ably creditors, were similarly deleted. In these circumstances the Sheriff-Substitute (MURRAY) held the oath affirmative of the reference to the extent of £50. On appeal the Sheriff pronounced the following interlocutor:—

"*Glasgow*, 11*th February* 1871.—Having heard parties' procurators on their respective appeals, and reviewed the whole process, Finds that it is contended for the defender that his oath of reference is negative of the resting-owing of the sum sued for, in respect he has deponed that said sum was repaid in flour; but finds that it is not deponed either that it was a part of the original transaction that the debt was to be so extinguished, or that the pursuer afterwards agreed to hold the debt discharged in respect of the receipt of flour: Finds therefore that the statement is not intrinsic but extrinsic, being merely that of a counter claim or independent transaction, which is not inconsistent with the subsistence of the debt (see Dickson on Evidence, secs. 1650 and 1655, and authorities there quoted): Finds that the defender admits in his said oath that he received coin from the pursuer amounting in value to more than £50, and he cannot say whether it did not amount in value to £100: Finds that the defender afterwards gave up the pursuer in his state of affairs as a creditor for £98, and he depones that he cannot say that he made any payment to him subsequent to the date of said state: Finds that in these circumstances the oath is substantially affirmative of the reference: Therefore dismisses the defender's appeal, but sustains the pursuer's, and, alters the interlocutor appealed against; and instead of restricting the sum decerned for to £50, decerns against the defender in terms of the conclusions of the summons; and *quoad ultra* adheres."

The defender appealed.

WATSON and JOHN GIBSON for him.

GUTHRIE SMITH and J. M. LEES in answer.

Authorities cited—*Thomson* v. *Thomson*, 20 Feb. 1830; *Murray* v. *Murray*, 12 Feb. 1839; *Thomson* v. *Duncan*, 10 July 1855; More's Stair, p. 418; *Hunter* v. *Kinnaird*, 9 Dec. 1830.

The Court adhered.

Agent for Appellant—Alex. Wylie, W.S.

Agent for Respondent—Ralph Richardson, W.S.

Thursday, June 29.

BROADHEAD *v.* YULE.

Ship—Charter-Party—Agent. By the charter-party it was stipulated that a ship should be addressed to the charterers' agents in this country. When the ship arrived the agent collected the freight on behalf of both the owner and charterer, and, without the knowledge of the owner or master, arranged with a third party a claim for damage to cargo. *Held* that this arrangement was not binding on the owner or master.

This was an action by John Broadhead, master of the ship "Puck," against T. B. Yule, merchant, Leith, concluding for £45, 7s. 9d., as a balance of an account-current between them. The defender denied that he acted as agent for the pursuer in collecting freight, or in any other matter than as broker in the ship's customhouse business; and he explained that "the 'Puck' was chartered by Messrs Scott & Allan of Leith by charter-party, dated 13th April 1870, to convey a cargo of wine and other lawful merchandise for Yarmouth and Leith, the freight payable by the charterers on the right delivery of the cargo being at the rate of 32s. per imperial ton of 252 gallons of wine delivered for what she could carry; but the captain was to be obliged, without prejudice to the charter, to sign on presentation bills of lading, at any rate of freight which the charterers could succeed in obtaining, and the ship was to be addressed to the charterers' agents in Cadiz, Yarmouth, and Leith; that the ship was accordingly addressed to the defender in his capacity of agent in Leith for the charterers; that on the out-turn of the cargo it was found that one butt of wine, of the estimated value of £45, received by the pursuer in good order and condition at Cadiz, had been crushed by the pursuer during the voyage, through the fault of the pursuer or those for whom he is responsible, and that the pursuer had failed to carry the same in safety, in terms of his contract of carriage. The charterers declined to authorise the defender to settle the freight on their behalf, except on the footing of his retaining in his hands on their behalf the £45 to settle the price of the said butt of wine; and to this the pursuer consented. An account upon this footing was accordingly made up by the defender, and the balance appearing therein was paid to the pursuer on 29th July 1870, as per receipt produced. That subsequently to that date the charterers, through the defender, succeeded in effecting an arrangement regarding the said butt of wine, whereby Messrs Wauchope, Moodie, & Hope, of Leith, the owners thereof, accepted in full £33, 7s., and the difference betwixt that sum and the £45 in his hands the defender, though in nowise bound to do so in a question with the present pursuer, has all along been willing to pay to the pursuer, and offered to do so before the service of this action."

The Sheriff-Substitute (HAMILTON), after a proof, pronounced the following interlocutor:—"Finds the defender, as broker, or otherwise acting for the pursuer, collected the freight due to the pursuer under the charter-party, and that he is bound to account to him therefor: Finds that the items of the account annexed to the summons are not objected to: Finds that the sum of £33, 7s. mentioned in the minute of defence, does not form a proper charge against the pursuer, the same having been paid to Messrs Wauchope, Moodie & Hope without the pursuer's knowledge or authority: Therefore, and with reference to the foregoing findings, decerns against the defender in terms of the libel: Finds the pursuer entitled to expenses, allows an account, &c.

"*Note.*—This is a very clear case. By the charter-party with Messrs Scott & Allan the pursuer was to be paid freight at the rate therein mentioned on delivery of the cargo; and although there was a clause binding the master to sign bills of lading at any rate of freight which the charterers could obtain, yet, as this was to be without prejudice to the charter, the pursuer's right of lien remained complete, and he was not bound to give delivery of any particular portion of the cargo except upon payment of the freight stipulated in the relative bill of lading. In collecting and granting discharges for the freight due by the various consignees, the defender necessarily acted as the pursuer's broker or agent, and was bound to account to him in the first instance, and not to the charterers. Accordingly, in the account-current which he rendered to the pursuer after the discharge of

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

The Sheriff (DAVIDSON) adhered.

The defender appealed.

TRAYNER for him.

SCOTT for the respondent.

At advising—

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

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

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

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

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

Friday, June 30.

FIRST DIVISION.

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

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

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

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