship, and including in it a hypothecation of cargo.

Now, the question is—Was the master here in such circumstances? The owners were not absent. They were in Leith. The captain himself was the principal owner, and the only other owner was the mate, who was also present. There are other circumstances too, tending in the same direction. The owners had no money and no credit. There was a sum of £80 due to the master at Riga, which he got remitted to him, but it went a very short way in the discharge of his liabilities. But beyond that, as the Lord Ordinary says, they had no money and no credit. They had nothing but a damaged ship.

This is not therefore the case where the master finds himself with the owner of the ship absent and without the means of falling back on the resources of the owners; nor is it the case where a master is not able to communicate with the owners of cargo. The owners of the cargo here were at Newcastle, and between Leith and Newcastle the facilities of communication are very great. In point of fact, communication was had with them. Mr Becker went to Newcastle. I think the owners got notice from him that there was some intention of executing this bottomry bond, but that is immaterial, for as the owners of the ship had the means of communicating with the owners of the cargo, they were not entitled to hypothecate the cargo without communicating with them. Now, they may have communicated this intention, as I said, but they got no encouragement. The owners of cargo distinctly intimated that such a proceeding would not be submitted to. Just consider what a speculative proceeding this was. The owners, unless they succeeded in bringing this ship safely to the end of her voyage, must have been hopelessly insolvent. The vessel required extensive repairs, and these repairs, when executed, were not very satisfactory. Were the owners of the cargo bound to submit to the execution of a bottomry bond to enable this very speculative voyage to be made? That, I think, would be carrying the rule of law to a very absurd length. This case is a very special one. It is to be determined by reference to its own circumstances, and not by reference to any rule of law. Taking it in that way, I can see no reason for holding that the owners of the cargo were bound to submit to the execution of this bond.

Lords Deas and Mure concurred.

Lord Shand concurred, on the ground that there was evidence to show that this was an attempt to complete the voyage at the expense of the cargo, that the cargo was to be charged with the whole liability, there being no other assets of importance to meet it, and that in these circumstances no liability could be sustained against the owners of cargo unless with their full concurrence. Had the granting of this bond been for the purpose of fairly completing the voyage in the interest of the owners of cargo, such a bond would have been binding on the owners of cargo.

The Court adhered.

A week after judgment had been pronounced as above, a note was presented for the claimant Scott and others, for warrant on the Royal Bank to pay the balance of the consigned fund to him. Mr Dymond resisted this application, and asked leave to put in a claim for £112, 8s. 6d. on behalf of the captain, as representing the amount of general average due from the cargo. The captain had not in his claim made any mention of this item, but in his condescendence he had stated that there were certain claims of that kind due to him.

It was argued for Mr Dymond—This claim could be made by him as an arresting creditor of the captain holding a decree of date 23d October 1876 for £500, and so long as the fund was in Court any claimant could come forward on such conditions as the circumstances of the case required—*Morgan* v. *Morris*, March 11,

1858, 18 D. 797, and 3 Macq. 321. Now, Mr Dymond in the former branch of the case relied on his bottomry bond, and under it claimed the whole fund, having no interest to raise this question as to the captain's claim. This claim of the captain, although not formally stated in his claim, was admitted by the owners of the cargo in the witness-box, so that there was here no surprise.

Argued for Scott and others — A party who had not been called would no doubt be allowed to come forward with his claim at any time, but when he had been in Court in one character, and his claim as in that character had been rejected, he could not come forward with a new claim in a different character. The captain although in full knowledge of this claim failed to make it, and neither he nor his assignee could now do so—*Molleson* v. *Duncan*, June 3, 1874, 1 R. 964 (Lord President's opinion). This claim was in the same position, and should be rejected on the same principle, as a defence which was "competent and omitted"—*Stoddart* v. *Bell*, May 23, 1860, 22 D. 1092; *Downie* v. *Rae*, Nov. 20, 1832, 11 S. 51.

The Court allowed the claim to be received upon payment by Mr Dymond of the previous expenses found due by him in the cause, which included *inter alia* the expenses incurred by the claimants Scott and others.

Counsel for Claimant Dymond (Reclaimer)—Fraser—Thorburn. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Claimants Scott and Others (Respondents)—G. Smith—Young. Agent—Thomas Dowie, S.S.C.

Friday, November 16.

SECOND DIVISION.

[Lord Craighill, Ordinary.

SMITH *v.* HARDING AND OTHERS.

Relief—Co-obligants — Where a Law-Agent is employed on same Business by different Parties.

Several parties by separate mandates employed a law-agent for the same business. After rendering his account he accepted a certain sum, being less than their proportion of the whole, from each of two of them, the respective discharges bearing to be "in full of my account against him . . . this receipt being given and taken without prejudice to my claims against" the others, who were named.—*Held* (1) that there having been no special agreement, the parties were jointly and severally liable in the expenses incurred; but (2) (distinguishing the case from *Crawford* v. *Muir*, October 29, 1873, 1 R. 91, 2 R. (H. of L.) 148) that the terms of the receipt imported a discharge in so far as regarded two entire shares of the the whole expenses, and that there was no recourse against the remaining co-obligants for the balance unpaid by those who had been discharged.

This was an action at the instance of D. Howard Smith, an enrolled law-agent in Edinburgh, against three parties, named respectively Harding, Cornelius, and Clunas, the last-named being the sole partner of the firm of Clunas & Sey, for payment of an account for professional services rendered by him. The question arose out of business done in connection with the sequestration of a party named Levy, and the opposition to an application for the benefit of *cessio* following upon it. The pursuer, on 10th April 1876, received written mandates, in supplement of previously received verbal instructions, from each of the three defenders to act for them in the Sheriff Court in opposing the *cessio*, and subsequently they each gave written authority to the pursuer to appeal the Sheriff's decision, by which *cessio* had been granted, to the Court of Session. The defender Clunas, however, refused to allow his name to appear in the appeal, but agreed verbally to pay £3, 3s. towards the expenses. Two other parties named Scott and Forrest at this stage likewise gave mandates to the pursuer. The account sued for was made up and rendered on 2d November 1876. A separate statement was made up of the sums for which each was liable. The whole amounted to £89, 17s., and besides being rendered to the defenders, it was rendered to Forrest and Scott, "upon the footing," as the pursuer averred, "that each of the co-obligants would pay an equal share, but without prejudice to the pursuer's right to hold each liable for the whole account." Forrest and Scott settled their portion of the account by a payment of £10 each. The receipts given them were in the following terms:—"Edinr. 24th November 1876.—Received from , the sum of ten pounds stg., as in full of my account against him in connection with Levy's sequestration and *cessio*, this receipt being given and taken without prejudice to my claims against Mr Cornelius and Mr Harding and Mr Clunas for balance of said a/c."

The defenders were now sued as liable *singuli in solidum* for the unpaid portion of the account. The defenders Harding and Cornelius answered that the pursuer had not been employed by them prior to 10th April, and that they gave the mandates on condition that they would not be charged more than £7. The defender Clunas denied employment.

The pursuer, *inter alia*, pleaded—"(1) The defenders having employed the pursuer to perform the business and make the cash advances referred to in the account libelled on, they are legally bound to pay the charges and advances incurred under their instructions. (2) The defenders Henry Harding and William Cornelius are liable to the pursuer *singuli in solidum* of the account in question. (3) The defenders Clunas & Sey, and David Clunas as partner of that firm and also as an individual, are liable conjunctly and severally with the other defenders for the sum of £22, 5s. 10d. *pro tanto* of the total amount of the account referred to."

The defenders Harding and Cornelius, *inter alia*, pleaded—"(2) Assuming it to be true, as stated by the pursuer, that he has discharged Scott and Forrest of all liability for the account sued for, he has thereby discharged the defenders; —at least he has thereby discharged them for all but their own share of the account. (3) The defenders not having employed the pursuer for any