works. I do not know how these words can be construed as not to comprehend a claim for the price. This is a claim which must arise. It is the natural and indeed necessary incident of the contract. If any claim is to fall within the reference, I can see none which more naturally falls under it. Nor can I see any ground for thinking that the parties did not intend that it should be decided by the tribunal which they have created. It seems to me to be far more suitable for the determination of the question which has been raised, than a suit in court. So far, therefore, I agree with the Lord Ordinary.

The pursuer, however, argued that the arbiter was disqualified. He has no such averment or plea on record; but he says that the statements of the defenders show that the arbiter has already pronounced adversely to his claim. But the arbiter has done nothing which did not fall within his ordinary functions as the engineer of the works, and if so, the case referred to by the Lord Ordinary seems to be conclusive against the argument of the pursuer.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Lord Craighill and Lord M'Laren concurred.

The Lord Justice-Clerk and Lord Young were absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—D.-F. Macdonald, Q.C. — Johnstone. Agent — J. Smith Clark, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson — Hay. Agents — Rhind, Lindsay, & Wallace, W.S.

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*Thursday, June 21.*

## SECOND DIVISION.

[Lord M'Laren, Ordinary.

## LINDSAY (MACGREGOR & CO.'S TRUSTEE) *v.* COX AND OTHERS.

*Ship — Freight — Hypothecation of Freight for Advances on Ship—Ship's Husband — Trustee in Sequestration.*

The managing owners and ship's husbands of a vessel obtained from shipping agents, whom they employed to collect the freight, advances to account of freight, and, without any authority from the other owners, empowered them to retain the freight when collected in extinction of these advances. The ship's husbands having become bankrupt, the trustee on their sequestrated estate sued the owners of the ship for the amount of disbursement made by them on behalf of the ship. The owners claimed to take credit for the freight which the agents had retained as against the ship's husbands, in terms of their agreement. The trustee refused to admit their right to compensation. *Held* that the receipt of the freight by the sub-agents on the instructions of the ship's husband must be held to be equivalent to receipt by the ship's husband, and that therefore the owners were entitled to take credit for it in accounting with the trustee.

In this case Thomas Steven Lindsay, as trustee on the estates of the firm of D. R. Macgregor & Co., shipping agents, Leith, which had been sequestrated on January 11, 1878, sued Messrs Cox and others, the owners of the steamship "Mikado," for payment of the sum of £14,577, 0s. 11d., being the balance of freight and disbursements brought out by the accounts of the ship. The sum sued for was composed of three sums, viz., £654, 17s. 7d., £3861, 3s. 8d., and £10,060, 19s. 8d., which several sums were averred to be due in respect of three voyages made by the "Mikado." The present case was practically restricted to the pursuer's claim against the defenders in respect of the third voyage of the ship from London to Shanghai and back, which took place in 1877, the sum alleged to be due on it, being £10,060, 19s. 8d. This voyage was commenced from London on 10th May 1877, and the ship arrived home in October.

The defence was that the trustee had failed to carry to the credit of the ship's account a sum of £12,640, for which they were entitled to credit in accounting with Macgregor & Co. In support of this contention the defenders averred that on the 24th July 1877 Macgregor & Co., without their knowledge or authority, had employed Adamson & Ronaldson, shipbrokers, London, to attend to the ship on arrival, and to collect the freight; that an arrangement was made between them by which Macgregor & Co. were allowed to draw bills in anticipation of the freight, and Adamson & Ronaldson were empowered by Macgregor & Co. to retain the freight in repayment of advances made on this footing—in pursuance of which arrangement, Macgregor & Co. in July 1877, or three months prior to the arrival of the vessel in London, received advances from Adamson & Ronaldson, directly or through the intervention of other firms, to the amount of £11,137, 11s. 2d. or thereby, in security of which advances they hypothecated the freight which would fall to be collected in October, the date of the ship's arrival. This freight they averred that it was the duty of Macgregor & Co., to collect and to credit to the defenders their co-owners, which had not been done. They averred further that Messrs Adamson & Ronaldson collected £12,318, 16s. 2d. between 19th October, when the ship arrived, and the 31st December 1877, and a further sum of £321, 11s. 3d. between 1st January and 1st May 1878.

The pursuer in answer to these statements denied that the freight was received by Macgregor & Co. from Adamson & Ronaldson. He maintained, on the contrary, that the alleged advances were made for and applied to the general purposes of the business of the firm of Macgregor & Co. under an arrangement between them, which was not authorised by the owners, nor necessary for the ship.

He also founded on proceedings which had taken place in an action in the Lord Mayor's Court, London, of the following nature. In April 1878 Adamson & Ronaldson sued the present defenders, and also D. R. Macgregor, in that Court for payment of £817, 7s. 2d. as the balance alleged to exist in respect of advances to Macgregor & Co., and of disbursements for the "Mikado" after

deducting the freight collected by them. To that action the owners of the "Mikado," the present defenders, pleaded in defence that they were "never indebted" to Adamson & Ronaldson, and they also pleaded compensation or "set off" in respect of the freight that firm had uplifted. Several of the defendants (defenders) there gave evidence and proved that they never gave authority to Macgregor & Co. to borrow money for the "Mikado" on their behalf, and the jury as a result found for the defendants. By these proceedings the pursuer maintained it had been judicially established that the freight collected by Adamson & Ronaldson belonged to the defenders, and ought not to be imputed to them to payment of their advances on account of the ship. In these circumstances, he maintained that he was not bound to give the defenders credit for the advances in question, and that these advances were resting owing to them by Adamson & Ronaldson.

The pursuer pleaded—"(3) The pursuer is not bound to give credit to the defenders for the amount of the freight of the 'Mikado' received by Adamson & Ronaldson in October 1877, in respect 1st, that the bankrupts in point of fact never received that freight; and second, that that freight still belongs to the defenders, and may be recovered by them from Adamson & Ronaldson. (4) Adamson & Ronaldson have no right to set off the said freight against the balance alleged to be due to them by the bankrupts, in respect, 1st, that it is *res judicata* between Adamson & Ronaldson and the bankrupt estate and the defenders that that freight belongs to the defenders; 2d, that in point of law it does belong to the defenders; 3d, that the alleged advances by Adamson & Ronaldson to D. R. Macgregor & Co., on which the said balance arose, are not and never were debts due by the defenders to Adamson & Ronaldson, and that accordingly there was no *concursus debiti et crediti* in respect of which Adamson & Ronaldson can plead compensation. (5) The defenders are barred from now maintaining that the said freight may be or ought to be set off by Adamson & Ronaldson against the debt due to Adamson & Ronaldson by the bankrupts, and from assisting or allowing Adamson & Ronaldson so to set off the said freight and thereby to secure a preference on the bankrupt estate, in respect 1st, that they have already judicially averred and pleaded, subsequent to the sequestration, that that freight belongs to themselves; 2d, that the said averment and plea at their instance has been sustained by a competent Court in a litigated cause, to which the bankrupt estate, the defenders, and Adamson & Ronaldson were parties; 3d, that it is *res judicata* that the said freight belongs to the defenders, and did so at a period after the date of the sequestration of D. R. Macgregor & Co."

The defenders pleaded—"(4) The pursuer, as trustee foresaid, is bound to credit the ship with the whole freight, or otherwise and at least with all sums received by or on account of D. R. Macgregor & Co., either in anticipation of freight or in payment thereof. (5) As it is not alleged by the pursuer that the defenders have claimed and obtained payment of the said freight from Adamson & Ronaldson the averments of the pursuer in that respect are irrelevant. (9) The estates have vested in the pursuer *tantum et tale* as they stood in the bankrupts, and the pursuer has no higher right in the premises than the bankrupts themselves as against any of the defenders."

The Lord Ordinary (M'Laren) pronounced this interlocutor:—"Repels the fifth plea-in-law for the pursuer, and finds that the defenders are not barred by the proceedings there referred to: Further, finds that the pursuer is bound to give credit to the defenders for the freight of the 'Mikado' received by Adamson & Ronaldson, with the exception of £321 received by them after the date of the sequestration of Donald R. Macgregor & Co.; and appoints the cause to be enrolled for further procedure, reserving as to expenses.

"*Judgment.*—In this case the trustee on the sequestrated estate of D. R. Macgregor & Co., in right of the sequestrated firm, sues the owners of the ship 'Mikado' for payment of the sum of £14,577, 0s. 11d. with interest, being the amount of disbursements on account of said ship, of which Macgregor & Co. were the managing owners. In defence, the owners claim to take credit for freight amounting to above £12,000, alleged to be received by Macgregor & Co., and not accounted for to the owners. It appears that Macgregor & Co. in the last year of their management drew to an extent exceeding £11,000 upon Adamson & Ronaldson, whom they had appointed agents at the port of arrival, and their drafts were accepted by Adamson & Ronaldson in anticipation of freight. The freight was collected by Adamson and Ronaldson, and has been retained by them in repayment of their advances, with the consent of Macgregor & Co. The defenders contend that Macgregor & Co., having allowed the freight to be applied in extinction of their debt to Adamson and Ronaldson, must be deemed to have received the freight; that its application, in the manner described was payment on account between Adamson & Ronaldson and Macgregor & Co., who in their turn became accountable to the owners. The trustee on Macgregor & Co.'s estate denies that the estate is accountable for freight, and maintains that Adamson & Ronaldson have never discharged themselves, and that they are directly accountable to the owners. He also maintains a plea in bar to which I shall advert.

"I shall consider first the question of the right of the owners (defenders) to set off their claim for freight against the trustee's claim for re-imbursement of advances, independently of the plea in bar founded on the proceedings in the Lord Mayor's Court, and if the defenders' claim is held to be originally well founded, the question will arise whether the defenders have waived it by the proceedings before the recorder and jury who represent the Lord Mayor's jurisdiction.

"I. Messrs Macgregor & Co. were the managing owners of the 'Mikado,' having the powers and duties of a ship's husband or general agent. It was their duty to collect the freight in the ordinary way—that is, through the instrumentality of a sub-agent at the port of discharge. They empowered Messrs Adamson & Ronaldson to perform this duty, and no objection has been stated to their appointment. If, then, it appeared that Macgregor & Co. had received the freights, either by way of specific payment, or by being credited with the amount of the freight in account with their sub-agents, an action would lie at the instance of the owners against Macgregor & Co.

to account for that freight. On the same supposition it is clear that in an action at the instance of Macgregor & Co. for repayment of their advances they might be met by a plea of compensation to the extent of the freight which they had received. Does the supervening bankruptcy of Macgregor & Co. vary the liability of their estate? I apprehend not. On the assumption that Macgregor & Co. had received the freight, the owners would be entitled to set off their claim to the freight against the demand of Macgregor's trustee, and would be liable only in the difference. They would have this right under the equitable extension of the doctrine of compensation known as the 'Balancing of accounts in bankruptcy.'

"On the other hand, if Macgregor & Co. became insolvent before receiving the freight, I apprehend that their bankruptcy would operate a revocation of their authority as managing owners, unless an arrangement for continuing that authority should be made by the trustee, and in the ordinary case the owners would have a direct action against the sub-agent as for money received by him for their use. If in the present case the owners are in a position to recover the amount of the freight from Adamson & Ronaldson, I think they must do so, and that they cannot force the trustee on Macgregor & Co.'s estate to proceed against Adamson & Ronaldson if that would cause a loss to the sequestrated estate. The question in dispute will, therefore, in my opinion, be determined by the consideration whether the owners can maintain an action for freight against Adamson & Ronaldson. If the latter firm are in a position to maintain that they have accounted to Macgregor & Co., the claim of the owners will be against Macgregor & Co.'s estate. I proceed then to consider what are the rights of Adamson & Ronaldson under their employment as sub-agents.

"Adamson & Ronaldson in effect advanced to Macgregor & Co., in anticipation of freight, a sum which, together with their disbursements on ship's account, amounted to £11,137. It does not appear that the proceeds of Adamson & Ronaldson's acceptances were directly applied to the use of the defenders. But it does appear that, in connection with the 'Mikado's' then current voyage, Macgregor & Co. advanced sums amounting to £10,391, 5s. on owners' account, for which credit is claimed in this action, and it may be reasonably inferred that through Adamson & Ronaldson's acceptance Macgregor & Co. were put in funds to make advances, or were enabled to forbear from claiming immediate repayment from the owners. The particulars of the transaction will be found in the letters printed in the appendix. It is clear enough that these letters give no security to Adamson & Ronaldson for the repayment of their advances. If their authority to collect freight had been revoked, either directly or in consequence of the bankruptcy of Macgregor & Co. before it had been executed, Adamson & Ronaldson would have had no means of operating repayment of their advances except through a personal claim against Macgregor & Co. or their sequestrated estate. But their authority was not revoked, and the freight, with the exception of a sum of £321, to which I shall afterwards refer, was collected by Adamson & Ronaldson. This, as I think, very materially improved the position of Adamson & Ronaldson. If they had been sued for the freight by Macgregor & Co. in their own names, they would have been entitled to plead compensation in respect of their advances. If Macgregor & Co., in the character of general agents of the owners had sued them for freight, Adamson & Ronaldson might have pleaded that Macgregor & Co. dealt with them as principals or as agents for undisclosed principals (which is the same in legal effect), and that Macgregor & Co. could not by disclosing their principals deprive their sub-agents of the compensation which would otherwise have accrued; or Adamson & Ronaldson might have founded on the right of lien for a general balance which results from the relation of principal and agent. It is quite settled that the factor's lien extends to unappropriated money as well as to unappropriated goods, the lien of bankers being an instance, or at least a parallel case. I am not aware of any distinction in the case of a sub-agent which should make his lien less extensive than that of a general agent in a case like the present, where the sub-agent has the entire management and control of the particular business entrusted to him. Certainly, where the general agent takes the position of a principal towards the sub-agent, the equity of the case is in favour of conceding to the sub-agent the same lien which he would have had if his employer had been a principal really as well as nominally. I am therefore of opinion that Adamson & Ronaldson as and when they uplifted the freights were entitled to apply them in repayment of their advances. It could not be necessary that they should send a bank order to Macgregor and Co. for the amount of the freight in exchange for an order of equivalent amount on repayment of advances. If that would have squared accounts the law will imply a settlement of the counter claims without the interchange of money or bank paper. It is contended there was no formal setting off of the one account against the other, and that bankruptcy intervened before the accounts were squared. But Adamson & Ronaldson's letter of 1st December 1877 seems to be a sufficient assertion of their right to set off the one claim against the other, if it was necessary that this should be done before the bankruptcy. In the absence of objection on the part of Macgregor & Co. their assent is to be presumed, and compensation is thus effected by agreement. I do not think, however, that bankruptcy makes any difference as regards the freights previously collected by Adamson & Ronaldson under authority lawfully given. I think that they might make their claim for repayment of advances effectual in the balancing of accounts in bankruptcy, just as the defenders are entitled to make their claim for freight effectual against the trustee when sued for the amount advanced by their immediate agent. If the trustee on Macgregor & Co's sequestrated estate could not directly compel Adamson & Ronaldson to account for the full freight, and to accept a mere dividend for their advances, neither can he do so in my opinion by putting forward the owners and making them sue Adamson & Ronaldson in their own name. Any such proceeding would, for the reasons I have given, be defeated by the assertion of Adamson & Ronaldson's right of lien over moneys coming into their hands in the course of their employ-

ment. I am not speaking here of a lien over freight as freight, but of the right which every agent has to retain money of his principal coming into his hands, and not specially appropriated, against advances. I therefore come without difficulty, though not without much consideration, to the conclusion that the trustee on Macgregor & Co.'s sequestrated estate in his settlement with Adamson & Ronaldson is bound to allow them to set off freights received against money advanced. If this be so, the defender's claim for freights will lie against the trustee on Macgregor & Co.'s estate, in respect of his having been credited with freight on account, and being virtually in receipt of the money.

"I except from the preceding observations the sum of £321 of freight uplifted by Adamson & Ronaldson after Macgregor & Co.'s bankruptcy. I think that the bankruptcy revoked Macgregor & Co.'s authority, and with it their employment of Adamson & Ronaldson, and that Adamson & Ronaldson having received the money after their authority had ceased are directly accountable for it to the owners of the vessel. This sum will accordingly be subtracted from the set-off claimed in the present action.

"II. On the plea in bar, founded on the proceedings in the Lord Mayor's Court, it is admitted that these proceedings do not constitute *res judicata*. That being so, it appears that in order to found a personal exception the present defenders must be shown to have either gained some advantage in consequence of their plea of compensation which they would not otherwise have gained, or to have put the present pursuer to some disadvantage in his contention with Adamson & Ronaldson. Now, in the English proceedings the verdict of the jury, following on the recorder's charge, was a verdict sustaining the plea of 'never indebted.' The jury gave no effect to the claim of compensation or set-off, and it would be a strong thing to assert that a plea which was not sustained, and which was probably ill-founded, should bar the party maintaining it from setting up a different view of his legal rights in a question with a different party. I do not see how a plea which was not sustained can be held to have any *inertia* opposing itself to the reception of the pleas upon which the merits of the present case depend. With these views, I must repel the plea in bar and find the defenders entitled to set off the claim of freight against the pursuer's demand, and allow to both parties an opportunity of establishing the amount due under their respective claims.

"Since this opinion was written I have seen in the reports the judgment of the First Division of the Court (July 2, 1880, 7 R. 1036), in a case between the present pursuer and Messrs Adamson & Ronaldson, sustaining their claim over the freight earned by the 'Mikado' on her immediately succeeding voyage. I wish to add a few words in explanation. In my opinion, I say that a general agent cannot without special authority hypothecate the unearned freight to a sub-agent; and that the security so given might be defeated by the bankruptcy of the general agent before the ship had completed her voyage so as to earn the freight; but that if the sub-agent actually collects the freight, he will have a lien or right of retention for his advances. My last proposition is, in the view I take, sufficient for the decision of the case, and I am not satisfied that their Lordships meant to affirm that the sub-agent had any higher right than I have assumed. At the same time, as expressions were used in the previous case which seem to point to a power on the part of the general agent to hypothecate the freight in a more absolute sense, it will be understood that my views are stated with the reserve due to the authority of a higher Court."

The pursuer reclaimed, and argued—(1) It was settled a ship's husband had no power to impignorate freight for his own debt—M'Lachlan, 184; Bell's Comm. i. 552; *Guion*, June 18, 1860, 29 L.J., Ch. 337; *Beynon & Co.*, May 18, 1878, 3 L.R., Ex. Div. 263; *Lindsay* v. *Adamson & Ronaldson*, July 2, 1880, 7 R. 1036. In this case, too, the owners were at hand if money was wanted for the ship, and there was no trace that the money had been applied to the ship. The freight therefore was to be regarded as still in the hands of Adamson & Ronaldson, and the defenders ought to recover it from them. It might be that between Macgregor and Adamson & Ronaldson, directly, Macgregor or his trustee could not get payment from the latter, but that would be no answer in an action against them by the defenders. But here the owners having a good action against Adamson & Ronaldson, really preferred to go against Macgregor. The accident of his having a counter account against the owners could not benefit Adamson & Ronaldson, in whose interest this action really was. (2) In the English Courts the defenders had pleaded set off against Adamson & Ronaldson of the very sum of £12,000 which they here claimed to set off against Macgregor's estate. That could not be allowed—Dickson on Evidence, sec. 1434; Taylor i, secs. 76 and 89; *E. of Arran*, M. 14,023; *Westin*, 8 S. 424; *Cairns*, March 20, 1850, 12 D. 919.

The defenders replied—It was absurd to expect them to sue Adamson & Ronaldson for the freight. The receipt of the freight by the latter from Macgregor & Co. was equivalent to receipt by Macgregor & Co. That being so, the pursuer, whose right was no higher than theirs, must place the freight for behoof of the defenders, and as extinguishing *pro tanto* the existing balance against the ship. There might possibly fall, however, to be deducted the sum of £321 received after Macgregor & Co.'s sequestration, and the sum of £718 which Adamson & Ronaldson might be bound to keep to pay the disbursements made in the port of London. (2) It was equally untenable to argue that the defenders were barred by the English proceedings from pleading that Macgregor & Co. had received the freight. It was difficult to gather from the general nature of the verdict of the jury what were the grounds upon which the case was decided, but, at all events, the pursuer was no party to the action, and all the interest he could pretend in the question would be whether the sum of £718 was to be held as satisfied out of freight received, which would go to diminish the credit side of the account in this action, by which his claim was to be reduced.

At advising—

Lord Justice-Clerk—The pursuer Mr Lindsay is the trustee on the sequestrated estates of Donald R. Macgregor & Co., whose estates were sequestrated on the 11th of January 1878. The

defenders are the part-owners of a vessel called the "Mikado," of which Donald Macgregor was managing owner and ship's husband. The action concludes for payment of a balance of £14,577 said to be due by the ship in account with Macgregor at the date of his sequestration.

The defence stated by the owners is that the pursuer has failed to carry to the credit of the ship's account a sum of freight earned by the vessel amounting to £12,000, subject to certain deductions which I shall mention, which sum it is maintained by the defenders Macgregor received, or must be held to have received, at the date in question. It is not disputed that the vessel had earned and had paid this sum of freight, or, as I understood the argument, that the bankrupt ought to have recovered it. But the pursuer alleges that he did not in point of fact recover it, because he and his sub-agents, Adamson & Ronaldson, a London firm at the port of discharge, had entered into an unauthorised agreement by which Macgregor was allowed to draw bills in anticipation of this freight, and Adamson & Ronaldson were empowered by Macgregor to retain the freight in repayment of advances made on this footing on Macgregor's personal account.

Both parties are agreed that this transaction was beyond the power either of Macgregor or of the London firm, and it is also agreed that the advances in question were not made on account of the ship; but it is contended by the pursuer that the remedy of the owners lies not against the managing owner or his trustee, but against the London firm who retained this freight against Macgregor.

It is plain enough that if Macgregor had remained solvent he never could have sued the part-owners for the amount standing at the debit side of the account of the ship in his books, without giving credit for the amount of freight earned and paid; nor would it have been any answer on his part that he had improperly agreed with his own agent that the freight should be advanced to him by anticipation, and should be retained by his agent when actually received. Whether the agents who concluded this improper agreement, and who received the freight, made themselves thereby liable to the part-owners to account for it is a question which in the view I take of this case I need not stop to solve, for the right of the defenders to have credit for the account in a question with Macgregor seems undoubted, and I am of opinion that the trustee on his sequestrated estate is in no better position than he would have been himself. I think in the circumstances that the receipt of the freight by Macgregor's agent by his own direction and on his instructions was in this matter equivalent to his own receipt of it, and that his trustee cannot sue for one side of the account without completing it as it actually stood at the date of the sequestration. It would, I imagine, be out of the question to contend that when the managing owner had actually received by payment to his agent, on his own order, the full amount of the freight three months before his bankruptcy—it was about that time—these funds were not to be considered as in the hands of the managing owner for behoof of the part-owners, and as extinguishing *pro tanto* the existing balance against the ship.

It could not to my mind signify to this result whether the defenders could have sued the London agents for the amount on the ground that they had improperly retained it in their hands. And as little do I see what interest—indeed what title—the trustee in the sequestration has to raise any such claim in this case, to which the London agents are not parties. But I am clear that the part-owners are not bound to do so, and are entitled to deal with this act of their managing owner as he intended that the agents should—as a discharge of the freight on payment. It seems to me very clear that Macgregor or his trustee have no title or interest to question their right to do so. The wrong, if there was one, was committed only against the defenders, and they may found on or may repudiate their manager's act as they may think best for their own advantage.

The trustee, however, has maintained that certain proceedings in the Lord Mayor's Court in London constitute a personal bar against the defenders pleading in this action that Macgregor must be held to have received, and to have been bound to credit, these sums of freight. The case in question was a suit brought by Adamson & Ronaldson to recover a sum of £718 said to have been paid by them as Macgregor's agents for the vessel. In answer it was maintained—first, that the sum never was a debt due by the owners; and secondly, that if it were, the plaintiffs had funds in their hands belonging to the owners to answer it. It appears very doubtful which of these two pleas prevailed. The case went to a jury and the jury returned a general verdict that the defendants were not indebted—whether because the amount sued for was not a debt against the ship, or because the plaintiffs had not the freight in their hands, does not appear. The pursuer here was no party to that suit, and could not be bound by the judgment in it, and it decided and could decide nothing which is raised in this action. But all the interest which the pursuer here could pretend in that question, would be whether the sum of £718 was to be held as satisfied out of the freight received, which would go to diminish the credit side of the account in this action, and so to reduce the balance belonging to the defenders on the ship's account. As I read the judgment of the Recorder, he took very much the view which I have tried to illustrate in these few observations, that both the London agents and Macgregor had combined to deal with this freight in an unauthorised manner, and that the nature of that proceeding disentitled the agents to recover; but that at all events they had in their hands funds due to the ship sufficient to answer it. It is too clear to require further argument that whatever view is taken of the result, there is no obstacle thence arising which prevents us from doing what we believe to be justice between the parties. And I am of opinion that if all the claims against the ship which were paid by the London agents out of the freight are allowed to diminish the total freight carried to credit, no further allowance should be made. This is not the necessary result of the verdict in the London suit, but I think it equitable.

As to the sum of £321, I understand it stands in this way. It was received by the agents after the sequestration of Macgregor, and therefore the agents could not have paid it over to Macgregor, and it rather seems to me that it cannot in this action go to reduce the balance.

Lord Craighill—I am on all points of the same opinion, and your Lordship has so fully stated my views that it is really unnecessary for me to enter into the reasons which have led me to the same conclusion.

My short view on the great question, so to speak, in controversy between the parties is this: That Donald Macgregor, ship's husband or managing agent for the "Mikado," having appointed Adamson & Ronaldson to be his deputy-agents or deputy ship's husband in London, not merely for the purpose of making disbursements, but also for collecting freights when these should come to hand, and it being a part of the arrangement that in the meantime, as against freight, money should be advanced to him in the character of ship's husband, and this arrangement having been carried out when the funds came into the hands of Adamson & Ronaldson, it was the duty and a matter of legal obligation upon Macgregor & Co., the ship's agents, to give the ship credit for the moneys which as against freight had come into his hands; that if he had done that which he ought to have done it would have appeared on the books kept as for the ship that the £14,000 sued for was outstanding. Plain it is, if the ship's husband had done that which he ought to have done, that the trustee on his sequestrated estate could not maintain the position he asserts here. He cannot say that he would have been entitled, had things gone properly, to overturn the account. He could not have said that the transaction between the agents of the ship was an illegal transaction in so far as regards the freight. He must have taken things as they were; and it appearing that freight had been received and had been credited, the trustee must accept the situation thus presented. Well, but if Macgregor ought to have credited the money to the ship, is he or are his creditors in that sequestration to be entitled to take the benefit of it simply because he has not done that which he ought to have done? Even if on the face of Macgregor's books this freight had come into the hands of the agents, then the trustee on the estate of the individual who was ship's husband was not entitled to say that freight has not been received, but is entitled and bound to give credit for that. It may be very well that the arrangement entered into in July 1877 between the ship's husband and the deputy ship's husband might have been challenged. I do not give any opinion on that, far less any opinion as to the result, money having been actually received as for freight and placed in the deputy ship's husband's hands against money that had been advanced. I am willing in the meantime to concede for the purposes of the case that the transaction might have been challenged, but it is not challenged now, and the shipowners, as I think, are entitled to say that money which was freight in the end of the day, and was received by Adamson & Ronaldson, was money received by Macgregor & Co., and having been received, must be placed to the credit of the ship in the ship's husband's account. That on the general and larger question presented here is the short and simple view I proceed upon in coming to this conclusion.

On the other points raised in the course of the discussion I have nothing to add.

Lord Rutherfurd Clark—The bankrupts were the ship's husbands of the "Mikado," and the trustee on their estate sues the owners for a sum said to be due on account of disbursements made by them on ship's account. The action is therefore in substance a settlement of accounts between the ship's husband and the ship.

The question is between the trustee and the owners. But I do not see that this fact introduces any different principle into the settlement of the account. It seems to me that no more can be due to the trustee than was due to the bankrupts, and that if the owners have any plea of compensation available to them it must be as available against the trustee as against the bankrupts, for the trustee sues in the right of the bankrupts, and can recover no more than they could have recovered. Indeed, in balancing accounts in bankruptcy it is well settled that the plea of compensation has a wider scope than it has in settled accounts between solvent persons.

These considerations seem to me to be sufficient to decide this case. For apart from the question that is raised with respect to a sum of £321, it seems to me clear that the bankrupts could not have recovered the sum alleged to be due to them by the ship without bringing to its credit the freight which was uplifted by the broker whom they appointed to receive it, and who has accounted to them for it in the manner which they themselves arranged.

The pursuer contends that the defenders have an action for the freight against Adamson & Ronaldson, who actually collected it under the authority of the bankrupts. It is possible that such an action may be competent to them. But I do not see that they are under any obligation to sue such an action if they prefer to settle the account with the bankrupts or with the trustee as representing them. The defenders have no duty to the creditors on the bankrupts' estate. They are entitled to adopt that mode of settlement which they conceive to be best for their own interest.

But have the defenders a claim against Adamson & Ronaldson for the freight? I do not think that they have. It was hypothecated to them for advances which they had made to the bankrupts. Clearly this gave them no security, for the bankrupts had no power to give a security over the freight. But under the authority of the bankrupts they uplifted the freight and accounted for it to them. This amounted to payment of the freight to the ship's husbands who were entitled to receive it, and was consequently an effectual discharge to them. It is not said that Adamson & Ronaldson knew that the money which the bankrupts raised against the freight was not to be applied to or required for ship's purposes. They were, I think, in good faith throughout.

Further, I do not think that the pursuer can take any benefit from the proceedings in the Lord Mayor's Court. It seems to me that the pleas of the defender went no further than this, that the brokers who collected the freight were bound to apply the freight *primo loco* in payment of the account that was incurred against the ship in the port of London. In this they were right, and so much of the freight as was or ought to have been so applied must in this question be deducted from the amount which was actually collected. With respect to the portion of the freight amounting to £321, which was col-

lected after the bankruptcy of the ship's husband, I have more difficulty. But I shall not dissent from the view which your Lordship takes of it. It is probably the safer view. After the bankruptcy the mandate in favour of the brokers fell. Therefore they could not collect on the authority of the bankrupts, and I think that they were not entitled to pay over to them. It follows that it must be held as still in the hands of the brokers, on account of the defenders.

Lord Young was absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord M'Laren's interlocutor of 9th July last, Recal the said interlocutor, of new repel the fifth plea-in-law for the pursuers, and find that the defenders are not barred by the proceedings therein referred to: Further, find that the pursuer is bound to give credit to the defenders for the freight of the 'Mikado' received by Adamson & Ronaldson, but under deduction of the necessary disbursements on account of the ship when in the port of London, and of the sum of £321 received by Adamson & Ronaldson after the date of the sequestration of Donald Macgregor & Company: Find the defenders entitled to expenses from the date of the said interlocutor: Remit to the Auditor to tax the same and to report to the Lord Ordinary, and remit the cause to his Lordship with instructions to proceed thereon as accords, and with power to decern for the expenses now found due."

Counsel for Pursuer—Trayner—Comrie Thomson—Jameson. Agents—H. B. & F. Dewar, W.S.

Counsel for Defenders—Mackintosh—Pearson. Agents—Boyd, Jameson, & Kelly, W.S.

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*Thursday, February* 1.

## OUTER HOUSE.

[Lord Kinnear, Ordinary.

## BLENKHORN, RICHARDSON, & COMPANY *v.* THE MILNATHORT SPINNING COMPANY, *et e contra.*

*Sale—Buyer's Obligation to Return the Goods if not Satisfied with their Quality.*

A company of cloth manufacturers ordered from a spinning company a quantity of yarns to be used in their business. These yarns were to be of certain specified colours and sizes. After most of the yarns had been delivered and been woven into cloth, the manufacturers raised an action of damages against the spinners on the ground that the yarns were disconform to contract, and defective in quality for the manufacture of first-class cloth, the alleged purpose for which they were bought. They alleged that it was not possible to discover the defects before using the yarns. *Held*, on a proof, that the defects alleged to exist might have been discovered by reasonable examination, and therefore that the defenders were barred from claiming damages by having retained and used the yarns.

In 1881 Blenkhorn, Richardson, & Company, tweed manufacturers in Galashiels, ordered 30,000 lbs. of yarn of different colours and sizes from the Milnathort Spinning Company, yarn spinners at Milnathort. Particulars of the yarns were to be given afterwards, and Blenkhorn, Richardson, & Company accordingly sent to the Spinning Company various orders specifying the different yarns, quantities, and colours required, stating that the yarns were to be of a uniform thickness. After receiving these orders the Spinning Company began to deliver the yarns as they were completed, and between 20th June and 10th November 1881 20,000 lbs of yarn had been delivered. Payments were made during the course of these months to a considerable amount. Certain parcels of the yarns were returned on account of defective quality, and various complaints were made as to other parcels, but these latter parcels were retained by Blenkhorn, Richardson, & Company, and by them made up into cloth.

In June 1882 the Milnathort Company raised an action against them for £583 as the unpaid balance of the price of yarns delivered under the contract. The defenders averred that these yarns, as well as those previously delivered, were disconform to order and defective in quality, and that the defects were not discoverable until the yarn had been woven into cloth, and that they had suffered loss and damage thereby to the amount of £600. On 1st July 1882 a counter-action was raised against the Spinning Company for £620, the sum which Blenkhorn, Richardson, & Company claimed as damages for the alleged defective quality of yarn supplied to them under the contract.

The actions were conjoined.

Blenkhorn, Richardson, & Co. pleaded—"The imperfections in the said yarns being in general latent and not discoverable by the pursuers until they were woven into cloth, the pursuers' claim for damages is not barred by their taking delivery of the yarn and using the same."

The Milnathort Company pleaded—"(3) The pursuers never having rejected the goods, but having retained and used them, are not entitled now to object thereto as disconform to contract. (4) The alleged imperfections being discoverable before the yarns were woven into cloth, the pursuers were not relieved of their obligation to reject."

A proof was taken in the conjoined actions, the import of which fully appears from the opinion of the Lord Ordinary.

The Lord Ordinary pronounced this interlocutor—"The Lord Ordinary having considered the conjoined actions, with the proof adduced—in the action at the instance of the Milnathort Spinning Company against Blenkhorn, Richardson, & Company, decerns against the defenders in terms of the conclusions of the libel: Finds the defenders liable in expenses, allows an account thereof to be lodged, and remits the same to the Auditor to tax and to report: And in the action at the instance of Blenkhorn, Richardson, & Company against the Milnathort Spinning Company, assoilzies the defenders from the conclusions of the summons,