tion, on such terms and subject to such conditions as the Court thinks fit." . . .

A shareholder in a company which was being voluntarily wound up, applied to the Court for the rectification of the register by the deletion of his name therefrom in respect of certain shares standing therein in his name.

The liquidator of the company came to terms with the petitioner, and by note applied to the Court to sanction the compromise, and the Court, in terms of section 138 above quoted, and without inquiry, approved of the minute of agreement, and authorised the rectification of the register in terms thereof.

On 30th April 1884 the Boson Oil Company (Limited) was incorporated under the Companies Acts 1862 to 1880, and on 15th August 1888 it was duly resolved that the said company should be wound up voluntarily in terms of the said Acts, and Henry Moncreiff Horsburgh, C.A., was appointed liquidator.

George Simpson, Lomond House, Trinity, was entered on the register of members of the said company as proprietor of, *inter alia*, 1440 shares. In October 1888 he presented the present petition to have the register of members rectified and his name deleted as a shareholder of the 1440 shares.

Section 35 of the Companies Act of 1862 provides that "If the name of any person is without sufficient cause entered in . . . the register of members of any company under this Act . . . the member aggrieved . . . may, as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified." . . .

The liquidator lodged answers, in which he averred that the shares in respect of which the petitioner's name stood on the register of the company consisted of two lots—(1) A lot of 1391, which were part of a lot of 1441 which had been improperly allotted to the petitioner, and for the calls upon which the directors were advised that the petitioner could not be made liable. (2) 49 shares, which were part of 100 shares which the petitioner acquired by transfer in October 1885; £1 per share had been paid upon these shares, and the balance of £9 per share (amounting in all to £441) was still due.

In January 1889 a note was presented to the Court by the liquidator stating that since his answers to the petition had been lodged he had succeeded in effecting an arrangement with the petitioner of the matters in dispute between them.

The material provisions of this arrangement were (1) that the petitioner was to pay the liquidator the sum of £196, being £5 per share on the foresaid 49 shares (less £1 per share already paid thereon); (2) that both parties agreed that the aforesaid 1440 shares be deleted from the register of the said company in liquidation, and held as cancelled.

The liquidator accordingly prayed the Court to approve of the minute of agreement, and to order the rectification of the register of the Boson Oil Company in terms thereof.

Argued for the liquidator—This was an incidental application in the course of a voluntary liquidation, and was competent under section 138. It was just the kind of application contemplated by the section; and the Court should give effect to the section by sanctioning the agreement come to between the liquidator and the petitioner. — *Sdeuard* v. *Gardiner*, March 10, 1876, 3 R. 577, and 5 R. 867; *Clark* v. *Wilson*, June 7, 1878, 5 R. 867; *Gardner* v. *Hughes*, July 11, 1883, 10 R. 1138.

Argued for the petitioner—The petitioner and the liquidator were at one in desiring that effect should be given to the agreement arrived at, and as the whole facts were before the Court no further inquiry was necessary.

The Court pronounced the following interlocutor:—

"Approve of the said minute of agreement, and on payment of £196 by the petitioner to the said liquidator, order and direct that the register of shareholders or members of the Boson Oil Company, Limited, be rectified by deleting or removing therefrom the name of the petitioner as a shareholder of the said company in so far as the 1440 shares of the said company mentioned in the petition and proceedings are concerned, and that due notice of such rectification be given to the Registrar of Joint-Stock Companies." . . .

Counsel for the Petitioner—C. S. Dickson. Agents—Richardson & Johnston, W.S.

Counsel for the Respondent—G. W. Burnet. Agents—George Andrew, S.S.C.

Tuesday, February 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GEORGE SMITH & COMPANY AND MILLAR *v.* SMYTH AND ANOTHER.

Bankruptcy—Act 1696, c. 5—Illegal Preference—Assignation in Security—Sale of Bankrupt Estate under Deed of Arrangement—Right of Purchaser to Challenge Preferences.

A firm assigned their book debts to the amount of £387, 15s. in security of an advance of £330 and a bill for £57, 15s. previously granted by them to the lender. A further assignation of their book debts was made in respect of other advances, and in security of any possible deficit on the first assignation. Three weeks after the date of the first assignation the firm was sequestrated, but by deed of arrangement the sequestration was wound up, and the whole property of the estate was sold.

In an action by the purchaser against the assignee in security for transference of the book debts, the purchaser objected to the assignee crediting himself with the sum of £57, 15s., the amount of the bill, on the ground that it had been granted within sixty days of bankruptcy. *Held* that as the deed of arrangement did not convey to the pur-

chaser a right to challenge preferences by the bankrupt, he had no title to challenge the assignation in respect of the said bill.

Opinion (*per* Lord Young) that the said assignation would not have been challengeable even at the instance of prior creditors or a trustee in a sequestration.

The Act 1696, c. 5, "declares all and whatsumever voluntar dispositions, assignations, or other deeds, which shall be found to be made or granted directly or indirectly be the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of befor in favors of any of his creditors, either for their satisfaction or further security in preference to other creditors, to be void and null."

On 6th May 1887 George Smith & Company, ironfounders, Sun Foundry, Kennedy Street, Glasgow, and David Prentice Menzies, and George Whitehall, partners of the firm, granted the following assignation—"In consideration of the sum of £330 advanced by Hugh Farries Smyth, 4 Main Street, Anderston, and a bill dated 31st March 1887 for £57, 15s. granted by us, We do hereby assign, convey, and make over to the said Hugh Farries Smyth, and his heirs, executors, and assignees whomsoever, the following book debts due and owing to us, and to be held and collected by him in security of the said advance and bill, videlicet."

On 20th and 23rd May 1887 the firm made further assignations of their book debts to Smyth in security of advances by him amounting respectively to £300 and £50, and any deficit that might arise on former assignations.

Upon 25th May 1887 the estates of the firm were sequestrated. At a meeting of creditors held on the 11th day of July 1887 for the election of trustee in the sequestration, the creditors present or represented at said meeting unanimously resolved that the estate ought to be wound up under a deed of arrangement, and that an application should be presented to the Sheriff to sist procedure in the sequestration for the period of three weeks, and a trustee accordingly was not elected.

The Sheriff granted the application, and a deed of arrangement was entered into between George Smith & Company, Gavin Bell Millar, and the creditors of the firm, whereby Millar purchased the whole estate, property, and assets constituting the sequestrated estate, including the goodwill of the business, and a right to use the firm's name, for the payment of £3500 for a discharge of the heritable debts due to the firm, and £3000 for division among the unsecured creditors.

In May 1888 George Smith & Company and Gavin Bell Millar brought an action in the Sheriff Court of Lanarkshire at Glasgow against Hugh Farries Smyth and his assignee David Prentice Menzies, to have the defenders ordained to grant to the pursuers a valid assignation or translation of the book-debts and others contained in these assignations in so far as the debts were still due and unpaid, and also to ordain them to produce an account of their intromissions with the said book debts. The defender Smyth admitted his liability to account for the book debts, and he proposed to credit himself with the sum of £387, 15s. The pursuer denied the defender's right to take credit for the sum of £57, 15s. He averred—"The bill for £57, 15s. represented a prior debt due by the defender Menzies as an individual to the defender Smyth. The granting of said bill by the firm of George Smith & Company was a preference in favour of the defender Smyth, and the granting of an assignation in security of said bill was a further preference in favour of the defender Smyth. The estates of George Smith & Company were sequestrated within sixty days after the date of said bill and assignations, and they were insolvent at the dates of said documents."

The pursuers pleaded—"(1) The pursuers being in right of the assets of the late firm of George Smith & Company, the defenders are bound to account to them for their intromissions with the debts assigned to them as aforesaid. (2) The pursuers having tendered and being prepared to consign the balance due to the defenders, they are entitled to have the said book debts, so far as still unpaid, assigned to them."

The defenders pleaded—"(2) The defender Smyth, being assignee for value of the accounts in question, was legally entitled to assign the same to the other defender without challenge on the part of the pursuers. (3) The pursuers having declined to pay the balance of the defender Smyth's claims, the latter was in no way bound to transfer the assigned accounts to the pursuers. (4) The defender having always been ready and willing to account for the sums received under the assignations in question, the prayer of the petition craving for an accounting should not be granted."

Upon 20th July 1888 the Sheriff-Substitute (LEES) found that the pursuers had no title to sue.

"*Note.*—Only one point is now left in issue. The pursuers have acquiesced in the charges for commission which are made by the defender Smyth, and having regard to the other deliverances in the case, the only question on the merits that requires to be disposed of is the challenge by the pursuers of the bill for £57, 15s. Assuming that that bill constituted or evidenced a debt by the company, I cannot regard the three assignations that were granted as other than in further security of it and of the advances which were made at the time in cash. So far as regards these advances the assignations of the book-debts of the firm are good. But as regards the bill they are, I think, open to challenge. It is plain that they were not a payment of the debt contained in the bill. They bear to be only in security of it, and as the debts included in each assignation largely exceeded the sums for which they were assigned it is plain that these assignations were matters which are struck at by the Act of 1696.

"But, then, have the pursuers a title which authorises them to found a challenge on that Act? The statute did not restrict the remedy it granted to prior creditors, but an unfortunate course of decisions so consistently interpreted it as having that implication that the matter must be accepted as beyond question. Now, there is no proof that the pursuers, or either of them, are creditors prior to Mr Smyth. They may be, but it is not shown that they are. The 11th section of the Bankruptcy Act of 1856 gives a trustee in bankruptcy such right of challenge. No trustee, however, was appointed here, because the bankrupts' estates were wound up under deed of arrangement. The section which authorises such settlement provides 'that the sequestration shall

receive full effect in so far as may be necessary for the purpose of preventing challenge or setting aside preferences over the estate' (section 38). The pursuers contend that the effect of this *proviso* is to authorise challenges to be made of preferences, although not by the trustee. Accepting that as a fair interpretation of the *proviso* in question, does that clause confer on the pursuers, or either of them, the right of challenge? As regards the bankrupts themselves, it is required as a condition of such title to challenge that they shall have been re-invested in their estates, that they shall have obtained a special assignation of such right to challenge from the creditors, and that notice shall have been given to the creditor whose preference is to be challenged so that he may have the opportunity of stating his views in regard to the propriety of the resolution of the creditors to authorise such challenge. It seems to me that the deed of arrangement founded on by the pursuers confers no such right upon the bankrupts. Mr Goudy remarks (p. 385) that the bankrupt must stipulate for an express assignation of the right of challenge, and not make a mere vague reservation of it. Now, I fail to find in the deed of arrangement anything approaching to an express assignation of the right of challenge. And it is not alleged that any notice was given to Mr Smyth. Indeed, on the assumption that the deed does contain an assignation of authority to challenge, it leaves it quite uncertain whether that right is with the bankrupt firm or Mr Millar. It seems to me, however, that the deed contains no such assignation, but simply transfers the estate as it then stood.

"But it is urged that Mr Millar by his purchase of the estate took the position and received the rights which the trustee would have got. But if the trustee had been appointed and thereafter relieved of his office, and the bankrupts been re-invested, as has been the case here, he would have lost his title to challenge without having transferred it to the bankrupts. Therefore even on this line of argument Mr Millar seems to me to have no title to sue. And if the bankruptcy estate had been bought by various parties in portions, difficulty might and probably would have arisen as to where such right to sue lay. I am disposed therefore to hold that the mere purchase of the estate, with the goodwill of the bankrupt's business and the right to use their name, does not in itself suffice to constitute a right to challenge preferences in favour of such purchaser, and that without special assignation of such right he has no title to challenge preferences, and that such assignation or its equivalent is awanting here. As the point, however, is one of some delicacy as well as novelty, I am willing that the pursuers should bring this judgment under review, if so advised."

The pursuers appealed, and argued—The real question here was, whether when in a sequestration a deed of arrangement had been entered into, and the purchaser of the bankrupt estate wished to reduce an illegal preference, it was necessary that the power of challenge should be specially conveyed to him in the deed? It was admitted that under a composition contract it was necessary that a special assignation should be granted, and notice given to the creditor that such a challenge was to be brought, but that was not necessary under a deed of arrangement. The clause of retrocession in the deed was purely for conveyancing purposes; to enable the bankrupt firm to give Millar a feudal title to the heritable subjects, so that that did not affect its real character. The Bankruptcy Statute 1856, section 38, which provides for a deed of arrangement, enacts further—"Provided always, that the sequestration shall receive full effect in so far as may be necessary for the purpose of preventing, challenging, or setting aside preferences over the estate." It must therefore be taken that the right of the creditors to reduce illegal preferences had been assigned to the pursuer Millar, although there was no special assignation. The three assignations in May had been granted within sixty days of bankruptcy, and therefore constituted an illegal preference so far as related to the bill of £57, 15s., because that was a prior debt due by Menzies as an individual. If Millar had been a trustee in bankruptcy he would have been able to reduce this preference without any assignation, and although the sequestration had not been carried through to the extent of appointing a trustee, Millar had taken his place as representing the creditors—*Douglas, Mitchell, & Company* v. *Hunter, Newall, & Company*, July 14, 1859, 21 D. 1302; Bell's Comm. ii. 458.

The defenders argued—The transaction was not struck at by the Act 1696. Upon the 6th May 1887 the defender Smyth granted a loan to the firm of George Smith & Company of £330. He then handed back the bill for £57, 15s. which was current, and received an assignation to the book-debts for the whole sum of £387, 15s.; there was no distinction between the two sums, they were made one debt under this new arrangement. The creditors had not by implication assigned their right to challenge preferences to the pursuer Millar as the purchaser of the bankrupt estate of George Smith & Son. All that was assigned to the pursuer were the creditors' rights in the bankrupt estate, but the power to challenge preferences was no part of the bankrupt's estate; it was a special and peculiar right in the creditors and the trustee in bankruptcy as acting for the creditors. If it were intended that this right was to be transferred to a person other than a trustee for the creditors, who endeavoured to get as much out of the estate as possible for himself, that intention must be shown by a special assignation. The 38th section had no bearing here, as it was intended to meet the case where the creditors desired to keep up the sequestration for the purpose of challenging preferences.

At advising—

Lord Young—This case raises a question which is not without interest, although in my view it is not attended with much difficulty. In May 1887 Messrs George Smith & Company required an advance of £330. They applied for accommodation to Mr Farries Smyth, who held their bill, granted sometime previously, for £57, and the agreement come to was that he should advance the sum of £330 to them and give up the bill for £57 upon receiving security in the shape of an assignation to their book debts, entitling him to uplift these debts to the extent of £387, 1s. 9d., the £57 for which they were already indebted to him under the bill, and £330 which they received from him on the spot. Shortly afterwards George Smith & Company be-

came bankrupt, and their estates were sequestrated, but before a trustee was appointed, an arrangement was come to whereby the creditors transferred the bankrupt estates, including of course the book debts, to Mr Gavin Bell Millar for the price of £6500, and they arranged among themselves to divide that sum, which thus represented the bankrupt estate. There is no doubt of the validity of such an arrangement, and Millar I presume knew—we must at anyrate take the case upon the footing that he knew—that the book debts had been already pledged to Smyth for the sum of £387. As the purchaser of the bankrupt estate, Millar was entitled to call on Smyth to account for the book debts, and accordingly he has brought the present action, which is in substance an action of accounting against Smith. In this action Smyth debits himself with the amount of the book debts which he has ingathered, and he credits himself with the sum of £387. Millar admits the correctness of this accounting except as regards £57, but he disputes Smyth's right to take credit for this sum, on the ground that it represents the amount of a bill which was current within sixty days of George Smith & Company's sequestration, and is consequently struck at by the Act 1696.

Now, I think it more than doubtful whether if this transaction had been challenged by some one entitled to challenge it—by the trustee in the sequestration, if there had been one, or by prior creditors—it would have been set aside as involving an illegal preference under the Act 1696. The inclination of my opinion is that it is not. It would, I think, have been quite legitimate, according to the principles fixed by a series of decisions, for Smyth to say—"Give me a bill not only for the £330 which I am now advancing, but also for the £57 which you also owe me, and let me have an assignation of your book debts in security of the whole £387." I think that that assignation would not have been challengeable under the Act, even at the instance of a trustee acting for prior creditors, assuming that there are prior creditors.

That I think would have been sufficient for the determination of the case; but passing by that, and assuming that this assignation would have been challengeable at the instance of prior creditors to the extent of £57 out of £387, the question remains—Did they convey that right of challenge to Millar under the arrangement by which they transferred the bankrupt estate to him for £6500? Now I am of opinion that while the parties might have contracted as they pleased expressly about that right, an assignation of it in favour of Millar is not to be raised up by implication. Such an assignation could be exercised only to the prejudice of the general body of creditors, and it is not to be presumed that they intended to transfer a right which could be exercised to their own prejudice. In the absence of express stipulation I think the contrary is to be presumed, and as there is no such express stipulation here I am of opinion that Millar has no title to challenge the conveyance of the book debts to Smyth to any extent.

I am not much moved by the argument on which Mr Asher mainly relied, founded on the words at the end of the 38th section of the Bankruptcy Act. I think the purpose of these words plainly is, where creditors agree to terminate the sequestration and have their claims satisfied by some other machinery, to provide that the sequestration shall nevertheless continue to the effect of cutting down illegal preferences; but I think that has no bearing on the question now before us.

I am of opinion therefore, in the first place, that this assignation is not challengable either in whole or in part at the instance of anyone, and, secondly, if I thought the right of challenge existed at all, I think it belongs to the creditors alone in virtue of a peculiar and exceptional law, and is not presumed to have been transferred by them under such an assignation as we have here, I should also wish to say that if I had thought otherwise—that the right of challenge had been transferred to Millar—I should have felt unable to decide that question in the absence of the creditors.

LORD RUTHERFURD CLARK—Upon the question whether this assignation of the book-debts could have been reduced by anyone having a proper title to do so, I desire to give no opinion. I think it is a question of difficulty.

Upon the question whether under the deed of arrangement with the creditors Millar has a right to reduce the assignation under the Act 1696, I am of opinion that he has no such right. If he possessed such a right he could use it only to the prejudice of his cedents, and we are not entitled to presume that the cedents intended to convey a right which could be used only to their prejudice.

I am also of your Lordship's opinion that if we had taken another view we could not have decided the question in the absence of the creditors.

LORD LEE—I am of the same opinion. I only wish to say that I do not understand your Lordships to decide the question of the validity of the assignation, but only that of the title to sue.

LORD YOUNG—The case may be decided on either ground. I decide it on both.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute appealed against: Find that on 6th May 1887 Messrs George Smith & Company and David Prentice Menzies and George Whitehall, the partners of the company, in consideration of a sum of £330 advanced to them by the defender Hugh Farries Smyth, and of a bill dated 31st March 1887 for £57, 15s. granted by them to him, assigned to him certain book debts in security of the said advance and bill: Find that on 20th and 23rd May 1887 the said George Smith & Company granted to the said Hugh Farries Smyth assignations of certain other book debts in security, *inter alia*, of any deficit there might be on the assignation of 6th May 1887: Find that by deed of arrangement the sequestration of the said George Smith & Company, which was awarded on 25th May 1877, was brought to an end, and George Smith & Company were re-invested in their estates: Find that by the said deed of arrangement the pursuer Gavin Bell Millar became purchaser of the whole estate, property, and assets constitut-

ing the sequestrated estate of George Smith & Company as they then stood: Find that the challenge of the said assignations by the pursuer has been departed from by them, except as regards the said bill for £57, 15s.: Find that by said deed of arrangement no special authority was given to the pursuers, or either of them, to challenge any preferences that may have been granted by the bankrupt: Find in law that the pursuers have no title to challenge the said assignation in respect of the said bill: Find that the pursuers are entitled to an assignation of the book debts enumerated in the said assignations of 6th, 20th, and 23rd May 1887, so far as these are unpaid, upon payment to the defender David Prentice Menzies of the balance of the sums due to him, and interest thereon at 5 per cent. from 3rd May 1888 to the date of payment: Grant warrant to the Sheriff-Clerk of Lanarkshire at Glasgow to pay to the pursuer Gavin Bell Millar the sum of £132, 2s. 10d., the amount consigned on 18th May 1888, and that upon production of a certified copy of this interlocutor: *Quoad ultra* dismiss the action," &c.

Counsel for the Appellant—Asher, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondents—Goudy. Agents—J. W. & J. Mackenzie, W.S.

Friday, February 1.

FIRST DIVISION.

[Lord Trayner, Ordinary.

STEEL COMPANY OF SCOTLAND *v.* TANCRED, ARROL, & COMPANY.

(*Ante*, vol. xxv., p. 178.)

Contract—Construction—Words of Estimate or Expectancy.

A company contracted to supply "the whole of the steel required" by the contractor for the Forth Bridge, less 12,000 tons of plates, at certain prices. The general conditions appended to the contract contained the following clause—"The estimated quantity of the steel we understand to be 30,000 tons, more or less." From the specification attached to the contract for the construction of the bridge, to which the above contract referred, it appeared that the part of the bridge for which in the contemplation of the parties the steel was required was the superstructure of the four main spans.

In an action by the company against the contractor for damages on account of breach of contract—*held* that the pursuers were entitled to supply the whole steel required for the construction of the superstructure of the four main spans, in respect that the estimate of "30,000 tons, more or less," was merely a guide to the parties as to the amount which would probably be required, and did not in any way limit the legal obligation under the contract.

This was an action at the instance of the Steel Company of Scotland (Limited) against Messrs Tancred, Arrol, & Company, the contractors for the construction of the Forth Bridge, to have it found and declared "that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry, and that at the prices and subject to the terms and conditions contained in offer by the pursuers, dated 27th February, and acceptance thereof by the defenders, dated 7th March 1883, and the defenders ought and should be decerned and ordained to make payment to the pursuers of the sum of £100,000 sterling, or such other sum as shall be ascertained in the process to follow hereon as the damages due to the pursuers in respect of the defenders having supplied themselves elsewhere with steel needed for the construction of the said bridge."

In their offer the pursuers wrote—"We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz.—Steel plates, per ton, £10; angles, £8, 10s.; tees, up to 12 united inches, £8, 10s.; tees, 12 in. by 6½ in. by 1 in., £12; channels, 10 in. by 3 in., £10, 10s.; channels, 12 in. by 4 in., or 14 in. by 3 in., £14; flats, £8, 10s.; rivet bars, £9, 10s." The offer contained the following clause—"The estimated quantity of steel we understand to be 30,000 tons, more or less."

The defenders accepted the offer in the terms in which it was made. The offer and acceptance were subject to the following general conditions, which are here given as appended to the acceptance— "*General Conditions.*

"The work and material herein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract for the construction of the Forth Bridge, and to the entire satisfaction in all respects of the engineer for the time being of the Forth Bridge Railway Company, who shall have full liberty at all times to inspect in person or by deputy the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory, or not in accordance with the said specification, and his decision is to be final and conclusive. You will provide at your own cost all requisite apparatus and labour for the purpose of testing the steel. No part of the work will be considered as being in accordance with the contract until the engineer or his deputy shall have given his certificate in writing that it is satisfactory, but if the same be afterwards found to be defective, or not in accordance with the contract, it may, notwithstanding such certificate, be liable to rejection at our works. You agree at your own cost and charge to satisfy all royalties or claims in respect of any patent rights affecting any part of the works. Upon the first day of each month you shall render us an account of the material delivered during the preceding month, and the amount found due by us thereon is to be paid by us to you in cash on or before the first Tuesday of the following month. We are to have the power to cancel this contract should our contract for the erection of the bridge be from any