in the Court of Session against a debtor. The debtor was insolvent and the charge was allowed to expire without payment, but after its expiry the debtor presented an appeal to the House of Lords which he had intimated while the charge was current. *Held* (*aff.* judgment of First Division) that there was notour bankruptcy under the statute which could not be affected by the appeal.

This case is reported in the Court of Session, *ante* p. 164, December 1, 1883.

Fleming (suing in *forma pauperis*) appealed to the House of Lords and argued his case in person.

Counsel for the respondent were not called on.

The House affirmed the interlocutor of the First Division, and dismissed the appeal.

Agents for the Appellant—Simson, Wakeford, Goodhart, & Medcalf—William Officer, S.S.C.

Counsel for Respondent—Lord Adv. Balfour, Q.C.—Law. Agents—William Bell—D. S. & T. Littlejohn, Dundee.

COURT OF SESSION.

Tuesday, July 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MANNERS *v.* RAEBURN & VEREL

Ship—Ship's Husband—Commission to Ship's Husband—Rebates on Commissions.

The owner of several shares in a vessel which was managed by a ship's husband on behalf of the whole owners, on the footing that his remuneration should be by way of a commission of a fair amount on freight, sued him for an accounting with regard to certain voyages His defence was that he had already accounted on the footing that his commission was to be 7½ per cent. on the gross freight, he paying all commissions and brokerage, which was a proper charge, and was conform to a resolution of a majority of the owners. This resolution was arrived at after the voyages in question were completed. *Held* that it formed no answer to the claim for an accounting for these voyages.

In the subsequent accounting it appeared that the account was truly kept on the footing of a commission to the ship's husband of 2½ per cent. on freight, he charging all outlays against the ship, and that he had received from merchants certain rebates from commissions which he had paid to them and charged against the ship. *Held* that he was bound to give the ship credit for these rebates.

William Manners was part owner to the extent of nine sixty-fourths of the steamship "Kremlin" of Glasgow, which was purchased by himself and the other co-owners in June 1881. Raeburn & Verel, shipbrokers in Glasgow, were appointed by the owners ship's husbands and managers of the vessel, and acted as such from the time of its purchase.

In 1882, after the "Kremlin" had completed three voyages, accounts were rendered to the owners by Raeburn & Verel. Only the accounts relating to the first and second voyages—the latter of which was finished in March 1882—need here be referred to. These showed with regard to the first voyage, payments to a firm of Primrose & Co. in Shanghai, after allowing for an erroneous entry which need not be here detailed, of £324 8s. 3d., and that Raeburn & Verel had received as commission for that voyage £148, 3s. For the second voyage the account showed £324, 10s. 6d. as paid to a firm of Patton & Co., London, and that Raeburn & Verel had received as their commission £134, 10s. 8d. Manners regarding the accounts as insufficiently stated, raised the present action in November 1882 in the Sheriff Court at Glasgow against Raeburn & Verel, praying the Court "to ordain the defenders to produce a full account of their intromissions as ship's husbands or managers for the steamship 'Kremlin,' of Glasgow, or as agents for the pursuer in the management of the said ship, or otherwise in relation thereto, and to pay to the pursuer the sum of £100 sterling, or such other sum as may appear to be the true balance due to him," and failing their producing an account, to pay him £100.

The material averments of the pursuer and the answers of the defenders thereto were as follows:—"(Cond. 3) In the course of their management of said vessel the defenders have from time to time rendered to the pursuer statements of their intromissions with the earnings of the said vessel; but these do not disclose the full details of their intromissions, and in particular do not disclose, as they ought to do, the amount of money which the defenders have received, either in the shape of direct charges against the ship and her owners—as remuneration to the defenders as managers or agents aforesaid—or in the shape of premiums, rebatements, discounts, return brokerages on accounts or charters for said vessel, or commissions or shares of commissions on freight, charter or insurance premiums, or otherwise. (Cond. 4) . . . The books and accounts in which the defenders have kept the ship's accounts have to a certain extent been exhibited to the pursuer; but these, so far as the pursuer has seen them, do not fully disclose the sums which the defenders have, as the pursuer believes and avers, retained, received, or taken credit for in the course of their management. (Ans. 3 and 4) Denied and explained that according to defenders' practice, which is believed to be usual in the case of ship agency business, they rendered to the various owners abstract statements at the end of each voyage, and the details and vouchers were given at meetings of the owners in defenders' office, the accounts having been twice audited and found correct by the auditor, Mr W. T. Duncan, C.A., Glasgow." The pursuers further stated that when the management of the vessel was entrusted to the defenders no specific arrangement was made as to commission, but it was mutually understood that a direct commission of a fair amount on the gross freight earned should be charged. This was admitted by the defenders, who stated that in their account they had charged 7½ per cent. commission on the gross freight,

which was a fair and reasonable charge, but that to secure charters and effect business they had to pay brokerage and commission to third parties, so that they did not get over 3 per cent. of profit. "(Cond. 7) The pursuer believes and avers that that 2½ per cent. on the gross freight is fair and reasonable as an adequate reward and recompense to the defenders for their management of the said vessel, and has been recognised as such by defenders themselves; and the pursuer has always been willing to allow a debit in the accounts in favour of the defenders to the extent of £420, or whatever other sum accurately represents 2½ per cent. on the gross freight. The balance of the amount charged for commissions (being about £980, or 5¾ per cent.) represents commissions and other charges alleged by defenders to have been paid by them to charterers or brokers other than themselves; but the pursuer has recently come to believe, and now avers, that of the sums so charged by the defenders as having been paid, they have in point of fact retained, had returned to them, or received credit for—in the shape of rebates, discounts, or returns—a considerable proportion for which they have not accounted to the co-owners, as they are bound to do. (Ans. 7) Denied, and reference made to the voyage account . . . herewith produced. (Cond. 8) The defenders have declined to furnish the pursuer with information to enable him to state accurately what proportion has been retained, returned, or received credit for by the defenders of the sum representing outside commissions or brokerages; but he believes that his share of the sums so received and not accounted for by defenders amounts to not less than £100. (Ans. 8) Denied that defenders are bound to account to pursuer for any sum. *Quoad ultra* admitted and explained that on account of pursuer's complaints and ultroneous procedure among the other part-owners the defenders found it necessary to convene them all at a meeting held on 25th October 1882, when the owners, representing forty-five sixty-fourth shares, fixed the defenders' past and present remuneration at 7½ per cent. on the gross freight, defenders paying out of this all commission to brokers or otherwise. The pursuer and another owner, representing together fourteen sixty-fourths, dissented from this resolution."

The minute of the meeting of owners referred to in this statement bore that after a discussion about the ship's accounts, Manners moved that "in future the commissionto be paid to Messrs Raeburn & Verel for the management of the boat shall be 2½ per cent. on the gross freight, the shareholders being charged with all commissions paid on charters, &c., and credited with all returned commissions;" whereupon another owner moved as an amendment "that the commissions for managing the boat remain as before, 7½ per cent. on the gross freight, Messrs Raeburn & Verel paying out of this all commissions to brokers or otherwise;" and that the vote was fourteen sixty-fourths for the motion, and forty-five sixty-fourths for the amendment, which was accordingly declared carried.

The result of the defenders' contention was thus to apply to past voyages the resolution that their accounts should be fixed on the footing of their remuneration being 7½ per cent.

The pursuer pleaded—"(2) The defenders, as ship's husbands, or managers or agents for the said vessel and her owners, are bound to disclose in detail to the owners of the vessel not only the commissions, brokerages, and other charges made against the vessel, but also all premiums, rebates, discounts, or returns which they have retained, received, or had credited to them."

The defenders pleaded—"(1) In respect the rate of commission charged by defenders is fair and reasonable, and the principle of stating their accounts is according to practice, and approved of by the large majority of the owners, the defenders are not liable to be called to count and reckon with the pursuer. (2) The defenders having already submitted accounts and vouchers, which have been audited, and the pursuer having had full access to these, the prayer of the petition ought not to be granted."

The Sheriff-Substitute (LEES) on 19th December 1882 found the action irrelevant.

"*Note.*—The first thing to be noticed is that this is an action of count and reckoning, and payment of £100 under an action *ad factum præstandum*. The pursuer, as a co-owner of the vessel, has a right to see and examine its accounts. If, therefore, he were bringing this action for that purpose alone, or in the expectation of thereby gaining information and details that would enable him to get his co-owners to adopt his view as to the mode of remunerating the defenders (who act as ship's husbands to the vessel), or if he said that though he desired to satisfy himself that they were faithfully acting on the agreed-on scale of remuneration, they refused to let him have access to the ship's papers, he would be entitled to every necessary facility I could give him. But that is not the aim of the action. Three-fourths of the proprietary of the vessel came to the conclusion that it was best to continue to pay the defenders a percentage of 7½ per cent. on its gross earnings, rather than adopt the plan which the pursuer advocated and now practically wishes me to compel the other owners to resort to. But it is not for me to decide which is the best way; the majority of the owners have resolved to adhere to the plan hitherto acted on. The pursuer tried to get them to change it and failed, and not having succeeded, wishes me to compel them to change. I could conceive his having such a right if the circumstances justified it. If he averred that their resolution was incompetent or fraudulent, or unfair to him or unreasonable, probably a Court could and would interfere. But that is not what he says. He comes into Court asking me to compel the defenders to count and pay on the footing that the majority are bound to follow not their own views but those of the minority. Therefore in my opinion he does not furnish a case relevant to justify the interference of the Court." . . . .

The Sheriff, on appeal, on 1st March 1883, adhered.

"*Note.*—The question here raised is one which has been already decided in accordance with the view of the Sheriff-Substitute by the English authorities. See Maclauchlan on Shipping, p. 98, who thus states the law:—'A prior settlement of the accounts by the majority of the owners is held binding on the others; and in the absence of fraud or gross error, a suit by one owner to unravel the accounts after such a settle-

ment will not be entertained.' See *Robinson & Thomson*, 1 Vernon, 465. The same view is taken by Abbott on Shipping, p. 85. The principle upon which these views rest may be stated as follows:—The several part-owners of a ship make in law but one owner, and though the part-owners are not, strictly speaking, partners, yet as they are jointly interested in the use and employment of the ship, the law as to the earnings of the ship follows the general law of partnership. The ship's-husband or ship-master, when duly appointed, is the agent of the concern, not the special agent of each co-owner, and is accordingly accountable to the body of co-owners, not to each of them individually. Were the law otherwise, a ship's-husband might be unnecessarily harassed with the expense of several suits to obtain the same thing which may be as well and indeed much more effectually attained by one. Of course, cases may be figured in which, from the *laches* or corrupt motives of the majority of the co-owners, the rights of one or more may be sacrificed either by their not choosing to join in calling the ship's-husband to account, or by their agreeing to pass his accounts without proper examination. In such cases the objecting co-owner is not without his remedy. Where in such a case the accounts have been passed *pro forma* and protested against, it would be necessary for the objecting owner, if he did not choose to aver fraud directly, to state very specifically the grounds of his dissent against the proceedings of his co-owners, and in general to make them, as well as the ship's-husband, parties in some shape or other to this action. (See also the opinions of the Judges in the Scotch cases of *Scotland* v. *Walkingshaw*, 1830, 9 S. 25; and *Lawson* v. *Leith and Newcastle Steam Packet Co.*, 1850, 13 D. 175.)"

The pursuer appealed to the Court of Session, and the Second Division on 27th June 1883 pronounced an interlocutor finding "that the defenders are liable to account to the pursuer, and with this finding remit the cause to the Sheriff to proceed therein as accords."

On 28th July the Sheriff-Substitute, having resumed consideration of the cause, ordained the defenders to lodge in process the account of his intromissions prayed for, and the pursuer his objections (if any) thereto.

The defenders produced in process copies of their accounts as originally rendered, to which the pursuer objected that they were not the accounts ordered by the Sheriff's interlocutor of 28th July, and did not "disclose the credits on account of return commissions, discounts, and other rebatements received by the defenders, the details of which are specially asked for in the pursuer's condescendence" [condescendence 3 above quoted].

On 9th October the Sheriff-Substitute, after hearing parties on the pursuer's note of objections, ordained the defenders to count and reckon with him by producing the documents and details specified in the petition and condescendence.

The defenders then lodged a statement of commissions for the "Kremlin." It showed, with regard to the first voyage, that out of the £324, 8s. 3d. entered in the accounts originally rendered, as paid to Primrose & Co., there was a rebate of £71, 13s. 2d,, and this sum the pursuer, in objections lodged to the account by him, claimed to have set to the credit of the ship as being a sum belonging thereto, and called upon the defenders to say whether it had been given to the co-owners or retained for themselves over and above their remuneration on that voyage of £148, 3s.

With regard to the second voyage, as to which, as already stated, the original accounts showed a sum of £324, 10s. 6d. paid to Patton & Co., the new account lodged brought out, on its details being examined, as actually paid away, £271, 13s. 10d., leaving a difference of £52, 16s. 8d., with regard to which sum the pursuer in his objections called upon the defenders to say whether or not they got this sum. The other objections not being eventually the subject of judgment, need not be here detailed.

The defenders stated that their voyage accounts were prepared and submitted on the footing that they were to charge 7½ per cent. on the earnings of the ship—paying as much or as little as they chose to third parties, brokers, or others in connection with securing charters, &c., and that the adjustment of these matters was one among the defenders and such third parties alone, so long as the charge against the ship was not more than 7½ per cent. They admitted having thus got on the first voyage £32, 7s. more than the £148, 3s. above mentioned, which they stated they had never pretended to be their only remuneration, thus making their net remuneration £180, 10s. out of the agreed-on slump commission of 7½ per cent. In like manner, with regard to the £52, 16s. 8d. in dispute as to the second voyage, they explained—"In the charter 5 per cent. bore to be payable to J. Patton jr. & Co.; and it is customary for agents like Messrs Patton in this charter in stating ships' accounts to charge the full 5 per cent. brokerage as per charter, and in a separate account give credit for the part of it which they are not entitled to. In this charter J. Patton jr. & Co. were only to receive one-third of the 5 per cent.; the balance or two-thirds represented by the £52, 16s. 8d. became payable to defenders, and is so stated in 14/1, [the account to which the objections are lodged]. In the actual result of commission paid to third parties, and to defenders on this voyage, the *cumuio* amount does not exceed 7½ per cent. on the ship's earnings." This sum of £52, 16s. 8d. undisputed on the second voyage was therefore explained by the fact that the brokerage commission which Patton & Co. retained for themselves was not £79, 5s., as stated in the original accounts, but one-third of that amount, being £26, 8s. 4d., thus leaving the disputed sum of £52, 16s. 8d.

As will be seen hereafter, it appeared from documents eventually recovered, and the Court of Session found, that although the whole commissions charged did in fact almost amount to the sum of 7½ per cent. on the whole freight, the amount was not truly made up on that principle, but really on the principle of charging against the ship 2½ per cent. commission, and also all actual outlays.

The Sheriff-Substitute after hearing parties on the objections, "in respect that the pursuer has had the ship's accounts and other relative documents exhibited or produced, and that he does not allege there is anything the defenders are bound to do or to pay, if the resolution as to their payment by commission is binding on him,

and that he does not aver any specific ground of challenge to the said resolution, and that there is thus nothing further to be gained by the continuance of the action, Dismisses it and decerns: Finds the pursuer liable to the defenders in one-half of their expenses, &c.

"*Note.*—The pursuer does not wish an appeal, but asks that his averments generally should be remitted to probation. It is not, and cannot be, disputed that to follow such a course will be of no service if the pursuer is precluded by the resolution carried as to the mode of the defenders' remuneration from obtaining any decree for payment. Now, as regards that resolution, no ground of challenge whatever is stated,—the pursuer simply says he ignores it; that *quoad* him it is to be regarded *pro non acto*. For reasons already assigned I should desiderate some basis for such an impracticable proposition; and in the absence of any I can only take the course I have taken." . . .

The pursuer again appealed to the Court of Session, and obtained a diligence to recover further documents under which he recovered excerpts from the cash-book kept for the "Kremlin," which showed that the £148, 3s. of admitted remuneration on the first voyage really consisted of 2½ per cent. managing commission on the freight (£5922, 19s. 3d.) There was recovered also a letter by the defenders to Patton & Co. (to the items regarding whom in the account of the second voyage the objection related) stating that it had been agreed that two-thirds of the brokerage charged by them for themselves should be returned to the defenders, and asking a letter to that effect; also a letter from that firm asking that they might have half, which, however, the defenders did not allow them in point of fact. The cash-book showed £112 as the defenders 2½ per cent. managing commission on the second voyage. The documents thus recovered established the fact above explained, that a commission was at first charged against the ship as having been paid to Patton & Co., and that two-thirds of it had been kept back by the defenders from them by arrangement with them.

The argument was then taken as regarded these two rebated sums of £71, 13s. 2d. and £52, 16s. 8d., belonging to the first and second vovages respectively, the pursuer maintaining that the ship should get credit for them.

The pursuer agreed to give the defenders credit for a sum which had been previously in dispute, and which sum being taken from the £71, 13s. 2d., would, if the first objection were sustained, leave the amount depending on that objection £43, 10s. 4d.

At advising—

Lord Young—This is an action of accounting at the instance of a Mr Manners against certain shipbrokers in Glasgow, concluding for an account of their intromissions as ship's husbands of the steam-ship "Kremlin" of Glasgow, or as agents for the pursuer in the management of the said ship, and for the payment of any money which should be found due. There is a conclusion for the sum of £100 sterling, or such other sum as may appear to be the true balance due to him. It appears that the ship's voyages for which an accounting is thus asked were prior to the month of July 1882—indeed the second voyage ended in March 1882. On the 25th of October 1882 there was a meeting of the company, that is, of the shipowners, at which a motion, or an amendment to a motion, was made and carried, that the commissions for managing the boat remain as before, namely, 7½ per cent on the gross freight, Raeburn & Verel paying out of that percentage all commissions to brokers or otherwise. This motion was not unanimously carried, but by an overwhelming majority. This resolution was pleaded as an objection to the action for an accounting with respect to the voyages which occurred before it was made. The Sheriff was of opinion that in face of that resolution the action was irrelevant, and on the 19th December, accordingly, the action having been brought in November, he "finds the action irrelevant and dismisses it and decerns, and finds the pursuers liable in expenses"—that is to say, an accounting with respect to voyages which terminated in March 1882 is held irrelevant in respect of this resolution passed in the month of October following. There was an appeal against that judgment, and we were of opinion that the resolution was no answer to the action at all. Therefore on the 27th June we sustained the appeal, recalled the interlocutors of the Sheriff, found that the defenders were liable to account to the pursuer, and with this finding remitted the case to the Sheriff "to proceed therein as accords." I need not state now the grounds on which we were of opinion that the resolution of October 1882 was no answer whatever to the action for accounting respecting the voyages to which the action applied. They are too obvious to require expression, but when the case went back to the Sheriff this resolution of October seems to have been urged upon him again, or to have occurred to himself as a reason, not for dismissing the action as irrelevant, but for dismissing it as altogether unnecessary. He accordingly substantially, though in another form, repeated his former judgment, and that is now before us upon the present appeal. However, before he did so the accounts had been given in—the accounts which are now before us. These accounts are not really stated upon the footing of the resolution of October, but upon quite another footing. They are stated upon the footing of the ship's husband being entitled to a certain commission to himself, and to be repaid all his outlay in procuring freights. Upon examining the account it is quite clear that it is so stated. The commission he charges is 2½ per cent.; *plus* that he charges all the outlays. Well, we having sustained the accounting and remitted to the Sheriff to proceed with it, reversing his interlocutor dismissing the action as irrelevant, it was his duty to proceed with the accounting. The objections stated to the accounts given in in obedience to the order are that in stating disbursements they do not give their employers credit for rebates. These are the only objections stated. The commission is not objected to; and the disbursements are objected to only as regards the rebates, these not having been credited to the employers. Now, that raised the question—properly raised it—in the accounting whether these objections to the accounts were good or bad. If the Sheriff thought them bad—that he was entitled to keep the rebates, because adding them to a commission of 2½ per cent. it did not amount to more than a reasonable commission, or adding the disbursements without any

deduction for rebates to the commission which he charged there is no more than 7½ per cent on the whole; I say if he thought the objection bad on any of these grounds he might have repelled them, but he was bound to consider the objections, and to pronounce a decision upon them in one way or another. But instead of that, in respect of the resolution of October 1882 he repeated substantially the judgment which we had before reversed when we remitted it to him to proceed with the action. The consequence is that we have now to consider the accounting and the objections which are stated to the accounts. That is the proper purpose of an accounting. The party liable to account gives in accounts, and the party interested in it on the other side, if satisfied, has no more to say; if dissatisfied, he states his objections. The pursuer states his objections here, and I have already indicated what they are—that credit is not given for the rebates, the rebates not given credit for amounting to £96, 7s. altogether [after making the deduction to which parties had agreed]. I am of opinion that the rebates ought to have been given credit for, and that therefore the objections are well founded. I do not need to enter upon the question—it was hardly argued to us—that if there was no agreement to the contrary the rebates must be given effect to. There was no agreement to the contrary prior to the resolution of October. If there had been a prior agreement to that effect, that he should have 7½ per cent., taking the whole outlay upon himself, and paying it himself, the account would have been judged of accordingly; I suppose it would have been rendered accordingly—that is, "7½ per cent. commission according to my contract with my employers, but I give you no further details. These are the gross freights, and 7½ per cent. commission amounts to so and so." But, I repeat, if the resolution which *prima facie* amounts to a contract between the shipowners and the ship's husband had been applicable I should have decided accordingly. For I quite assent to what the Sheriff says—and I do not suppose anybody in the world ever disputed it—that one of a great number of co-owners of a vessel cannot object to any reasonable arrangement which the others make. But then that resolution is not applicable, and we decided before that it was not applicable to the voyages prior to the resolution to which allusion has been made. And it not being applicable, nothing was said in support of the proposition that this agent was entitled to pocket the rebates without saying anything, and not give credit for them to the employers.

The result, if the rest of the Court agree in that view, would be practically what Mr Mackintosh suggested, to sustain these two objections to the account and so correct the balance accordingly.

Lord Craighill and Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I concur. Even if I had doubts on my own part, I was not present at the original discussion on the first interlocutor of the Sheriff, and possibly do not know the question fully. Independently of that, however, I concur in the opinion of Lord Young.

The Court pronounced this interlocutor:—

"Find that in the accounts of intromissions lodged by the defenders under order of Court, they charge their employers, the owners of the steamship 'Kremlin,' with a commission on the gross earnings of that vessel, and also with all sums disbursed, including commission allowed to other brokers, and fail to give credit for the sums of £43, 10s. 4d. and £52, 16s. 8d., in all £96, 7s., being rebates granted by said other brokers on commission allowed them as aforesaid: Find that the defenders are bound to account to the pursuer for £13, 10s., being the proportion of the said sum of £96, 7s. effeiring to his interest in the said vessel: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; ordain the defenders to make payment to the pursuer of the said sum of £13, 10s., with interest thereon from the 21st day of November 1882 till paid: Find the pursuer entitled to expenses in the Inferior Court and in this Court, with the exception of the expenses of the commission granted at his instance: Remit," &c.

Counsel for Pursuer—Mackintosh—Dickson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders—Trayner—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, July 9.

SECOND DIVISION.

[Lord Adam, Ordinary.

BOSWELL (BOSWELL'S TRUSTEE) *v* MATHIE.

Trade Name—Master and Servant—Right of Former Servant to Describe himself as Formerly in Master's Service

A person who had been in the employment of A B, a manufacturer and seller of certain goods, opened a shop of her own on the opposite side of the same street, and designed herself in her bills, advertisements, circulars, &c., as "late manager to A B." She also had her name as "from A B" over the door and on the windows, and she used blinds so lettered and so arranged that when they were drawn up a certain length the name "A B" only was visible. In an action to interdict her from calling herself late manager to A B, and from using the name A B so as to lead to the belief that she was carrying on or interested in the business of A B, the Lord Ordinary (Adam) found that she had so acted as to mislead the public, and interdicted her as craved. In the Inner House she acquiesced in this judgment as to the blinds, and undertook to cease from designing herself on bills, &c., as having been "manager to A B," and the Court found it unnecessary to determine either whether she had been manager or was entitled to state that she had been so, and modified the expenses found due to the complainer in respect that a great part of the expense had been incurred in connection with the question of the use of the term "manager."