schedule A. annexed to the Act. We therefore answer the first question in the affirmative, and the second in the negative.

The Court answered the first question in the affirmative.

Counsel for Parties of the First Part—Dean of Faculty and Pearson. Agents—Gibson & Strathearn, W.S.

Counsel for Parties of the Second Part—Solicitor-General (Watson) and Kinnear. Agents—Dove Lockhart, S.S.C.

Wednesday, June 2.

FIRST DIVISION.

[Lord Young, Ordinary.

GOURLAY (PINKERTON'S TRUSTEE) *v.* HODGE.

Bankrupt—Sale—Statute 1696, *c.* 5—*Reduction.*

On 15th May a firm of merchants received from A, brother-in-law of one of the partners, the sum of £500, and granted in return a letter acknowledging receipt, and promising to give him, "within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Indian corn, to the full value, viz., £500." Between 22d May and 8th June the firm delivered to A peas, oats, and beans to the value of £238, 5s., and on 25th June they were sequestrated,—*held* that the transaction was reducible under the Act 1696, c. 5, and that the goods so delivered belonged to the bankrupt estate.

This was an action of reduction, delivery, and payment, at the instance of John Gourlay, chartered accountant in Glasgow, trustee on the sequestrated estate of James Pinkerton & Son, merchants in Glasgow, against William Hodge, brickmaker and contractor there. The following were the circumstances of the case:—

The estates of Messrs Pinkerton & Son were sequestrated on 25th June 1874, and thereafter the pursuer was elected trustee. Previous to the sequestration, and on 16th May 1874, the bankrupts received from the defender the sum of £500, granting at the same time a letter in the following terms:—"Dear Sir,—We have this day received from you the sum of (£500) five hundred pounds sterling, and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value, viz., £500." Thereafter, at various dates between 22d May and 8th June, the defender received from the bankrupts various quantities of peas, oats, and beans, of the value of £238, 5s. The defender did not pay for the grain so delivered, but the deliveries were taken as in implement of the obligation entered into in the letter of 16th May. The pursuer required the defender to pay the price of the grain delivered, but he refused to do so, and this action was brought to reduce the account and deliveries of the grain, for declarator that such portion of the grain as was still in the defender's possession belonged to the pursuer as trustee, and for payment of £238, 5s.

The pursuer pleaded—"(1) The pursuer, as representing the creditors of said sequestrated estate, and as trustee thereon, is entitled to insist in this action. (2) The oats, beans, and peas specified in the foresaid account having been given in security of or satisfaction of a prior debt within sixty days of bankruptcy, contrary to the terms of the statute 1696, c. 5, the pursuer is entitled to have the transaction reduced and set aside as concluded for. (3) The parties being conjunct and confident, and delivery having been given without any just, true, and necessary cause, the transaction is null and reducible. (4) The defender being indebted in the value of the said oats, beans, and peas, the pursuer is entitled to decree for the same."

The defender pleaded—"(1) The pursuer's averments are not relevant, or sufficient in law to support the conclusions of the summons. (2) The goods in question having been delivered in partial implement of a contract of sale, under which the price had been paid by the defender, the action is untenable. (3) The action, so far as founded on the statute 1696, cap. 5, cannot be maintained, in respect the deliveries were made not in satisfaction or security of a prior debt, but in fulfilment *pro tanto* of the bankrupts' obligations under the contract of 16th May 1874, which were the counterpart of the payment then made to them by the defender. (4) The deliveries not having been made to a conjunct or confident person, without a just, true, or necessary cause, to the prejudice of prior creditors, they are not challengeable under the Act 1621, c. 18. (5) The defender having under the transaction in question paid the sum of £500 to the bankrupts within sixty days of bankruptcy, in consideration and on the faith of performance of their counter obligations as to delivery, and the deliveries made in pursuance of the contract having been of much less value than the said sum, the defender ought to be assoilzied. (6) The pursuer's material allegations being unfounded in fact, the defender is entitled to absolvitor, with expenses."

The Lord Ordinary allowed a proof, of which the following are the important portions:—

The defender deponed:—"The transaction came about in this way: My son-in-law called upon me. I had intimated to him that I would give him no more accommodation bills, and that at any time I had money beside me I could purchase grain, so far as I pleased, for my horses. My son-in-law did not want accommodation at that time, and did not propose it. He inquired if I stood in need of grain, and said he was a little tight for money for the following day. I agreed to give him £500, and he was to give me grain at the market price as I required it for feeding purposes. . . . I had never had any transaction of the same kind with the bankrupts previously. I had been in the habit of getting grain from them—sometimes less and sometimes more—but I did not get one-third from them of the total grain I required. I generally paid for it within the month. I called at the bankrupts' office shortly afterwards, in order to begin to get the grain according to the arrangement. I pressed them for it, because I required it. I called on or before 22d May. At that time I had not the slightest knowledge that the bankrupts were insolvent—quite the opposite; and nothing had occurred to excite my suspicion. I

did not know of their insolvency until immediately before the sequestration. I only knew of it when it became public; I had no previous knowledge. . . . My horses consume at the rate of about 9¾ bolls of oats per week. I gave Pinkerton a cheque for £500 on my bank account with the City of Glasgow Bank."

James Pinkerton, jun. (his father being dead), deponed—"Prior to May 1874 my father-in-law told me he would not grant us any further accommodation in the way of bills, but that he would help us if we needed it by advancing money against grain to be afterwards delivered. It was in consequence of that I proposed this mode of accommodation on 16th May. It was understood between my father-in-law and me at the time that in return for the £500 he should receive delivery-orders from us for grain to be consumed by himself in the course of his business. The delivery-orders we gave him were in pursuance of that bargain."

The Lord Ordinary (YOUNG) pronounced this interlocutor:—

"*7th January* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the proof, record, and cause—Finds that the deliveries of the goods referred to in the summons and in the record were not in contravention of the Act 1696, c. 5: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

The pursuer reclaimed.

Argued for him—The loan was made to the bankrupts on the ground that they required accommodation, and on that ground alone. There was no contract for delivery of a specific subject, but of a quantity of grain. Thus the bankrupts were not by their obligation bound to give the defender any one of the parcels of grain delivered by them, and on making these deliveries they were voluntarily giving satisfaction of a prior debt, in preference to other creditors within the meaning of the statute.

Argued for the defender—There was nothing to show that the defender knew that he was dealing with a firm on the eve of bankruptcy, although he made the advance for their accommodation. This did not belong to the class of transactions struck at by the Act, but was simply the implementing of a contract of sale entered into by the letter of 16th May.

Authorities—*Taylor* v. *Parry*, Mar. 8, 1855, 7 D. 630; *Miller* v. *Shiell*, Mar. 19, 1862, 24 D. 821; *Young* v. *Johnston*, 1783, M. 1141; *Steven* v. *Scott*, June 30, 1871, 9 Macph. 923; *Gibson* v. *Forbes*, June 9, 1833, 11 S. 916.

At advising—

The LORD PRESIDENT—The pursuer is trustee on the sequestrated estate of James Pinkerton & Son, against whom sequestration was awarded on 25th June 1874. The object of the action is to reduce certain deliveries of grain by the bankrupt to William Hodge between the 22d May and 8th June of that year, and therefore within sixty days of bankruptcy. This action is laid on the Bankruptcy Act of 1696, and also on common law, but it was argued before us entirely on the Act of 1696. The ground of challenge is, that the delivery was made in satisfaction of a prior debt within sixty days of bankruptcy, and the reply is that they are not challengeable, because they were the natural performance of an obligation incumbent on the bankrupts under the letter of 16th May 1874. So it is necessary for us to attend, first, to the terms of the obligation, and, secondly, to the nature and circumstances of the deliveries of 22d May and 8th June. Now, the letter of May 16th is expressed in very remarkable terms. It is signed by Pinkerton & Son, and is addressed to Mr William Hodge:—"Dear Sir,—We have this day received from you the sum of (£500) five hundred pounds sterling, and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value, viz., £500." The defenders represent this transaction as being a sale, and perhaps it is more nearly allied to sale than to any other nominate contract; but it is a sale of a peculiar sort, for the purchaser advances the price of the commodity, and that commodity does not consist of any definite subject-matter. Nor is the quantity of the subject-matter ascertained, for the letter only contains an obligation generally to give delivery-orders for the different kinds of grain mentioned to the full value of £500 within one month. So delivery-orders for any grain, whether in possession of the bankrupts or not, and howsoever acquired, would be fulfilment of the obligation under the letter of 16th May. Then, on the other hand, the delivery actually made was made under peculiar circumstances. The various parcels of grain in the account were none of them in the possession of the bankrupts either at the date of the contract or at the date of the delivery. They were acquired for the purpose of the obligation under the letter; were purchased from various parties, and not paid for; and the defender himself explains that the prices of the different parcels of grain were all payable at a date subsequent to the sequestration. The delivery was made not only by actual delivery of the corpus of the grain, but by giving delivery-orders on the persons from whom the grain was bought, or storekeepers with whom it was lodged. The first question is, taking the obligation of the 16th May, and the deliveries made under it between the 22d of May and 8th of June, What was the nature of the transaction? That is not much disguised by the parties to it, for Mr James Pinkerton, the son, says:—"Prior to May 1874 my father-in-law told me he would not grant us any further accommodation in the way of bills, but that he would help us if we needed it by advancing money against grain to be afterwards delivered. It was in consequence of that I proposed this mode of accommodation on 16th May. It was understood between my father-in-law and me at the time that in return for the £500 he should receive delivery-orders from us for grain to be consumed by himself in the course of his business. The delivery-orders we gave him were in pursuance of that bargain." It is plain, therefore, that the object of the transaction was to supply money for the accommodation of the bankrupt, and the counterpart of that advance was simply the contract to pay off the money advances by delivery of grain. Mr Hodge does not express himself exactly in the same way as his son-in-law, but his evidence is in substance the same. He says:—"The transaction came about in this way My son-in-law called upon me. I had intimated

to him that I would give him no more accommodation bills, and that at any time I had money beside me I could purchase grain, so far as I pleased, for my horses. My son-in-law did not want accommodation at that time, and did not propose it. He inquired if I stood in need of grain, and said he was a little tight for money for the following day. I agreed to give him £500, and he was to give me grain at the market price as I required it for feeding purposes." In short, in consideration of the present advance for accommodation, the bankrupts undertook to make delivery of grain to the value of £500 at the market prices of the day. Now Hodge is, among other things, a contractor, and keeps horses, which require to be fed upon grain. But we know something of the extent of his business, and how much grain he consumes. He tells us that the consumption of grain in his stables is 9¾ bolls per week, which, on the average price, is about £16, 17s. in money. So when he advanced £500 he must have been buying grain for a whole year, which, according to his own statement, is quite contrary to his ordinary course of business—and, indeed, evidently to the way in which business is ordinarily done. So, is that delivery of grain a contravention of the Act of 1696, as delivery was made in security of a prior debt? There is no doubt that the deliveries are in satisfaction of a debt, but it won't do in a case of this sort to adhere too strictly to the words of the statute, for the statute has been the subject of a great deal of interpretation. But, in the first place, whether we deal with this transaction of 16th May as a sale or a security, the result is the same—it was an obligation to deliver goods, but not any particular goods. There was no specific security. The obligation was of the most general kind, to deliver grain. The obligation is as indefinite as one to pay money. Any grain within the kinds mentioned in the letter of 16th May might be delivered at the option of the seller, and the buyer was willing to take delivery as soon as he could get it, so as to get repayment of his £500. Also, while the security given on the 16th of May was not specific in any sense whatever, the right of the creditor was not a right to demand immediate performance of the obligation of the debtor—not a right to demand immediate transference of the security—which, on the contrary, was to be postponed over a period of time. These two particulars make the case fall under the Act of 1696, as read by recent judgments. I am not going to enter into any general exposition of the law on this subject, for it was recently fully entered into in the case of *Steven* v. *Scott*. In that case I gave my full views on the subject. I think, in accordance with these views, that this case clearly falls under the statute.

LORDS DEAS and ARDMILLAN concurred.

LORD MURE—I have arrived at the same result as your Lordships, and in coming to that conclusion I do not think we trench upon the principles applied in the cases of *Gilmore* and *Taylor*, and other cases quoted to us. They all went on this—that the obligation was to deliver a specific article to a party with whom the bankrupt had contracted. Now there is no such specific article here. The defender gave the bankrupts £500, the obligation was a general one to deliver grain to that value. On the evidence it appears that it could not well be otherwise, for at that date it appears that the bankrupts had no grain in their possession to deliver, and what they did deliver they bought in the open market, except a quantity which they bought from two farmers who are now ranking on the estate for the price.

Looking at the nature of the transaction, I doubt if the defender could have demanded transference of the delivery-orders if there had been no bankruptcy, for I do not think he could have made the bankrupts give him any *one* of these delivery-orders. The only contract was for delivery of a certain quantity of grain, and it was optional to the bankrupts which of these delivery-orders they would give. In doing so they did a voluntary act, and in that view the delivery of these orders to the defenders was in satisfaction of the debt of 15th May, and was to the prejudice of creditors.

The Court pronounced the following interlocutor:—

> "The Lords having resumed consideration of the reclaiming note for the pursuer against Lord Young's interlocutor of 7th January last, with the minute for the pursuer, and answers for the defenders, Nos. 43 and 44 of process, and heard counsel, recall the said interlocutor: Find that the deliveries of grain sought to be reduced were made by the bankrupts in satisfaction or further security of a prior debt, in preference to other creditors within the meaning of the statute 1696, c. 5; therefore reduce, decern, and declare in terms of the reductive conclusions of the summons; and further, in terms of the petitory conclusions, decern and ordain the defenders to make payment to the pursuer of the sum of £238, 5s., with interest at 5 per cent. from 8th June 1874 till payment: Find the defender liable in expenses, and remit to the Auditor to tax the account thereof, and to report."

Counsel for the Pursuer—Dean of Faculty (Clark) and Guthrie Smith. Agents—Webster & Will, S.S.C.

Counsel for the Defender—Solicitor-General (Watson) and Alison. Agent—Robert A. Brown, L.A.

HIGH COURT OF JUSTICIARY.

Friday, June 4.

PETITION—WILLIAM TAYLOR KEITH.

Petition for Liberation—Statute 1701—*Circuit Court—Calling of Diet against a Prisoner.*

Circumstances in which a petition for liberation by a prisoner, who had been nine months in prison without having been put on trial, was *refused.*

This petition, at the instance of William Keith, prisoner in the jail at Glasgow, set forth that he was apprehended and committed to jail on a warrant of the Sheriff of Lanarkshire, on the 22d of September 1874, on a charge of falsehood, fraud, and wilful imposition, and also breach of trust and embezzlement. On 5th December following he was served with an indictment containing seven