my attention. The Lord Ordinary, who heard the evidence, has gone into it very carefully, and I hesitate to differ from him in his verdict on the facts brought out. But the interests here are important, and undoubtedly there is on the evidence, which is very full, an absolute conflict on the question on which the whole case turns. It seems that the French vessel left Marseilles for Oran, and on the other hand the "Thames" was clearing out of Oran to Valencia, and I think we may hold it as proved that the course of each vessel was exactly the converse of the other, so that unquestionably if that course had been continued the vessels would have come close together, but would have cleared each other in passing. They did come close together, and the owners of the "Thames," who are the pursuers in the first action, say that after sighting the "Lutetia" they was her intention to pass to starboard of them—saw a red light exhibited, which showed that it that the French master suddenly starboarded his helm, and the collision then took place. On the other hand, the French witnesses agree in saying that the only light shown was a green or starboard light, and that while it was intended to pass the "Thames" on the starboard side, the latter vessel suddenly went across the bows of the "Lutetia," too late to avoid the collision. The whole question then depends on the question as to what light was in point of fact shown, the men on board the "Thames" deponing, as I have said, that the only light they saw was a red one, while, on the other hand, the crew of the "Lutetia" are equally clear in deponing that the "Thames" only showed a green one until the vessels were within 200 yards of each other. We have then the troublesome task of giving judgment on the conflict of evidence on this point. The Lord Ordinary, while he does not accuse the crew of the "Lutetia" of wilful misstatements, thinks they must have made some mistake, and that it would rather appear that they ought to have seen the red light of the "Thames" in sufficient time to prevent the collision. On the other hand, this view is at variance with the depositions of the French crew. Is there any preponderating evidence on either side, or is there an equality in the evidence of both? I am of opinion that the parties are not on equal terms here, and that there is a clear balance of evidence in favour of the French crew, for their opportunities of observation were better than those on board the British ship. The French vessel was well manned, in good order, and commanded by a skilled navigator who was in the habit of sailing this particular voyage, and could not possibly on a clear night, such as the one in question, have mistaken a green for a red light. I cannot say as much for the "Thames." She had started with her anchors dragging, and they were fouled to such an extent that she had to stop altogether after she had left the harbour in order to get them on board again. In the second place, the captain, though the crew was short-handed for the work, left his post on deck and went below, knowing that the vessel was being navigated under difficulties, and did not wait to see the anchors put right. That is a serious matter where it turns out that a collision takes place, and a captain not on duty in such circumstances is certainly to blame unless it can be shown that his duty has been discharged by some-one else equally capable. In the third place, I cannot help coming to the conclusion that the captain was not in a condition to discharge his duty. The evidence on this point is, I think, complete, and the master of the "Lutetia" speaks in forcible terms as to the captain of the "Thames" having leapt on board the "Lutetia" after the collision in a drunken condition. My whole ground of judgment, then, in the case is, that I find in it those elements which entitle me to believe one set of witnesses and to doubt another. I do not say that the British crew are guilty of wilful misstatement, but their attention was distracted from their ordinary duties by the extra work they had to perform, and the position of affairs on board their ship. On the whole matter, then, I do not think it necessary to say more. In my opinion the French captain and his crew have entirely vindicated their conduct in the matter.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor [of 20th July]: Find that the collision libelled was due to the fault of the s.s. 'Thames:' Therefore in the action at the instance of William Edward Maclaren and others, owners of the 'Thames,' against the said Compagnie Francaise de Navigation à Vapeur, owners of the 'Lutetia,' and others, assoilzie the defenders from the conclusions of the summons; and in the action at the instance of the owners of the 'Lutetia' and others foresaid, against the owners of the 'Thames' foresaid, find the pursuers entitled to damages; and remit to William Richards, average adjuster, London, to assess the same and to report: Find that the owners of the 'Lutetia' and Cyprien Fabre & Company are entitled to expenses in both actions and in the conjoined actions," &c.

Counsel for Reclaimers, Owners of "Lutetia"—Trayner—Dickson. Agents—Melville & Lindesay, W.S.

Counsel for Respondents, Owners of "Thames"—J. P. B. Robertson—Jameson. Agents—J. & J. Ross, W.S.

Friday, December 7.

FIRST DIVISION.

[Lord Fraser, Ordinary.

M'GAAN v. FRENCH AND OTHERS (M'GAAN'S TRUSTEES).

Succession—Executor—Constitution.

An executor is entitled in settling with an alleged creditor of the deceased to require the creditor to constitute the debt at his own expense.

J. C. M'Gaan, as executor-dative of the late W. M'Gaan, sued John French and others (marriage-contract trustees of W. M'Gaan and his wife) for £41, 2s. 7d. as a balance due to the deceased (who as the survivor of the spouses was entitled to a liferent of the income of the funds in the trust) after giving credit for various sums. The

defenders claimed to take credit also for the amount of an account said to have been incurred by W. M'Gaan, which they had guaranteed payment of to a creditor of his, and had ultimately paid. They tendered £18, 2s. 4d. as the balance due to the pursuer, and had tendered payment of it before the action was raised. The pursuer's objection to give credit for this account was, that it had not been constituted as a debt against M'Gaan, that he believed it not to be due, and that the defenders had no authority to pay it. After the action came into Court the debt was constituted by an action in the Debts Recovery Court. The Lord Ordinary decerned for £18, 2s. 4d., the amount tendered, but in "respect that the said sum was tendered by the defenders to the pursuer before the action was raised," found defenders entitled to expenses.

The pursuer reclaimed, and argued that he was not bound to give credit for the sum contained in the account until it had been constituted, because an executor was not bound to pay an alleged debt till it was constituted, and was entitled to require the creditor in it to constitute it at his own expense—Stair, iii. 8, 66; Erskine, iii. 9, 43, and cases there cited; *Carruthers* v. *Hogg*, 7 S. 81.

At advising—

Lord President—In this case the pursuer has not recovered more than was offered him before he came into Court. But whether that offer was a sufficient tender is quite another matter. I think the pursuer's argument sound, that to make a sufficient tender the defenders should have proffered not merely payment of the balance, but also a decree of constitution of the account deducted. Though a decree of constitution is not always necessary, yet where, as here, the executry estate is small, and the amount of claims uncertain, and the existence or amount of the alleged debt at all doubtful, the executor is entitled to protect himself and the estate by requiring formal constitution. Therefore I cannot concur with the Lord Ordinary's ground of judgment, and I think that his interlocutor ought to be varied. But I arrive at the same result on other grounds, which I find in the correspondence between the parties—[*His Lordship then referred to the correspondence*].

Lords Deas, Mure, and Shand concurred.

The Court varied the interlocutor of the Lord Ordinary by deleting the words above quoted, and *quoad ultra* adhered to the interlocutor.

Counsel for Pursuer — Kennedy. Agents — Campbell & Somervell, W.S.

Counsel for Defenders—Thorburn. Agent—Andrew Wallace, Solicitor.

Saturday, December 8.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CLARKE, PETITIONER.

Bankruptcy—Bankruptcy and Cessio (Scotland) Act 1881, *sec.* 6—*Discharge*—Onus.

A bankrupt whose estate had yielded a dividend of less than 5s. per £1, presented a petition after the expiry of two years from the date of sequestration for discharge, without any consent of creditors. It appeared that the bankrupt's liabilities had arisen from reckless trading, and there was no evidence to show that the fact of his estate not yielding a dividend of 5s. per £1 was due to causes for which he could not justly be held responsible. The Court *refused* the petition.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 146, provides—"The bankrupt may at any time after the meeting held after his examination petition the Lord Ordinary or the Sheriff to be finally discharged of all debts contracted by him before the date of the sequestration, provided, &c. . . . . . And the bankrupt may also present such petition on the expiration of two years from the date of the deliverance actually awarding sequestration, without any consents of creditors."

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6, provides—"Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act, and to bankrupts whose estates may be thereafter sequestrated—that is to say, (1) a bankrupt shall not at any time be entitled to be discharged of his debts unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled: (*a*) That a dividend or composition of not less than five shillings in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors: or (*b*) That the failure to pay five shillings in the pound as aforesaid has, in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible."

This was a petition for discharge presented to the Sheriff Court of Lanarkshire by Patrick Clarke, formerly merchant in Glasgow. The petitioner's estates were sequestrated on 3d December 1866, in terms of the Bankruptcy (Scotland) Act 1856, Mr Mitchell, accountant, being thereafter confirmed as trustee. The trustee was discharged on 21st March 1873. The dividend paid was 2s. 2½d. per £1. The petition was presented without any consents of creditors. Objections were lodged by Crockatt and others, creditors of the petitioner, to the discharge. They were creditors to the amount of £1009.

There were produced in process the following reports by the trustee and by the Accountant in Bankruptcy:—I. Report by the trustee, dated 22d December 1881—"The trustee has to report, in terms of the Bankruptcy (Scotland) Act 1856, that the aforesaid Patrick Clarke has complied with all the provisions of the statute; that he had