the substantial interest in which is not with the law-agent, but with a third party. It is true that the pursuers' story is that the law-agent had a circuitous motive for wishing the testator to oust his heirs from the succession and to benefit the beneficiary named. But this will never turn the present case into one in which the law-agent is called on to give up a benefit which he has illegitimately obtained through the undue exercise of his influence as legal adviser. If it were such a case, the law which the pursuers have invoked would then be in point, although whether an issue of undue influence is the appropriate expression of that law is not so clear.

The pursuers' case, however, is quite different and much simpler. The condescendence presents an ordinary case of facility and circumvention; and the conclusion is for reduction, not of the incidental gift to the law-agent (which, standing the rest of the will, the pursuers have no title to challenge), but of the whole will. The testator is described, with circumstances and particulars, as having been in a very exhausted and weak condition of health and weak and facile in mind and easily imposed upon; and the usual and accustomed averments are made as to circumvention. The circumstance that Mr Cormack, the alleged impetrator, was the testator's law-agent is stated as supporting the averment that he had influence over the testator sufficient to supply the leverage requisite for successful circumvention. But this seems merely to supply another illustration of the variety of cases which are appropriately met by the general issue of facility and circumvention; and I think the decision in *M'Callum* v. *Graham* is in point.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Jameson—Salvesen. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defender Cormack—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for the Curator *ad litem*—Hunter. Agent—Alex. Wylie, S.S.C.

Wednesday, June 12.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GLENGARNOCK IRON AND STEEL COMPANY, LIMITED *v.* COOPER AND COMPANY.

Sale—Delivery—Ship—Contract to Deliver Goods Free on Board—Expense of Loading.

The pursuers having contracted to supply the defenders with goods at a specified price "free on board" at a certain port, the defenders, who were charterers of the vessel in which the goods were shipped under a time charter, claimed the right to deduct from the price of the goods sums which they had paid as wages to labourers employed in transferring the goods from the quay to the ship. *Held* by the Lord Justice-Clerk, Lord Young, and Lord Trayner, that the duty and expense of loading the cargo lay upon the ship and fell to be borne by the defenders as charterers.

Proof—Omission to Lead Necessary Evidence—Motion for Leave to Lead Additional Proof.

The defenders being sued by the pursuers for a sum which they had deducted from the price of goods supplied to them by the pursuers, alleged that the sum sued for had been paid by them in connection with the delivery of the goods, and was an expense which fell to be borne by the pursuers under their contract with the defenders. At the proof the defenders omitted to prove that they had in fact paid the sum in question, and a day or two after parties had been heard upon the evidence they moved the Lord Ordinary for leave to lead additional evidence on this point. *Held* by the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Trayner (*aff.* judgment of Lord Kincairney) that this motion was rightly refused.

On 30th December 1891 the Glengarnock Iron and Steel Company entered into a contract with Henry C. Cooper & Company, merchants, Glasgow, for the sale to the latter of their unsold make of basic slag for the year ending December 31st, 1892, at a specified price per ton free on board at Ardrossan.

The Glengarnock Company now sued Cooper & Company for the sum of £341, 1s. 11d., being the amount of various deductions made by the defenders from the price of parcels of slag delivered by the pursuers to the defenders under the contract. *Inter alia*, the defenders had deducted the sum of £74, 14s., which they alleged they had paid in wages to labourers for putting the cargoes of slag on board ship at Ardrossan.

The pursuers averred that, if these wages had been paid by the defenders, "they were paid by them in their capacity of

time charterers of the vessels which conveyed the cargoes, and not as shippers of said cargoes."

The defenders averred—"(5) The said dues were paid by defenders on behalf of the pursuers as shippers. The pursuers were bound under the contract to deliver the slag f.o.b. at Ardrossan, and were liable for the port charges."

At the proof the defenders omitted to prove the fact that they had made the alleged payments, and a day or two after parties had been heard upon the evidence they moved the Lord Ordinary to allow them to lead evidence upon this point.

Upon March 19th 1895 the Lord Ordinary (KINCAIRNEY) gave decree in favour of the pursuers for a sum which included the foresaid sum of £74, 14s.

"*Opinion.*—. . . . . 8. The defenders claim to deduct three sums, amounting to £74, 14s. 1d., as 'dues at Ardrossan,' not, as I understand, harbour dues, but wages for labour in putting the cargoes on board. The contract bears that the cargoes were to be free on board, by which, I think, is meant that the buyers should pay no charges prior to the completion of the loading. It does not, however, of necessity follow that the sellers should pay them. They may have been paid by the ship, and that is what, according to the pursuers' contention, actually happened. They say that it is not proved that the defenders paid these harbourage dues. I cannot find any sufficient proof that they did; and if they did not, they cannot claim this deduction.

"On this point I have to explain that one or two days after the proof had been closed and the parties heard, the defenders moved that they should be allowed to lead additional evidence for the purpose of showing that they had paid these sums. This motion was strenuously opposed, and I did not think that I could competently grant it."

The defenders reclaimed, and argued—A new proof ought to be allowed, and the defenders would be able to show that they had really paid the dues. It was proved that the custom under a contract f.o.b. at a certain port was for the seller to pay the labourage dues, and a different course was only adopted under a special clause in the charter-party; but there was no special clause here, and if the buyer had paid these dues for convenience he was entitled to repayment. It was true that the buyer here was also the charterer of the ship, but he was also the buyer, and as such entitled to deduct the labourage dues.

The pursuers argued—It was the custom of the port that ruled this matter; by the custom of the port the ship paid the labourage dues; in this case the defenders as charterers of the vessel, and in the place of the shipowners, had paid the dues and could not deduct them from the sum due to the pursuers as the price of the goods.

At advising—

LORD JUSTICE-CLERK—There seems to me to have been very great looseness in this case altogether, and the motions which have been made both to the Lord Ordinary and to ourselves have been a confession of that on the part of the defenders. Now, the defenders here, who had entered into a contract with the pursuers, are demanding that as regards the goods which were to be put on board this vessel they should be allowed to deduct from the price of the goods a sum of about £75 which they say they paid in respect of the labourage dues of putting the goods on board. Now, as the case stood before the Lord Ordinary, it is quite certain that the defenders could not succeed on the footing that they had proved that they had in fact paid these dues, for they certainly had not proved that, and they practically admitted that they had not proved it by coming to the Lord Ordinary two or three days after the proof had been closed, and endeavouring to get him to re-open the matter and allow them to lead proof on that subject. The Lord Ordinary refused to allow that proof, and in my opinion he was right in refusing to allow it. If the defenders were to state any such case at all, they should have led that evidence before. When the matter was finally concluded, I think the Lord Ordinary was quite right in not allowing that proof. This would be quite sufficient to dispose of the case on the reclaiming-note, but a considerable amount of discussion has taken place on the merits of the case, on the footing that they might have succeeded in proving that fact. They say they have in their hands certain receipts that they could put in as proof that they paid these labourage dues; and if they did, and if that had been proved, the question would come up whether or not they are entitled to claim these against the pursuers. And a good deal of discussion has taken place as to the meaning of "free alongside" and "free on board." It has been stated by Lord Trayner, who has had abundance of experience in regard to these shipping cases, that, as regards these two expressions, the difference is simply as to the point of time at which the risk of each party as regards the goods comes to an end. In the one case it comes to an end before the goods are put over the rails; in the other case it does not come to an end till the goods are on board—past the rail, but in regard to who is to put them on board and who is to bear the expense of putting them on board, it is the universal practice that the ship bears that expense. Now, surely one would imagine that there must be some distinct authority in the books on a matter so elementary in commercial law and practice as that, but Mr Watt and Mr Johnston were unable to cite to us any authority to support their proposition that the difference between the two expressions amounted to this—that "free on board" meant that the consigners of the goods were bound at their own expense to put the goods on board, and that the defenders, having paid, as they say they paid, and as I am assuming they did pay, these expenses, are entitled to deduct them from the charges

made against them. We have had no proof of that proposition, and therefore I think we have no grounds for holding it to be sound, but I should be inclined to hold it as quite sufficient in this case to dispose of the case on the footing of the statement that the defenders, if they were to prove their case, should have brought their proof at a proper time and failed to do so, and are not entitled to do so now, even if they are able to state the legal proposition for which they contend.

LORD YOUNG—I am disposed, and, I confess, without any reluctance, to express my opinion on the whole case that was argued to us, but certainly not going further than the case that was argued to us. The question is between the buyers and the sellers of a cargo of slag. The contract was that the slag should be delivered "free on board," so that in a question between a buyer and a seller there can be no doubt that the buyers were entitled to have the slag free on board, and were not liable (I repeat as in a question with the sellers) for any costs for putting it on board. I think that is clear, and indeed it is not disputed, that, when goods are sold upon a contract free on board at a particular port, the buyer as in a question with a seller, is not liable for any costs or charges in putting them on board. Here the buyer of the goods, being under no such liability in a question with the seller, nevertheless paid the charges of putting these goods on board—that is to say, taking them from alongside into the ship. He was under no obligation to make that payment as the purchaser of the goods—none whatever. But he avers, and no doubt truly, although it is not matter of proof in the case, that he did make the payment of the charges for putting the goods from alongside the vessel on board. Not being liable under the contract with the seller, why did he do it? The explanation given is that he was also the shipowner, or in the same position as the shipowner, because he was the charterer of the vessel upon a time charter, which put him as in a question with the shipowner in the same position as the shipowner as to all the charges incumbent on him for which he was liable. Now, it is the law; as I understand it, it has been so stated repeatedly, and there is no authority existing to the contrary, that when goods are brought alongside a ship it is for the ship to take them from the quay into the vessel, and also (but that we are not concerned with here) that, when a vessel arrives at the port of discharge, it is for the ship to put the goods out of the ship on to the quay. It is done by their own crew, if the crew is present and fit for the duty, the crew being paid by the ship, or by harbour porters who are employed to assist, or as substitutes for, the crew in performing that duty of the ship. Now, in this action which is for recovery of the price, the question raised for the defenders is, what deduction from the price or the price of some other goods—it does not signify—is the buyer of this slag to be paid for putting it on board? The answer is—"You were under no liability to pay that in a question with me. In a question with me you are entitled to have them free on board, but you paid these charges as charterer of the vessel on whom it was incumbent to pay all dues for taking the goods from the quay and putting them on board." Now, that question was argued to us, and I am disposed to express my opinion that the law is, that the obligation of performing that duty, or paying the labourage for performing it, is upon the ship, or where the ship is chartered as here, upon the charterer of the ship; and the only thing that can be represented as a puzzle in this case, if it be one, arises from the fact that the charterer of the ship was the purchaser of goods free on board. But the fact that he paid these charges because he was the charterer of the ship—for I impute the payment to that fact—gives him no claim to deduct these from the price payable to the seller. He was not at liberty in a question with the seller to pay these and claim deduction. There was no duty on him to make any payment at all. He might, if he thought the law was with him on that point as clearly as I think it is against him, have called upon the seller of the goods to make the payment, and then the seller of the goods would, according to the law as I think it exists, have called on the owner of the ship to pay. But it was not a right course or a defensible course for the purchaser of the goods to say—"I have no other connection with him except as buyer, and I paid the cost of putting them on board." I think that was not incumbent on him at all, and therefore, not proceeding on what I should have thought a very trifling matter, namely, the fact that payment of the cost had not been formally proved, although the receipts from the workmen, or the labourers, or the employers of the labourers who performed the duty are tendered here. I should be very unwilling indeed to proceed upon that; but upon the grounds I have already stated, I am quite prepared to affirm the judgment of the Lord Ordinary. I think there was no occasion for payment. I think it was not incumbent on the purchaser to make it; I think the fact that he made it is to be attributed to the fact that he was the charterer, and that he has no claim for deduction.

LORD RUTHERFURD CLARK—I am of opinion that the defenders' motion for additional proof should be refused. If so, it follows that the decision of the Lord Ordinary must be affirmed, and I do not desire to deal with the further question.

LORD TRAYNER—I do not know that I can add anything to what has been said by your Lordships and especially Lord Young. But I am of opinion clearly with Lord Young that the interlocutor of the Lord Ordinary ought to be affirmed, and I rather prefer, like him, to proceed on a decision of the general question than upon the peculiarity of this case, that there has been an omission to prove what I presume the

defenders were quite in a position to prove and can now establish. The counsel for the defenders has urged, as far as I could follow him, as the only ground on which he could maintain this claim for deduction, that this contract was a contract "free on board," and that unless the deduction was allowed him we would be drawing no distinction between the contract "free on board" and contract "free alongside." Now, I have been for a good many years very familiar with both these contracts, and I never heard until to-day that it was a distinction between these contracts that in the one case a shipper was bound to pay the expense of shipment, and in the other case that he was not. The distinction between the two contracts is not far to seek, and it may be an important distinction. The point of delivery under the two contracts is different, and the consequent risks and the necessary insurance to cover these risks may be very different—the duty of insurance or the risk in the one case lying upon one party, and in the other upon the other party; but as regards the question which is to be at the expense of putting the cargo on board, there is not any difference which I have ever heard between the one contract and the other. In either contract—putting the goods alongside or free on board—the universal practice is that the ship undertakes the duty and the expense of putting the cargo from the quay or alongside into the hold of the vessel. I never heard yet of a captain or a crew who would tolerate outsiders stowing their cargo. Of course putting coal and slag on board, which is tipped into the hold from a waggon, requires no particular stowage, but in dealing here with the general question, which affects not only stowage of cargo like coals or slag, but cargo that would require to be very carefully placed into the hold, that is undoubtedly on the ship and crew or those who take their place, and it is not only their duty but their right to see that nobody else but themselves interfere with the stowage of the cargo. But I repeat that up to this date I never heard it suggested that either under a contract "free on board" or "free alongside" the duty and consequent expense of putting the cargo from alongside into the hold of the vessel was a duty upon any other than the ship itself, and I am not astonished that there is no authority to be stated on that subject, because, so far as I know, the idea is absolutely universal that nobody is liable for the expense of shipping cargo on board a ship anymore than for the expense of discharging the cargo at the port of discharge. That is a duty incumbent on the ship and on the ship alone. Now, in this case the defenders having in a way ultroneously made payment—for I assume they can prove it,—come upon the seller to have it refunded. The answer is twofold—first, "You did not pay that at all as the buyer of the goods"; and in the second place, "You did pay it, if you paid it at all, as part of your own obligation." These things I think are abundantly made clear by the evidence before us. I say again that I assume they actually paid the £75 to the proper parties and to the persons who did the work. But under what conditions? If they had meant to claim it as an obligation of the shipper—if they had regarded it as the duty of the shipper to make payment of this £75, their position undoubtedly was to say—"We are not to pay the £75 for loading this cargo, for our contract entitles us to this cargo free on board. If anybody is responsible, then, for the loading of the cargo, it is the man who contracted with me, and I must ask payment from him." He would have had this answer to make no doubt—"Oh! It is the ship's duty; it is not mine." But in this case we need not even consider whether there is a claim against the ship at the instance of the seller of the goods, because the buyer of the goods in this case is the charterer of the vessel, and he undertakes by the charter-party which is produced to pay all charges whatsoever connected with the use of the vessel for the two months that it was to be in his possession under the charter except certain items which are put on the owners, those items which are put on the owners not covering the expenses in question, and the charges which the charterer is bound to pay covering the very item which we are now considering. I have no doubt on the whole matter, first, in agreeing with the Lord Ordinary that it was right to refuse the proof that was asked, but I think, in the second place, it is quite certain on the case, as argued to us, that the respondent has no claim whatever for this deduction against the seller of the goods, and that the pursuer is entitled to his full price free from this deduction.

The Court adhered.

Counsel for the Pursuers—Dundas—Aitken. Agents—Forrester & Davidson, W.S.

Counsel for the Defenders—H. Johnston—Watt. Agents—Clark & Macdonald, S.S.C.

Saturday, June 15.

FIRST DIVISION.

[Lord Low, Ordinary.

COWDENBEATH COAL COMPANY, LIMITED *v.* CLYDESDALE BANK, LIMITED.

Bankruptcy—Illegal Preference—Act 1696, *cap.* 5.

A firm of merchants, within sixty days of bankruptcy, obtained an advance from a bank upon the undertaking that they would send the bank as security the bill of lading of a cargo which they were shipping abroad. Upon the following day the bill of lading was endorsed and sent to the bank.

Held (*aff.* judgment of Lord Low) that