Lord Craighill—I concur in the opinion delivered by your Lordship in the chair, both as regards the judgment that has been proposed and the reasons given for that judgment; and I am well pleased that this is the result which has been reached. I will add only one observation.

Even if there had been such a representation relative to Pernambuco as has been alleged by the defenders, there was no reason that I can discover why the relative condition thence arising should not have been introduced into the policy. This precaution would not have disparaged the doctrine that insurance is a contract of exuberant good faith. The practice which was followed on the present occasion by the defenders putting a part of the contract into the policy, and putting that which was alleged also to be a part of the contract into the memorandum-book, or reserving it in the memory of the insurer, is not only anomalous but extremely inconvenient. Had the alleged condition relative to Pernambuco, upon which the defenders are said to have relied, been a part of the policy, this litigation, at any rate, would have been avoided, because the contract would have been so fixed as to be beyond controversy, evidenced as it would have wholly been by the policy.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor :—

"Find in fact—(1) That the pursuers in behalf of the barquantine 'Eunice' insured that vessel from 23d May to 22d November 1881 inclusive, as employment might offer, in port and at sea, in docks and in ways, at all times and in all places whatsoever or wheresoever, conform to the policy libelled, granted in behalf of 122 underwriters, of whom the defender was one, undertaking £50 of £2500, the sum-total insured; (2) That on 30th May 1881 the said vessel sailed with a cargo of iron from Middlesbro' to Imbituba, a port on the coast of Brazil, and was wrecked and totally lost there on 13th September thereafter; (3) That it is not proved that there was any fraudulent misrepresentation or fraudulent concealment of any fact material to the risk on the part of the pursuers on entering into the said policy: Find in law, that the defender is liable to the pursuers to the extent underwritten by him as aforesaid, for the damage sustained by them in the loss of the said vessel: Therefore sustain the appeal; recal the judgments of the Sheriff-Substitute and of the Sheriff appealed against, and decern in terms of the conclusion of the action: Find the pursuers entitled to expenses in the Inferior Court and in this Court, and remit," &c.

Counsel for Appellants (Pursuers) — Trayner —Graham Murray. Agents—Smith & Mason, S.S.C.

Counsel for Respondent — Solicitor-General (Asher, Q.C.)—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, February 28.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

TYTLER *v.* WALKER AND OTHERS.

Bankrupt—Voting in Sequestration—Voucher—Conjunct and Confident—Bankruptcy (Scotland) Act 1856, *sec.* 49.

Held (*diss.* Lord Deas) that there is a distinction in the case of conjunct and confident persons as to what constitute sufficient vouchers to entitle a creditor to vote in a sequestration.

In a sequestration awarded in November 1880 there was lodged in January 1882 a claim by two brothers of the bankrupt, founded on promissory-notes bearing to be for value and to be dated in March 1876, and to be payable in March 1877. They had never been discounted, and had lain in the claimants' hands from their date till they were lodged with their claim. *Held* that the claim was insufficiently vouched, and that the claimants were not entitled to vote in the sequestration.

There was also produced a claim by the bankrupt's law-agents for the amount of a promissory-note given them in payment of their business account. The account itself was not produced. *Held* that the proper voucher was the account itself, and that the claim was therefore insufficiently vouched to entitle the claimant to vote.

This was an appeal under the Bankruptcy (Scotland) Act 1856 at the instance of James Tytler, chartered accountant, Aberdeen, trustee on the sequestrated estates of John Walker, Polwarth Terrace, Edinburgh, against a resolution adopted by a majority of the creditors of the bankrupt at a meeting held in Aberdeen on 15th July 1882, "that James Tytler, chartered accountant, Aberdeen, be now removed from the office of trustee in the sequestration."

The estates of John Walker were sequestrated by the Lord Ordinary officiating on the Bills on 3d November 1880, and the appellant was confirmed trustee in the sequestration on 18th November 1880. John Walker had previously, on 28th August 1880, granted in favour of the appellant a trust-disposition for behoof of his creditors.

The total amount of the claims of the creditors who supported the motion for the appellant's removal declared to be carried at the meeting on 15th July 1882 was £20,755, 1s., while the total amount of claims against the resolution was £10,244, 14s. 10d., and the only question raised in this case was whether the votes of the majority in favour of the resolution were legal or not.

The appellant in his condescendence objected to eleven votes tendered in support of the resolution, amounting to £19,427, 10s. 7d.

The Lord Ordinary (Kinnear) sustained the objections to two votes only, amounting to £4810 (being Nos. 7 and 8 of the votes objected to), and therefore found that the resolution complained of was carried by a majority of the creditors entitled to vote, and dismissed the appeal.

The appellant then reclaimed, and in the Inner House the case turned upon the validity of two

votes, Nos. 4 and 6, amounting to £6195. No. 4 was vouched by two promissory-notes in favour of Messrs Alexander & James Walker, brothers of the bankrupt, which were thus described in the statement of debt referred to in the affidavit:— "Promissory-note, [dated 7th March 1876, granted by John Walker, No. 1 Polwarth Terrace, Edinburgh, of said date, to Messrs Alexander & James Walker, merchants, 52 Union Street, Aberdeen, payable twelve months after date, and indorsed by them to their firm of William Walker & Sons, merchants, of which firm the said Alexander Walker and James Walker are the sole partners, and held by said firm for value in Sandlodge, £2000; interest thereon from 10th March 1877 to 3d November 1880, date of the sequestration of the estates of the said John Walker, £365, 4s. 1d.—£2365, 4s. 1d." The other note was in the very same terms, and the claim No. 4 thus amounted to £4730, 8s. 2d. The affidavit and claim for this sum were made by Alexander Walker on 7th January 1882.

The Lord Ordinary in his note observed on this claim—"4. The vouchers are promissory-notes by the bankrupt in favour of the claimants, dated in 1876. It may be quite proper that the trustee should require explanation as to circumstances in which they were granted, but in the meantime, and in the absence of any ground of suspicion, they appear to me sufficient vouchers to support the vote."

(6) Vote for Messrs Dunn & Clark, advocates, Aberdeen, for £1465, 12s. 6d. William Dunn, the senior partner of the firm, was the bankrupt's brother-in-law, and the firm his law-agents. The affidavit and claim by Peter Clark, the other partner, referring to the note produced, was in these terms—"That John Walker, of No. 1 Polwarth Terrace, Edinburgh, was at the date of the sequestration of his estates, and still is, justly indebted and resting-owing to the deponent's said firm the sum of £1458, 15s. 6d. sterling, contained in a promissory-note granted by the bankrupt to deponent's said firm, dated 28th August 1880, and payable one month after date. *Item*, £6, 17s. of interest, at 5 per cent. from the date said promissory-note fell due till the date of sequestration, being together £1465, 12s. 6d."

The Lord Ordinary in his note observed on this claim—"It is possible that further explanation may be required before admitting the claimants to rank, but the promissory-note seems to be sufficient *prima facie* evidence to entitle them to vote."

This promissory-note was thus dated on the same day on which the voluntary trust-deed for creditors was granted. The affidavit in this case also was dated 7th January 1882.

The reclaimer (appellant) argued—These documents having been granted in suspicious circumstances, and to conjunct and confident persons, were not *per se* vouchers sufficient to sustain a vote —*Anderson* v. *Guild*, June 13, 1852, 14 D. 866; *Cullen* v. *M'Farlane*, July 16, 1842, 4 D. 1522; *Laidlaw* v. *Wilson*, January 27, 1844, 6 D. 530; *Aitken* v. *Stock*, February 14, 1846, 8 D. 509; *Dyce* v. *Paterson*, May 28, 1847, 9 D. 1141; *Gascoyne* v. *Manford*, December 10, 1847, 10 D. 231; *Brown* v. *Kerr*, June 14, 1809, Hume's Decisions, p. 62.

Respondent's authorities—Bell's Comm. ii. (5th ed.), 310–314, and cases there cited.

At advising—

LORD PRESIDENT—There are two objections which seem to be quite sufficient for the determination of this case, provided that they are decided in favour of the reclaimer, and I have no doubt that they must be so decided. The majority of votes by which the resolution complained of was declared carried was £10,511 in value; of these the Lord Ordinary has disallowed £4810, which leaves, on the Lord Ordinary's view, a majority of only £5701; but the fourth and sixth objections amount together to £6195, so that if both these objections are sustained there is quite sufficient to turn the majority the other way.

As to the first of these two objections, I have to observe at the outset that in dealing with questions of this kind the Court must take the votes in exactly the same form as that in which they were given and received at the meeting of creditors. The Court in reviewing is not entitled to do anything else. The question therefore comes to be, whether the vote was properly rejected or received at the meeting looking to the evidence which was there adduced in support of it? Now, this fourth objection relates to the vote of William Walker & Sons, which is supported by an affidavit by Alexander Walker, a partner of that firm, dated 7th January 1882, and the debt claimed is £4730, conform to statement annexed. The statement annexed sets out in the first place —[*quotes terms of promissory-note given above*]. And the other item in the statement is another promissory-note of the same date, between the same parties, and in all other respects in precisely the same terms. Both notes are produced, and they bear to be granted for "value in Sandlodge," and to be payable on the 10th March 1877. No markings of any kind are to be found on them, and therefore it is clear that they were not discounted. They have no appearance of having been lodged in any bank, nor are they indorsed to anyone except to William Walker & Sons. They have, in short, lain in the hands of these two gentlemen from 7th March 1876 to 7th January 1882 without anything following on them as far as we can see. Now, when we consider that the payees are the brothers of the bankrupt, and that the notes were produced under such peculiar circumstances, it seems to me impossible to sustain this claim to vote. It is quite true that there might have been a sufficient explanation, but without such an explanation, and with no statement as to the cause for which the promissory-notes were granted except that they were for "value in Sandlodge," I am clearly of opinion that there are no sufficient vouchers for this claim, and that the objection must be sustained.

The sixth objection seems to me to be clearer still. It relates to the vote for Dunn & Clark, of whom William Dunn, the senior partner, is the brother-in-law of the bankrupt, and the firm are his law-agents. The affidavit and claim is by Peter Clark, the other partner, and sets out that the bankrupt is indebted to the firm to the extent of £1458, contained in a promissory-note in favour of the firm dated 28th August 1880, which, as we know, is the day on which the bankrupt executed his trust-deed. Now, I do not say that there is anything wrong in the bankrupt granting this promissory-note provided the debt is really

due, but by itself it is not sufficient to prove that the debt was really owing. The proper voucher would have been the business account of the law-agents, accompanied by the vouchers, though probably the account alone would have been enough, in so far as it was for work done. But I have never heard of a claim by a law-agent for business account being vouched by anything short of the account itself, and accompanied, so far as possible, by the documents. It would be impossible to construe the statute so as to admit a claim by a law agent, vouched only by a promissory-note granted after insolvency, and on the very day that a trust for creditors was executed, when there is produced neither the account nor anything else in the shape of vouchers instead. This claim, No. 6, depends on different considerations from No. 4, because here one can see the nature of the debt, and I see no reason to doubt that it is a good claim; but no man is entitled to vote until he has produced the appropriate vouchers, and here they are entirely wanting. I think, therefore, that we must sustain this objection also, and as that shifts the majority the other way, the interlocutor of the Lord Ordinary must be altered.

Lord Deas—When the case was first discussed before us, almost the only objection taken to the Lord Ordinary's judgment was based on near relationship of the parties, but in the matters which have been debated before your Lordships to-day I quite agree in the result which I understand your Lordships have arrived at. I can see no difference in the statute between the qualifications necessary for voting and in order to claim a dividend. If these votes had been votes of strangers to the bankrupt, I should have held that they were not sufficient to sustain the claim, for in a question of this kind documents of debt not properly vouched are of no avail whether the claims are made by relatives or strangers. I wish to say that I think relationship in itself is no valid objection, and the same vouchers which would be satisfactory in the case of strangers, would in my opinion hold good in the case of relatives. But, as your Lordship has explained, there are grave omissions which would be fatal to the votes in any case, and it it is on these grounds, and not on the ground of relationship, that I proceed.

Lord Mure—I am of the same opinion, and have little or nothing to add to what your Lordships have already said. The parties here are in the relation of conjunct and confident persons, and when that is the case and bills are granted which are not operated on for years, and no explanation is afforded, nor any satisfactory voucher produced, then I think we are entitled to reject such votes.

The case of *Anderson* v. *Guild*, reported in 14 D. 866, was a case in which a competition for the office of trustee turned upon the vote of the bankrupt's mother-in-law, who produced a promissory-note dated eighteen months prior to the sequestration, and payable sixty days after sight, which bore a noting dated within three days of the sequestration. The affidavit gave no explanations of the debt nor of the noting, but merely said that the debt was due, and the vote was rejected. In the opinion of Lord Colonsay the following passage occurs:—"The principle seems to be that a conjunct and confident creditor who holds the bankrupt's acknowledgment of debt must produce along with such document, before he can be allowed to vote, some corroborative vouchers such as detailed account, excerpts from books, or other writings, or failing them must explain in his oath the nature and history of the transactions between him and the bankrupt which led to the granting of the acknowledgment founded on." Now, this clearly applies to the promissory-note for £2000 referred to in the objections to the fourth vote. The objections urged against the sixth vote are still clearer; the statutory provisions have not been complied with, and the vote cannot be allowed.

Lord Shand — I think that the votes here objected to cannot stand. Sec. 49 of the Bankruptcy Act of 1856 provides that "To entitle a creditor to vote or draw a dividend he shall be bound to produce at the meeting, or in the hands of the trustee, an oath to the effect and taken in manner hereinbefore appointed in the case of creditors petitioning for sequestration, and the account and vouchers necessary to prove the debt referred to in such oaths."

In the case of a creditor asking a ranking for a claim the law and practice requires that the proof should be of a very rigorous kind. I think that some relaxation has been admitted, and that a somewhat less strict rule has prevailed where a claim to vote was preferred and not a claim to rank. I think also that by a series of decisions a distinction has been drawn as to the nature of the vouchers required in cases of conjunct and confident persons, and of strangers, and I feel obliged to express my dissent from the view just explained by Lord Deas. I think a very clear statement of the law is to be found in a very careful note by Sheriff Glassford Bell in the case of *Anderson* v. *Guild*. If merchants in the course of their transactions have bills passing, and one should be drawn six weeks before sequestration, such a bill would be a perfectly good voucher. But it would be a very different matter if such a bill was drawn by a father upon his son. I think that by a long series of cases it is clear that a claim so vouched would be insufficient whether for voting or for ranking, and the reason is that in the one case the claim is by a conjunct and confident person, and the other is not.

The two claims we have here to deal with are by conjunct and confident persons—brothers and law-agents. Such claims must be very narrowly examined. They may no doubt be good, but to guard against fabricated documents concocted for the purpose of controlling the sequestration, some satisfactory explanation is required of the debt and some adminicle of evidence along with it—as, for example, a reference to a book, or the counterfoil of a cheque-book, the markings on a bill showing it has been in the circle—anything, indeed, supplying some independent evidence to sustain the vote. In the case of No. 4 here the only documents produced are these passing between the bankrupt and his brother. The same remarks apply to the objections stated to vote No. 6. A little care might perhaps have made both this vote and the one previously objected to good; but in the latter case a promissory-note granted on the same day as a deed executed in favour of creditors, and with no satisfactory vouchers, cannot be sus-

tained. I am therefore of opinion that the Lord Ordinary's interlocutor ought to be recalled, as far, at least as these two votes are concerned.

The Court recalled the interlocutor of the Lord Ordinary and found that the resolution complained of in the appeal was not carried by a majority of the creditors entitled to vote ; therefore sustained the appeal and declared the said resolution to be invalid.

Counsel for Appellant — Trayner — Dickson. Agent—R. C. Gray, S.S.C.

Counsel for Respondents—Keir—G. Burnet. Agent—George Andrew, S.S.C.

Wednesday, February 28.

SECOND DIVISION.

[Lord Lee, Ordinary.

LIDDELL *v.* MACKENZIE, *et e contra.*

Shipping — Charter-Party, Construction of — "Commencing on 8th of September, at which Date Vessel to be Ready—Breach of Contract— Measure of Damages.

A salvage contractor who had contracted to salve a vessel which had run ashore chartered a tug for the purpose. Under the charter-party the tug was hired "for the towing of a vessel off the rocks" for the period of four weeks, "commencing from the 8th September, at which date the vessel is to be at the disposal of the charterer." The tug, owing to delay on the part of the owner, did not start till after 2 p.m. on the 8th September, and in consequence the charterer lost the opportunity of salving the vessel. *Held* (1) that there was an obligation on the owner under the charter party to have the tug at the charterer's disposal from the commencement of the 8th September, and that the owner was liable in damages for the delay ; and (2) that the measure of damages was the loss occasioned by the failure to salve the vessel, since the tug-owner had notice of the purpose for which she was wanted.

On 6th September 1881 Æneas Mackenzie, a salvage contractor at Stornoway, entered into a contract with Captain Stephens of the London Salvage Association, who was acting for the underwriters of the "Tolfaen," a steamer which had gone ashore and was lying on the rocks at Longa Island, Gairloch, for the salving of the vessel. Mackenzie undertook to send a tug for the purpose of towing that steamer off the rocks on Thursday 8th or Friday 9th September 1881, and to provide pumps and other necessary materials for salving her. On the other hand, Stephens undertook to pay him £300 if the attempt to salve the "Tolfaen" were unsuccessful, £600 if successful, and £50 if the "Tolfaen" were floated off or broken up before his arrival with the tug and apparatus on one of these days. In order to take the steamer off the rocks and tow her to a safe berth Mackenzie required to charter a steam-tug, and before completing the salvage contract he on the 6th September 1881 directed Messrs Mackenzie Brothers, shipbrokers, Stornoway, to telegraph on his behalf to Messrs J. Milligen & Co., shipbrokers, Glasgow, in the following terms:—"Want offer handy paddle-tug for salving purposes, fortnight, month, option charterer, owner supplying *all except coals.* State speed, consumption, fuel, size, bunkers. Wire instanter." Messrs Milligen & Co. on the receipt of the telegram applied to William Liddell, manager of the New Clyde Towing Company, who offered to charter to them, as representing Mackenzie, the paddle-tug "Commodore," the hire to be at the rate of £50 a-week, the charter-party to be drawn up in Government form. Messrs Milligen & Co. thereupon sent the following telegram to Messrs Mackenzie Brothers, dated 6th September 1881:—"Offer paddle-tug fifty pounds week, Government form, steams ten miles, consumption about 7 cwts. hour, bunkers hold fifty tons, time counts leaving Greenock till returned there, ready to-morrow ; wire." In reply to said telegram Messrs Mackenzie Brothers telegraphed to Messrs Milligen & Co. as follows:—"Will accept tug represented your telegram; fifty pounds week; if employed month, charterer's option, forty-five pounds week; must leave to-morrow morning, arriving here not later Thursday morning; supply sufficient coal; bring steamer here subject your immediate confirmation per wire to-night." This telegram, which was received on the morning of the 7th September, was communicated by Messrs Milligen & Co. to Liddell, and was read by him. Liddell in reply dictated to a partner of the firm of Messrs Milligen & Co. to the effect that if the steamer were kept a month the terms would be £47, 10s. a week, payable weekly in advance, and that a steamer was ready to leave. Messrs Mackenzie Brothers telegraphed back on the same day to Messrs Milligen & Co. as follows:—"Accept tug; fifty pounds week, if kept month forty-seven pounds ten. Despatch immediately ; wire sailing. Pass cash-order on us for week's hire. Forward charter." On the same day they sent another telegram stating that the tug was wanted to carry a steam-pump, and to tow a vessel off rocks at Gairloch, and act as a despatch boat, and telling them to hurry her away with all speed. On the afternoon of the 7th Milligen & Co., in consequence of a communication from Liddell, telegraphed that "tug 'Commodore' is coaling ; will leave Greenock to-night about midnight." Messrs Milligen & Co. instructed Liddell to supply the "Commodore" with coals as directed in a telegram of the 6th telling them to supply sufficient coal. All the telegrams received by Milligen & Co. from Mackenzie Brothers were communicated to Liddell.

A charter-party was drawn up on 7th September between Liddell and Messrs Milligen & Co. as representing Mackenzie, the charterer. By the charter-party it was provided, *inter alia*, "That the said vessel or steamer, being tight, stanch, and strong, and in every way fitted for the voyage or service, and so maintained by owners, with a full complement of officers, seamen, engineers, and firemen adapted to a steamer of her class, shall be placed under the direction of the said charterer or merchant, or his assignees, to be by him or them employed for the conveyance of lawful merchandise as follows:—To carry steam-pumps, &c., and tow vessel off rocks at Gairloch, and to act as despatch boat, and do