On the contrary, on an accounting there is, the trustee believes, a large balance due by the claimant to the trustee, and the trustee therefore rejected the claim. (4) The claimant is not entitled to a ranking until he satisfies the trustee of his intromissions with the funds of the bankrupt. (5) The claimant is an undischarged bankrupt."

On 29th June the Sheriff-Substitute refused a motion by Dunsmore's trustee that Stewart should be ordained to find caution.

"*Note.*—The appellant's claim is founded on bills, and he is virtually a defender. No doubt he has failed to convince the trustee, who has no interest except to do justice, that the bills were granted for advances at their dates, but having in view the more recent decisions this is not to my mind sufficient to compel the appellant to find caution."

Dunsmore's trustee appealed. In addition to the statements made in the minute lodged for him, he stated that Stewart's trustee had been discharged, but that before his discharge he had considered the propriety of taking action upon this claim, and had decided not to do so.

He argued—Whether Stewart was to be looked upon as in the position of a defender or not, he should in the circumstances be ordained to find caution—*Stevenson* v. *Lee*, June 4, 1886, 13 R. 913. Further, the Sheriff was mistaken in thinking Stewart virtually a defender. He was claiming a sum of money, and his position was like that of a pursuer in a petitory action, while the answers of the trustee—viz., (1) Compensation, (2) No value given—were of the nature of defences. The ordinary rule should therefore be applied, and he should be ordained to find caution.

There was no appearance for Stewart.

At advising—

LORD PRESIDENT—In this case the claim by Stewart is a claim for the amount of certain bills granted to him by the bankrupt. The claimant himself is an undischarged bankrupt. It is true that there is no trustee at present acting in his sequestration, but it has been stated to us that the trustee when in office had this claim before him, and resolved not to take action upon it. The trustee is now discharged, but the beneficial right to the sum which the bankrupt claims is in the creditors; the money, if recovered, will have to be administered in some form for the benefit of his creditors, and this might be done by reviving the sequestration.

Now, in this state of affairs the question is, whether, if he desires to prosecute this claim, the claimant must not find caution, and whether the claim can be treated otherwise than a suit to recover money at the instance of an undischarged bankrupt. It is true the claim is made in a sequestration, but it is not the less a proceeding by an undischarged bankrupt to recover money. The ordinary rule in such a case is that the claimant must find caution, and I cannot see anything stated on record to take the present case out of that rule. The origin and substance of the claim are not very fully divulged by the claimant on record. He was very pointedly challenged on this subject, and under the interlocutor of 22d May 1891, which appointed the minutes of the parties to be exchanged and revised, he had very full opportunity of explaining the origin of the bills, but his explanation on the subject is confined to the three lines in the print which boldly state that the bills were granted for value.

I think therefore that he must find caution before he can proceed with his appeal.

LORD ADAM concurred.

LORD M'LAREN—I am very unwilling to disturb the finding of the Sheriff with regard to a matter of so purely a discretionary nature as the present. It seems, however, to be the policy of the Bankruptcy Act to give an unlimited or almost unlimited right of appeal from the Sheriff to this Court, and as the case is competently brought before us, we are bound to exercise the jurisdiction which the statute gives us to the best of our ability. That being so, I think that there is no reason in this case to depart from what is the ordinary rule as to finding security for expenses, and I agree with your Lordship that Stewart must find caution.

LORD KINNEAR concurred.

The Court sustained the appeal, recalled the judgment of the Sheriff-Substitute, and remitted to him to ordain Stewart to find caution in ordinary form.

Counsel for Dunsmore's Trustee — Strachan—Clyde. Agent—James Ayton, Solicitor.

Wednesday, October 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

TAYLORS *v.* MACLELLANS, *et e contra.*

Contract—Implement—No Specific Time for Delivery — Unavoidable Delay — Reasonable Time.

A firm of iron merchants in May 1887 contracted to supply the malleable ironwork of certain proposed buildings. The estimate provided — "The prices for the above to include all charges for carriage to and delivery at the job at such times as may be required by the mason, who will take delivery of joists and beams and lay the same." Following a usual course the iron merchants exported iron to Belgium, to be manufactured into girders and joists and returned to them, but owing to strikes and excessive heat in that country certain girders which were ordered between 6th and 15th June were not delivered till the end of September and beginning of October, from a month to six weeks beyond

what was admitted to be the usual and ordinary time.

In an action against the iron merchants for damages for breach of contract, *held* that as the defenders had taken a common course of ordering the ironwork from abroad, the causes of delay incident to its foreign manufacture must be considered, and were sufficient to exculpate the defenders from the charge of unreasonable delay in fulfilling their contract.

In May 1887 P. & W. Maclellan, iron merchants, Glasgow, contracted, for the sum of £489, 15s. 11d., to execute the malleable ironwork of three tenements which H. & E. Taylor, Buchanan Street, Glasgow, proposed to erect there. Maclellans' estimate included this condition—"The prices for the above to include all charges for carriage and delivery at the job at such times as may be required by the mason, who will take delivery of joists and beams, and lay the same." There was no absolute contract to deliver within a specified time. In order to implement their obligations Messrs Maclellan entered into contracts with several Belgian firms of ironworkers—the Providence Company, Sclessin & Company, and the Binehill Company, to supply iron beams to Garitte & Dehaspe, who manufactured them into girders fit for the use to which they were to be put. The specifications of the girders about which the dispute finally arose were given by Messrs Taylor to Messrs Maclellan upon 6th June 1887, and sent by them to their Belgian correspondents upon 20th June. The completed girders were delivered in Glasgow upon 17th August. Other orders were given upon the 10th and 13th June, sent to Belgium upon dates varying from the 20th to the 27th June, and the girders delivered in Glasgow from 17th August to 5th October. In consequence of the irregularity and lateness in delivery of the iron girders and joists, Messrs Taylor were not able to finish their houses in the time they had expected to do so, and could not get them ready for the letting season in Glasgow at the Martinmas term. They had also to do much of their mason and plaster work in the winter time, but the houses were finally finished and Messrs Maclellans' ironwork used in them by the spring of 1888.

In March 1888 Messrs Maclellan brought an action in the Sheriff Court at Glasgow for £244, 16s. 9d with interest, being the balance of the price of the girders, &c., they had supplied. The defence was that the pursuers had been in fault in not delivering the girders in due time; that as defenders had incurred damage from the delay, they were entitled to set off the amount of damage they had incurred against the pursuers' account. In December 1888 Messrs Taylor brought an action against Messrs Maclellan for £700, the amount of damage they alleged had been incurred by the failure of the defenders to deliver the ironwork in good time. They averred—"The girders and joists ordered on 6th June were not delivered until the 22d, 23d, and 24th September 1887, consequently the mason could not proceed with the mason work of the tenements from about the middle of June till the beginning of October 1887. Thus they had lost ten to twelve weeks of the best building season, and the buildings had themselves suffered.

In the latter action the defenders averred—"Explained that the pursuers' dates are not correct. Explained further that though an order for part of the goods was given on 6th June 1887, this order was amended, and was only finally adjusted about the end of June 1887. It is admitted, however, that the goods so ordered were not delivered within six weeks of the date of final order. Explained that that was a reasonable time in the circumstances. Explained that what is a reasonable time in a contract of the kind in ordinary circumstances is by custom, which custom the pursuers know or ought to have known, is subject to an extension, if strikes, weather, or other similar causes beyond the control of persons in the position of defenders hinder the work. The following circumstances which occurred in this case in accordance with said custom excused the defenders from giving delivery sooner than they did. The girders, &c., were to be made and brought from Belgium, and were liable to the ordinary delays and risks of the trade there, including strikes. The pursuers and their architect were aware of this at the time of entering into the contract. Considerable delay occurred in the manufacture of the girders, &c., in consequence of strikes occurring among the men employed by the manufacturers of such work in Belgium, and also of the excessive heat prevailing at the time the goods were being manufactured, causing the work to be interrupted. But for these and other similar causes the goods would have been delivered within the usual time allowed by custom of trade in the ordinary case, which is within six or eight weeks of the date of final order."

The pursuers pleaded—"(1) The sum sued for being the balance of the loss which the pursuers have sustained through the defenders' breach of contract in failing timeously to deliver the goods contracted for, decree should be granted, with interest and expenses, as craved. (2) The averments of defenders as to the construction of the written contract and the custom of trade are irrelevant, and cannot be admitted to probation. *Separatim*—The custom of trade being unknown to pursuers, is not binding on them."

The defenders pleaded—"(2) The pursuers' statements, so far as material, being unfounded in fact, the defenders should be assoilized with expenses. (3) The defenders having given delivery within a reasonable time, having reference to the circumstances, they should be assoilzied with expenses."

In the course of the procedure the Second Division of the Court of Session, on appeal, remitted to the Sheriff to allow a proof before answer of the parties' averments.

The proof was thereafter taken, and its

import is fully explained in the note to the interlocutor of the Sheriff-Substitute (ERSKINE MURRAY) upon 11th June 1891 —"Finds (1) that in May 1887 the parties H. & E. Taylor, who were erecting for themselves a number of tenements in Glasgow, contracted, under the advice of their architect Mr Munro, with the parties Maclellan, iron merchants, &c., Glasgow, for the supply to them of a number of iron compound girders, H beams, &c., required for the new building: Finds (2) that the contract which is contained in No. 7/1 of process, contains no direct obligation to deliver within a specified time, or when demanded: Finds (3) that near the close of the estimate occur the words, 'The prices for the above to include all charges for carriage to and delivery at the job at such times as may be required by the mason, who will take delivery of joists and beams, and lay the same': Finds (4) that from the evidence it appears that parties contemplated that in usual course the goods would be delivered in about six weeks or two months after specification of the lengths, but that there was no absolute contract to deliver within that time, all that was contemplated by parties being delivery within a reasonable time: Finds (5) that it is further clear from the evidence, even of the parties Taylor themselves, that the above-quoted clause was inserted, not for the purpose of giving a right to them to demand delivery the moment the masons were ready, but simply to regulate the mode of delivery after the Maclellans or other sellers were prepared to deliver, so that their work might not be blocked by the whole iron being delivered at once: Finds (6) that the parties Taylor through their architect, must in the circumstances, considering the prices at which they bought, and other facts, have known, or ought to have known, that they were not buying goods lying in stock in Glasgow, which could be delivered at any time, but goods which had to be ordered from, manufactured in, and imported from Belgium: Finds (7) that the parties Maclellan have proved that by the custom of trade the sellers in such a case are not responsible for delays occuring in Belgium by strikes and other causes beyond their control, the buyer taking the risk of any such delay in consequence of the cheaper price at which he gets the articles: Finds (8) that while in the present case the lengths were specified between 6th and 15th June, a considerable quantity of the girders, &c., were not delivered till the end of September and beginning of October, being from a month to six weeks beyond what is admitted to be the usual and ordinary time: Finds (9) that on the whole the parties Maclellan have proved by Belgian evidence that the delay was occasioned by strikes and by excessive heat, which delayed manufacture: Finds (10) that the parties Maclellan having raised an action for the contract price of the iron delivered, the parties Taylor have raised a counter-action for damages said to have been occasioned by the delay, through loss of rents, inferior work in consequence of operations being delayed till winter, &c., &c., and the two actions have been conjoined: Finds on the whole cases and in law—(1) that there is no dispute as to the liability of the parties Taylor in the first action, except in respect of their claim for damages in the second; (2) that *quoad* the action *Taylors* v. *Maclellan*, the parties Taylor have failed to prove the parties Maclellan were bound to supply the iron either at a specified time or absolutely on demand; (3) that the contract as regards delivery must be held to have been simply for delivery within a reasonable time; (4) that in such circumstances proof of custom of trade affecting the time of delivery is competent; (5) that the parties Maclellan have proved a custom of trade that the buyer in such cases takes the risk of delay from strikes and other unforeseen causes beyond the sellers' control; (6) that the parties Maclellan have proved that in the present case the delay arose from such causes: Therefore in the action *Maclellans* v. *Taylors* decerns as craved, and in the counter-action assoilzies the defenders: Finds the parties Taylor liable to the parties Maclellan in expenses in both actions," &c.

Messrs Taylor appealed, and argued—There was no custom of trade by which the defenders could be excused from furnishing this iron within six weeks of the date that the specifications were given to them. It was not known to the pursuers, and their architect could not so bind them even if there was such a custom. Even taking it that there was no specific time mentioned in which the iron was to be delivered to the pursuers, it must be delivered within six or eight weeks, as that was a reasonable time according to the custom of the trade, but the defender did not deliver it for eight or ten weeks beyond that time. They could not be excused upon the ground that the firms from which they had ordered the iron were in difficulties from strikes among their workmen or from excessive heat which brought the work to a standstill. The pursuers did not know and did not care if the girders supplied to them were of Belgium iron, and if the defenders could not get the iron from Belgium in time to fulfil their contract, they ought to have gone elsewhere for it or suffer the consequences, *i.e.*, pay damages for the loss they had caused by their failure to implement their contract.

The respondents argued—They had proved by the evidence, and the Sheriff-Substitute had so found, that this was a custom of trade by which an iron manufacturer was excused from fulfilling his contract if he was prevented from doing so by strikes or other causes beyond his control. But even if there was no custom of trade, the defenders were not bound to deliver the iron at any specific time by the contract, because the obligation to deliver as the mason wanted the iron, was only to prevent an accumulation of iron at the buildings, and had nothing to do with a specific time of delivery. The law therefore inferred that the iron was to be delivered within a reasonable time, and in finding out what that

was, regard must be had to all the circumstances at the time the contract came to be fulfilled, and not merely to what might be a reasonable time in ordinary circumstances—*Hick* v. *Rodocanachi & Company*, July 30, 1890, 7 Times Law Reps. 732. It was proved that strikes and excessive heat had prevailed in Belgium at the time the defenders gave their orders, so that the work could not go on, and that was the reasons of the delay in forwarding the girders.

At advising—

LORD YOUNG—I do not think that it is necessary to call for any further argument here. There are two actions before us—one at the instance of Messrs Maclellan, who are iron merchants in Glasgow, for the balance of a contract account due to them, and the other by the Messrs Taylor, the other parties to that contract, for damages for breach of contract. The contract is admitted. It is in writing, and it is admitted that the goods contracted for were supplied and delivered by the Messrs Maclellan in all respects according to contract except only in the matter of time. The contract was completely executed and fulfilled by them and the contract price is due, except in so far as damages for breach of contract in the other action may be found due to the Messrs Taylor. If no damages are due to them under their action, then there is no more answer by them to the action against them.

Now, that action is upon the ground, as I have already stated, of breach of contract, consisting in undue delay in delivering the articles. They were not delivered till towards the end of September, and it is alleged that they ought to have been delivered in the course of the month of August, and the delay therefore consists of the time between August and the end of September—may be from four to seven weeks—that is the delay for which damages for undue delay are claimed.

It appears upon the evidence that iron furnishings of the kind contracted for are not universally but generally, and as a rule, procured from Belgium, and it appears that the Messrs Maclellan resorted in a usual manner to quite suitable people in Belgium to supply the goods to enable them to execute this contract. And they did supply them, quite good and unobjectionable, and except in the matter of time there is *prima facie* no ground for complaining of the conduct of the Messrs Maclellan in ordering the material from Belgium. It further appears from the evidence that at this particular time—in June 1887—there were causes of interruption in the production of such goods in operation in Belgium, and these causes operated in causing delay in furnishing the Messrs Maclellan with the materials whereby they were to execute this contract. It is said, and I think proved, that any extra delay which occurred upon this occasion was thereby caused. It was not of an unusual kind. I do not mean that the cases are not much more frequent in which no such causes of delay occur; but such causes of delay are familiar enough, and they did come in upon this particular occasion and caused the delay which is complained of.

Now, the question upon the whole matter is, whether the Messrs Maclellan can be held to be guilty of breach of contract in respect of the delay so occasioned? Can we affirm in point of fact that they were guilty of undue delay or chargeable with undue delay in the execution of the contract, so that they were in breach of contract and were liable in damages? I am of opinion that upon the evidence we cannot so affirm. I do not quite like the expression "usage of trade" as applied in the present case. The particular language is not of first-class importance if we know what it means, but I would rather avoid the use of the expression "usage or custom of trade" as applicable to the circumstances of this case. When such goods as these (and the illustrations might be infinitely various) have to be got or are commonly got from abroad, the causes of delay which are incident to their being procured are *prima facie* to be taken into account, and not unreasonably, upon the question whether the party who is acting in the usual manner is to have undue delay imputed to him or not. I would rather take account of these causes of delay, which are proved to have occurred here not in an exceptional manner at all, in considering whether the party is chargeable with breach of contract. It is said he might have gone elsewhere. Well, so he might, and that is usual, or at least not unfamiliar. The causes of delay might have occurred in any quarter. Had he instead of going to Belgium gone to some other country, there might have been no strike in Belgium, and no heat there which prevented the men from working, and these might have been in the place to which he resorted. Had he given his orders to some manufacturer in Glasgow, the delay might have been occasioned there in that way—by strikes or an epidemic amongst the workmen, which prevented the work from being executed with the usual despatch. I think there is no specialty in his having gone to Belgium. The question is, whether the quite intelligible and by no means unfamiliar causes of delay occurring in Belgium at the works to which he in ordinary course resorted makes any difference? I think it makes none. He was acting in the execution of the contract in the usual manner, with all the energy in his power, and this delay—not very great in itself, and the first of the kind which has been made the occasion of any claim of damages—occurred.

I arrive at the same conclusion with the learned Sheriff, preferring to find in point of fact that the defenders the Messrs Maclellan were not guilty of undue delay. The word "guilty" is not an appropriate word to use in findings in point of fact in such a case, but the delay imputed to them has not been established, and they were not in undue delay in supplying and delivering the articles contracted for, and were not in breach of contract in that

respect. If that is found in point of fact, then the ground of action is here negatived without any finding upon usage or custom of trade at all. I think that such a finding ought to be pronounced, with the result that the Messrs Maclellan shall have decree for the amount sued for by them in their action, and that they shall be assoilzied from the conclusions of the action of damages against them. That that judgment should be pronounced, and with expenses in both Courts, is what I humbly recommend to your Lordships.

LORD TRAYNER—I have come to the same conclusion. The claim made by Messrs Maclellan being admitted, the question now to be determined is, whether the claim made by the Messrs Taylor for damages in respect of the failure of the Messrs Maclellan to fulfil their contract has been established? The failure alleged against them is, that there was undue delay in delivering the goods which they had contracted to deliver. In considering that question, the first thing to look at is the contract itself, because if the Messrs Maclellan have there undertaken to deliver the iron furnishing in question within a specified time, they are bound to deliver within that time or answer for the consequences. In my opinion, Messrs Maclellan did not bind themselves by the contract between them and the Messrs Taylor to deliver the iron furnishings within or before any particular date. There is no time for delivery specified. If that is a correct view of the contract, then the only obligation incumbent on the Messrs Maclellan was to deliver the goods within a reasonable time. It appears that the Messrs Maclellan took from four to eight weeks longer in the delivery of the goods than would have been the case, or would have been reasonable in ordinary circumstances. This delay was occasioned by strikes prevailing in Belgium, where the furnishings in question were being made. Now, I concur in the opinion expressed in the case of *Hick* v. *Rodocanachi & Co.*, that where a party is bound to fulfil a contract, not within a specified time, but within a reasonable time, the reasonableness of the time taken is to be considered in connection with the circumstances existing at the time of fulfilment, rather than the circumstances existing when the contract is made. Taking into account the circumstances which are proved to have existed here, I think the Messrs Taylor have failed to show that there was any undue delay in the fulfilment of the contract in question, and that their claim for damages on account of undue delay cannot be sustained.

I will only add, that in my opinion the custom of trade on which the Maclellans relied to some extent is not proved.

LORD JUSTICE-CLERK—I agree with both your Lordships in the opinion expressed, that this is not a case to be treated at all as one regarding established custom of trade. This is the case of a contract made to deliver certain goods without any time being specified, and that leads to the conclusion that the time of delivery must be a reasonable time. If that reasonable time is exceeded, then damages for breach of contract will be payable.

Now, it is essential that the one who makes such a contract, as in this case, to deliver within a reasonable time, shall exercise due care in making arrangements for fulfilling the contract. If he does anything which is unreasonable in the way of running a risk that the contract may not be fulfilled within a reasonable time, then he shall be responsible for that. But I am of opinion that there was perfectly reasonable care taken here. The orders were given to a well-known manufacturer, and the person giving the orders had at that time no reasonable ground for holding that any serious or exceptional delay would occur.

Then comes the question, if one is satisfied that reasonable care was taken in placing the contract, whether the time occupied was reasonable in the sense of being reasonable in the circumstances. It is of course quite plain that in the ordinary case usage would bring about in such contracts a general term which is held sufficient. In this case, if I remember right, the general term would be something like six weeks or two months. But then extraordinary circumstances may arise, such as a strike or a fire, or some very serious accident to machinery, or an epidemic among the workmen engaged in a large factory, which might fairly be a reasonable excuse for exceeding the ordinary time; and the question here I think is just this, whether we have sufficient evidence before us to satisfy us that there were such extraordinary circumstances occurring, and whether these extraordinary circumstances occurring were sufficient to prevent the Messrs Maclellan from being in fault and out of reason in delivering at the time they did so much beyond what would have been the ordinary time. I am satisfied upon the evidence that there is no ground for holding that they were in breach of contract in delivering so late as they did. That was due to the extraordinary circumstances which they could not have anticipated, exercising general care. Therefore I agree with your Lordships in the judgment proposed.

The Court pronounced this interlocutor—

"Find (1) that by the offer and the acceptance, P. & W. Maclellan agreed to supply, and H. & E. Taylor to buy, the iron therein referred to; (2) that the said iron was duly and timeously delivered in terms of the contract: Therefore of new, in the action of P. & W. Maclellan and H. & E. Taylor, decern as craved, and in the counter action H. & E. Taylor and P. & W. Maclellan assoilzie the defenders from the conclusions of the action," &c.

Counsel for Appellants—Asher, Q.C.—Ure. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Jameson—C. S. Dickson. Agents—J. & J. Ross, W.S.