and was used for storing his own goods only. In the present case the storehouse was used by the defender, not only for storing his own grain, but also for storing that of other persons. But does that speciality remove the present case from the ruling decision in Mathison's case. In judging of that, suppose that there is no intermediate person as storekeeper, but that the store which the proprietor kept, and in which he deposited his own goods, he throws open for the goods of others, charging store rent. I don't think this touches the important question that the delivery was never here passed, because the goods are in his own warehouse still, and there they remain. Hence that speciality that the warehouse belongs to him, and is kept by him, although opened to receive the goods of others, cannot touch the question whether the real right can pass by simple constructive delivery. But it is said that not only was the store kept by the seller, but that he kept a warehouse book, and that in this there was an entry for a sale effected by him to the purchaser. I am still taking the case of there being no intermediate party. But what about the entry in the books? Does the entry in his own books transfer the property? The principle of our law of constructive delivery is, that the custodier of the warehouse where the transfer is made becomes the custodier for the purchaser. By delivery, the real property is passed, and the matter no longer stands on a mere personal contract. The *jus in re* is in the purchaser, and the *jus ad rem* transferred. Having cleared the case in this way, and satisfied my mind that the mere circumstance of throwing open the store to admit the grain of others don't affect the question, we have to consider what was the position Angus occupied. Suppose Angus had been the tenant of the warehouse, and had himself drawn all the rents of the property stored, that would just be a case of his acting as an independent storekeeper. But that is not the position of Angus. He is, according to the finding of the special verdict, the mere servant or clerk of the storekeeper. The verdict identified Angus with the bankrupt. The speciality I have mentioned does not take the case out of the general principle. Then as to the question as to the usage of trade. Usage of trade must be universal. There must be a usage which shall have the effect of touching the law of the cause, affecting the position of parties. But when it is merely stated that there is an "*understanding*" only, and when it is said that this is generally acted upon, and only in Glasgow, I refuse to give effect to that usage of trade. I think it would be most dangerous if the creditors of a bankrupt should be affected by a usage so limited in its nature, and so local in its application, and therefore so innocuous in its legal effects.

Lord BENHOLME—I agree as to the principles upon which this case has been decided by Lord Cowan and your Lordship. The key of the case is the ascertained position of Robert Angus. What Lord Cowan said is satisfactory to my mind, and I only supplement it by one observation. It is rather remarkable that the bankrupts in keeping their books charged themselves with warehouse rent for grain belonging to themselves, thus indicating, though slightly, that they were due themselves warehouse rent, or rather giving rise to the suggestion that there was a separation of interests. I think this was done only to ascertain how their profits were made. They charged themselves with warehouse rent only for clearness in showing how their profits arose. The only other thing that can be said at all as bearing on Angus' position is in reference to his letter of 26th February 1864, addressed to M'Call—"I have transferred to your account from Andrew Jackson and Son 1386 bolls of wheat which I hold to your order," as if he was acting independently of his master. This is very like a *conatus* to make him a separate person. But the truth is, the grain was still held by Jackson, and not by Angus. The man may have been under a misapprehension as to his position.

Lord NEAVES—The old law of Scotland is that no security over moveables can be constituted *retenta possessione*. Even an instrument of possession will not pass property without delivery. It was argued by the defender that the only foundation of our law on the subject was public credit. That is not the foundation of our law. The foundation of it is that property does not pass by consensual contract, such as sale, and that no contract such as, "I hereby sell these goods"—nothing in the way of consensual contract—will pass the property. But will a consensual contract pass the grain because the bankrupt had other grain in the warehouse of which he is not the possessor? I see no reason for that. I think the statute 6 Geo. IV., c. 94, has an important bearing on the question. The statute only favoured certain cases which it prescribed. It does not supersede the old law of constructive delivery. As to the usage of trade, I think in matters which depend upon the contract of parties there is great weight to be given to usage. There are words to which persons in certain localities give certain meanings; and if you make a contract in that part of the country you use the glossary of the country. Nay, there may be local usage as to particular parts of duty. But real rights of property—preferences in bankruptcy—in their legal effects don't depend upon contracts. The law applies to contracts its own principles, and contracts do not rule the law.

The Court accordingly entered up the verdict for the pursuer.

Agents for Pursuer—Webster & Sprott, S.S.C.

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Saturday, June 2.

FIRST DIVISION.

EDMOND *v.* DUFFUS.

Bankruptcy—Stat. 1696, *c.* 5—*Issue—Prior Debt.* Averments of prior debt which, though vague, held sufficient.

This was an action of reduction at the instance of a trustee on a sequestrated estate founded upon the Act 1696, c. 5, and also upon fraud at common law. The defender pleaded that there was no issuable matter upon record.

The transaction sought to be set aside was an alleged sale of flour and butter to the bankrupts to the defender on 9th December 1864, within sixty days of their bankruptcy, and when they were in a state of insolvency, in satisfaction or security of a prior debt, to the prejudice of prior creditors of the bankrupts.

The pursuer proposed the following issues:—

"It being admitted that the estates of the said A. & W. Gray were sequestrated under the Bankrupt Statutes on 28th December 1864, and that the pursuer, Francis Edmond, is trustee on the said sequestrated estates:

"1. Whether, on or about 26th December 1864, and within sixty days before their said sequestration, the said A. & W. Gray delivered to

the defender forty barrels of flour and four casks of butter, of the value in all of £69 or thereby, or any part thereof, and that in security or satisfaction of a prior debt, contrary to the Act 1696, cap. 5?

"2. Whether, on or about the said 26th December 1864, the said A. & W. Gray delivered to the defender the said forty barrels of flour and four casks of butter, or any part thereof, fraudulently to disappoint the legal rights of the creditors of the said A. & W. Gray?"

The Lord Ordinary (Mure) reported these issues with the following

"*Note.*—In this case the defender when objecting to the terms of the issues, maintained that there was no issuable matter on record. The Lord Ordinary is, however, disposed to think that although the averments as to the defender being a creditor of the bankrupt at the date when the transactions under reduction occurred are not very specifically stated, there is sufficient set forth on the record to entitle the pursuer to an issue, both under the statute and at common law. But it appeared to him that the second issue would require alteration, so as to put in issue the fraudulent reception of the goods by the defender when in the knowledge of the bankrupt's insolvency, a point to be established under the issue at common law, as distinguished from that under the Statute 1696."

At advising—

The LORD PRESIDENT.—This record is somewhat vaguely expressed. At the same time I am not prepared to say that there is not in it sufficient for an issue. The question is whether there is an allegation of prior debt. There is an allegation in condescendence 6 that "the defender took delivery with the view of securing a preference for a prior debt," whatever it might be; and it is also said in cond. 9 that "there were numerous bill transactions between the bankrupts and the defender for the accommodation sometimes of the bankrupts and sometimes of the defender, and the bill founded on by the defender was one of these accommodation bills." How that may turn out I don't know, but I think there are materials for going to trial. I think, however, that the common law issue should be placed first, and that on the statute second.

The other Judges concurred; and with this variation the issues proposed were approved of, and the defender was found liable in expenses since the date of closing the record.

Counsel for Pursuer—Clark and Gifford. Agents—Patrick, M'Ewen, & Carment, W.S.

Counsel for Defender — Solicitor-General and Pattison. Agent—John Robertson, S.S.C.

WATT'S CURATORY.

Curator bonis—Remuneration. A *curator bonis* who was nearest agnate to his ward allowed, in special circumstances, remuneration for his services.

In this curatory an objection was raised by the Accountant of Court to the accounts of a *curator bonis*, in regard to which he made a report to the Lord Ordinary, which his Lordship reported to the Court, adding to his interlocutor the following

Note.—As the point which has been brought under consideration by the Accountant—namely, whether, seeing that the *curator bonis* stands in the relation of that of nearest agnate to his ward, he is entitled to the usual allowances of commission—materially affects the interests of the curator in the present case, and involves a question of some general importance, and the estate is one of very large amount, the Lord Ordinary has thought it right to report the case for decision.

The circumstances under which the point is raised are brought out in the report of the Accountant; and the questions for consideration are—1*st*, Whether, seeing that the appointment was made without any restriction or qualification, to the effect that the curator should act gratuitously, such as that inserted in the interlocutors in the cases of Jackson, 11th December 1821, and Robertson, 3d February 1830, and that an annual allowance had been hitherto made to the curator without objection, it would be proper now to disallow the payments so made; and, 2*d*, Whether, assuming that it would not be proper, *ex post facto*, to apply the condition as to acting gratuitously, the present position of matters is such as to render it necessary to impose that condition for the future.

With reference to the first of these questions, the curator relied on the decision in the case of Macdonald, 8th July 1854, in which the Court refused to apply the above rule, where it appeared, as it did here, *ex facie* of the petition at the date of the appointment, that the party proposed was the nearest agnate; and the curators had been allowed to enter upon the duties of the office without qualification or restriction as to remuneration; and to that extent the decision in the case of Mac donald seems to bear out the curator's view.

Upon the second question, the Lord Ordinary has not been able to find any express authority beyond the general rule that the office of tutor-at-law and curator is held to be gratuitous. But as against the view that this rule ought to be laid down for the future, in the present case it was strongly contended on the part of the curator that it was not imperative so to apply it, because the incapacity was not of that complete and permanent character which would necessarily warrant a cognition, and entitle the nearest agnate to demand the office of curator; and it would, moreover, not only be inexpedient, as regards the economical management of the estate, that the present curator should be changed, but also unjust, as matters now stand, to the curator himself, as depriving him of an occupation for which he had been all along trained, but the onerous duties of which he could not, without remuneration, be expected to undertake; and it is for the Court to judge whether, in these special circumstances, the appointment should be continued upon the footing on which it has hitherto been understood to have been made. (Initd.) D. M.

CLARK (with him SHAND) was heard for the *curator bonis*.

The LORD PRESIDENT—Are you willing, if we authorise this payment in the circumstances, that our doing so shall not be held to prejudice any objection which may be afterwards raised?

CLARK—We are.

H. J. MONCREIFF was heard for the Accountant of Court.

The Court then pronounced the following interlocutor:—

Edinburgh, 2d June 1866.—The Lords, on report of Lord Mure (Ordinary), having considered the report of the Accountant of Court, No. 18 of process, and heard the counsel for the *curator bonis*, and the counsel for the Accountant of Court, and having regard to the nature and extent of the duties performed by the curator, and to the special circumstances of this case, Find that the curator is entitled to credit for the allowances stated for the years from 1852-53 to 1863-64, inclusive, and to take credit for a reasonable allowance in future