damage to ship, goods, merchandise, or other thing—that is to say, ship's goods, merchandise, or other things whatsoever, on board of any other ship or boat. The claim for Mr Burrell that we are now considering is a claim, in the first place, for loss of freight. Now, he never can bring that claim within the operation of the 54th clause of the statute except as "loss or damage" occasioned to the ship. There is nothing about freight. There is no claim against this limited fund except for losses within the meaning of that section which I have read. And therefore, if there is to be a claim for freight, it must be a claim for freight as an incident or part of the ship. But the ship with all its incidents has passed to the underwriters, and there cannot be the smallest doubt, after the decision in the case of the *Greenock Marine Insurance Company*, that if there had been freight earned notwithstanding of the total loss, it would have belonged to the underwriters on the ship. It would be a very strange thing if another person should be entitled to come forward and say—I claim damages in respect of its not having been earned, when it would not have belonged to me if it had been earned. That seems to me to be a sufficient answer to the claim in respect of the freight.

With regard to the amount which Mr Burrell has expended in maintaining the crew of the "Dunluce Castle" on shore after the occurrence of the shipwreck, there can be no doubt in the world that he was bound to do that. He was bound to do that in two capacities properly—first of all as owner of the "Dunluce Castle;" but if he had made that expenditure as owner of the "Dunluce Castle" he would have had a very good claim against the offending ship for repayment; but he was also clearly bound to do so as the owner of the offending ship, because these people had been wrecked and thrown upon the world through his fault. But there is no room for saying that that is a claim which the crew of the "Dunluce Castle" could have made under the 54th section of the statute. Their board on shore, their loss of employment, is not a thing that was on board of the sunk ship; and unless it be something that was on board of the sunk ship it cannot form the subject of a claim here.

Lord Deas—I think this matter might be a little clearer, but I do not differ.

Lord Mure—I have arrived at the same result as your Lordship. The words of Lord Moncreiff in the case of *Stewart* v. *The Greenock Marine Insurance Company*, Jan. 13, 1846, 8 D. 336, seem to settle the question—"I am of opinion that the vessel stands transferred to the underwriters, with all her defects, but also with all her advantages, as at the moment when the last occurrence took place before she came from the voyage into the dock at Liverpool, and therefore that the freight, however it might in fact be received by the owners, belongs of right to the underwriters."

The following interlocutor was pronounced:—

"Find that the petitioner is liable in respect of the collision mentioned in the petition for the sum of £3590, 8s. sterling, with interest thereon at the rate of four per centum per annum from the 4th February 1876 till the date of consignation, and limit the liability of the petitioner as owner of the steam-ship "Fitzmaurice" in respect of said collision accordingly: Repel the claim made by the petitioner, and rank and prefer the whole other claimants *pari passu* on said fund, and appoint a state or scheme of division of said fund to be lodged by the petitioner, shewing the amount due to each claimant in respect of the above findings: Recal the restraint imposed by interlocutor of 1st June 1876 upon the claimants Simpson & Company, to the effect of allowing them to proceed in the action, mentioned in the petition, at their instance against the petitioner: Find the petitioner liable to the claimants in the expenses of this process, except such expenses, if any, as have been solely occasioned by the discussion between the claimants Thomas Thomson and others and Simpson & Company and others; and with regard to said last-mentioned expenses, Find the said Simpson & Company, and Henderson, Hogg, & Company, William Dickson (Limited), John Jeffrey & Company, A. & J. Alexander, Miller and Young, The Edinburgh and Leith Brewing Company, J. Hutchison & Sons, J. Boyd, and J. K. Smith & Company—all claimants jointly and severally—liable to the said Thomas Thomson and others: Appoint accounts of said expenses to be lodged, and remit the same to the Auditor to tax and report, and decern."

Counsel for Petitioner—Balfour—R. V. Campbell. Agents—Webster & Will, S.S.C.

Counsel for Owners of Cargo, and Crew—Trayner—Jameson—Lang. Agents—Scott, Moncrieff, & Wood, W.S., and others.

Counsel for Underwriters — Asher — Alison. Agents—Frasers, Stodart & Mackenzie, W.S.

Friday, November 24.

FIRST DIVISION.

[Lord Craighill, Ordinary.

WAUGH AND OTHERS (SHAW'S TRUSTEES) *v.* CLARK.

Cautioner—Factor.

Facts and circumstances *held* insufficient to liberate the cautioner for a factor appointed by trustees to manage the trust estate.

This was an action at the instance of Robert Waugh, farmer, Bathgate, and others, trustees of the late William Shaw of Trees, against Alexander Clark of Wester Inch and Whitehill, Bathgate. The summons concluded (1) for payment of £94, being the balance due to the pursuers by Robert Brock, sometime banker in Bathgate, on the accounts of his intromissions as factor for the pursuers with the funds of the trust-estate of the said deceased William Shaw, conform to account-current between the said Robert Brock and the pursuers, and for which balance the defender was liable to the pursuers as cautioner for the said Robert Brock; and (2)

that the defender, as cautioner, should be ordained "to free and relieve the pursuers of the sum of £133, 9s. 3d., being the balance due to the Clydesdale Banking Company on an account-current" kept with the bank in the pursuers' name by Brock, and exclusively operated on by him. An alternative conclusion for payment of £227, 9s. 3d., conform to account between Brock and the pursuers, was subsequently added.

The late William Shaw of Trees died on 3rd September 1875, leaving a trust-disposition and settlement, whereby he appointed the pursuers his trustees for the purposes therein mentioned. The chief purpose of the trust, after payment of debts, was to pay over the yearly rents to the truster's grand-daughter Mrs Davidson. On 8th September 1865 the trustees appointed Robert Brock, banker in Bathgate, to be their factor on the trust-estate, which consisted both of heritable and moveable property. The defender became cautioner for Brock, and on 10th and 11th December 1866 a bond of caution was executed in which the said Robert Brock, as principal, and the defender, as cautioner, but only to the extent of £400, became bound "that I, the said Robert Brock, shall hold just count and reckoning for my whole transactions of every sort in virtue of the said appointment, and shall make payment to the said trustees, or to any other person duly authorised to receive the same, of the rents and other sums uplifted or received by me from or on behalf of the said estate of Trees and others, half-yearly and termly, or at such time as I may be required by said trustees, or as the same are uplifted by me from the tenants of the said lands, and shall also transmit yearly to the said trustees, or other person authorised to receive the same, my accounts, with rentals of the estate and lists of the arrears due by the tenants."

The defender continued factor until 1875, when he became bankrupt and his estates were sequestrated.

The pursuers averred that besides his cash account with them, Brock kept an account-current in their name with the Clydesdale Bank on which he alone operated. On both these accounts there were balances due by the defender to the amounts set forth in the summons. In reference to the balance due on the bank account, the pursuers admitted that they had on 16th June 1874 authorised Brock to overdraw the Bank account to the extent of £230 for an advance which they had agreed to make to Mrs Davidson. Brock accordingly drew this sum from the bank and paid it to Mrs Davidson, but although he entered the sum in his account-current to his credit, he did not debit himself with the sum as received from the bank. Owing to the fact that Brock retained and applied to his own purposes the rents of the estate which he subsequently received, the overdraught was never repaid, but a balance of £133, 9s. 9d. remained due by him on the bank account.

In defence, the defender in the first place stated—"It was in the knowledge of the defender when he granted the foresaid bond of caution that there was in the trust a law-agent different from Brock, who would exercise independent influence over the trustees, and independent control over Brock and his proceedings; and it was not in his contemplation that there should cease to be a law-agent in the trust, or that the two offices of law-agent and factor should be merged in Brock, nor was he aware until after the raising of the present action that the latter had in point of fact been done. In or about the end of 1871 or beginning of 1872 the pursuers, without the defender's sanction or knowledge, changed their contract with Brock, or the nature of his appointment, and increased the risk of loss through him by appointing him law-agent in the trust and permitting him to act in that capacity."

In the second place, the defender maintained that Brock, in having paid into the bank account, had in fact to implemented the terms of the cautionary obligation, which provided that the sums received by him should be paid to the trustees or "any other person duly authorised to receive the same."

In the third place, the defender pleaded that there had been gross negligence and remissness in their duty on the part of the trustees, which, assuming their own statements to be true, barred them from having recourse against him. In support of this plea the defender founded upon the fact that the factor's accounts, and in particular his account for the year ending 1874, were docquetted by the pursuers as correct.

The Lord Ordinary gave decree against the defender for payment to the pursuers of £227, 9s. 3d., the sum alternatively sued for, with expenses, subject to a modification, and explained his ground of judgment in the following note:—

"*Note.*—The terms of the bond of caution sued on are the measure of the defender's liability; and the question raised by the pursuer is, Whether there are rents or sums received by Brock from the estate of Trees and others for which the defender interposed his guarantee, and which have not been accounted for and paid to the pursuers? Before, however, this question can be properly taken up for consideration, there are two questions raised by the derender which must be decided. These are—Has Brock, the principal, been discharged? And was the contract with Brock altered, and the risk of the defender as a consequence been increased, without his consent? The affirmative of both is assumed by the defender, and each is set up as a defence to this action.

"As regards the first of these defences, all that appears is that there were yearly accounts exhibited, examined, and docquetted; but the docquets are not a discharge of all liability arising out of Brock's intromissions. The accounts exhibited, for anything that appears, are supported by vouchers, and this must be held to be established by the docquets. But the accounts thus docquetted were imperfect; they did not present all Brock's intromissions. On the contrary, sums which ought to have been entered as rents received were purposely omitted, that the true result of his intromissions might be concealed; and this being the real situation, the Lord Ordinary thinks that what occurred is not a bar to the claim now urged against the defender.

"As regards the second of the defences referred to, all that has been proved is that from the opening of the trust till 1872 Mr Sinclair, a writer in Bathgate, was the law agent of the trustees; that there was no appointment of a succes-

sor; and that such business as had previously been done by Sinclair for the trust was afterwards performed by Brock. These arrangements, however, the Lord Ordinary thinks, did not concern the defender. There was no contract with him, either expressed or implied, that the law business of the trust should be carried on through the instrumentality of Sinclair; or that if his services were discontinued, Brock, in the character of an agent, should not be employed. It is said in the defences (defender's statement 8)—[*quoted above*]. Though this statement is denied on the record, no evidence in support has been adduced. The defender did not appear as a witness; and it may therefore be assumed, not only that the arrangements of the trustees as to the conduct of the trust business were unknown to the defender, but that the subject was one as to which he was indifferent when he undertook the obligation contracted by his bond.

"The real question in the case is that raised by the pursuers—Are their rents or other sums uplifted from the estate of Trees and others unaccounted for and unpaid? That such there are unaccounted for was not, and could hardly be, disputed, for sums still in the hands of Brock were not entered in his accounts. But it is contended that, whether accounted for or not, these, in a question as to the liability of the defender, must be held to have been paid to the pursuers or to 'a person duly authorised to receive the same;' and in this way Brock opened in the books of the Clydesdale Bank, of which he was the agent at Bathgate, an account in his own name as factor for the pursuers. From time to time rents were paid into that account, and sums were drawn out by Brock, but these operations were never entered in his factorial accounts. All were ignored; and indeed it was only years after it had been opened that this account came to the knowledge of the trustees. But it did at length come to their knowledge; and they on two occasions—the one occurring in 1871, and the other in 1874—authorised overdrafts. The account therefore must be regarded as one which was recognised by the trustees. It does not, however, follow from this that every sum paid into this account is to be regarded as a sum for which Brock accounted, and which in the sense of the bond of caution was paid to the pursuers, or to a person duly authorised to receive it. And yet this contention constitutes the answer of the defender to the pursuers' claim. The Lord Ordinary considers that this account is to be regarded as a part of the machinery by which the transactions of Brock as factor or cashier were to be conducted; that the use he made of this machinery was consequently one of the things covered by the cautionary obligation; that till his factorial accounts were rendered there could be no accounting in the sense of the bond; and finally, that as these accounts were perfect or imperfect, as they were or were not vouched, and as the balance truly due was or was not brought out and paid, the liability of the defender would or would not be discharged. The defender cannot reasonably complain of this as a view of the case by which he is exposed to hardship. The bond of caution did not provide for the deposit in bank of the rents collected before the time at which there was to be an accounting for the defender's intromissions. Nor was such a thing in the contemplation either of the defender or of the pursuers when the defender became cautioner. Unless, therefore, he could show, which he could hardly do, and certainly has not done, that his position to-day is worse than it would have been if all the rents collected between the yearly examinations of accounts had remained unlodged in bank, his suggestion of hardship cannot, the Lord Ordinary thinks, be entertained. And the conclusion on the whole matter to which the Lord Ordinary has come is that to which effect has been given by the foregoing interlocutor.

"The reasons for which expenses have been awarded, subject to some modification, is that there was a debate as to the construction of the bond, in which the pursuers were unsuccessful. That was a matter considered material by both parties, and the expenses involved in the discussion ought now, the Lord Ordinary thinks, to be allowed for in awarding the expenses of process to which the pursuers are to be found entitled."

The defender reclaimed.

Authorities quoted—*Leith Bank* v. *Bell*, May 12, 1830, 8 S. 721, 5 W. and S. 703; *Bonar* v. *Macdonald*, July 17, 1847, 9 D. 1537, 7 Bell's App. 379, Bell's Prin. § 259; *Dalzell* v. *Menzies*, Feb. 15, 1831, 9 S. 434; *Whitcher* v. *Hall*, 1826, 5 Barnewall & Cresswell, 269; *London and N.-W. Ry. Co.* v. *Whinray*, June 7, 1854, 10 Hurlstone & Gordon, 77; *Mags. of Glasgow* v. *Hopkirk's Trs.*, Nov. 16, 1839, 2 D. 61; *Pringle* v. *Tait and Others*, July 10, 1834, 12 S. 918; *Thomson* v. *Bank of Scotland*, June 11, 1824, 2 Shaw's App. 317.

At advising—

Lord President—This is an action on a cautionary obligation. The pursuers are trustees under the settlement of William Shaw of Trees. The trust-estate consisted in part of heritable property, and a factor was appointed by the trustees to receive the rents of the estate and to carry out the purposes of the trust. This was not an onerous duty, and the application of the income was also very simple so long as the liferenter lived. Robert Brock, sometime banker in Bathgate, was appointed factor, and was required to find caution—the defender in this case becoming his cautioner.

The facts are that Brock has failed to account for the monies received by him, and this action has been raised against the cautioner. But several defences have been stated, and I think they range themselves under three heads.

In the first place, it is maintained that the trustees altered the risk of the cautioner by changing the nature of the appointment, or at least by removing the safeguard which existed at the time the obligation was entered into. At the time of Brock's appointment there was a law-agent in the trust, and it appears that afterwards the trustees dispensed with the services of such an officer. The factor was allowed to conduct the business by himself, and it appears that he was acquainted with legal matters. It is not proposed to make the cautioner liable for what Brock did as law-agent, but it is said that his facilities for embezzling or keeping the monies without accounting for them were increased by there being no law-agent to look after him.

I cannot say that any general rule of law can be laid down to the effect that parties appointing a factor cannot alter the machinery with which he enters upon his duties without voiding a cautionary obligation that he is to be accountable for intro-

missions with the estate, and accordingly the defender has averred here that he was aware that a law-agent had been appointed, and that when he undertook his obligation he did not contemplate that there would cease to be a law-agent. That is distinctly averred, but it is not proved. It was quite in Clark's power to prove it, but he has not done so, and we must take it that he did not know of the appointment, so that we must ignore his statement and hold that he undertook the obligation without the knowledge of the existence of a law-agent. So on that ground the defence fails.

But it is said that the factor has not failed to pay in terms of the cautionary obligation—that he has paid, not directly to the trustees, but to another duly authorised to receive for them. That explanation is based on the statement that he has paid into the bank-account. It is obvious that in all ordinary cases the factor must pay into bank, unless he has immediate use for the funds. He cannot keep the rents when they have been collected in his pocket or in his desk. It would be unwarrantable in him to do so, and it would be equally unwarrantable in him to pay them into his private account. It does not appear to me what he could do with them other than pay them to the trust-account, which was opened to receive them until they were accounted for. That is the nature of the account which Mr Brock opened. It was he who operated upon it, and not the trustees. That fact is entirely consistent with the relations of factor and employer. The money which was paid in could be drawn out again the next hour by the person who paid it it. But that does not amount to paying in to the trustees. It is merely paid in by the factor for the purpose of custody. So that that objection is likewise unfounded.

Lastly, it is said that the trustees have been guilty of gross negligence in failing to superintend the operations of the factor. That argument is rested upon two occurrences. The bank-account was apparently opened without communication with the trustees. Mr Brock opened it as a matter of course. The trustees came to know of it, and so they naturally made reference to it. Accordingly, on two occasions on which there was a temporary want of money, the trustees authorised Mr Brock to overdraw it. The first was upon 16th June 1874, but it is not necessary to follow that, because the overdraft was small and of short continuance. But there was another overdraft of a later date, amounting to £233, 7s., and also authorised by the pursuers. It is said that it ought not to affect the cautionary obligation, and the cautioner cannot be made liable in respect of it. It was a matter between the trustees and their own factor, and should not have entered the factorial accounts. It ought to have been set right so soon as the rents came in. Mrs Davidson was the liferentrix, and might have been made personally liable for the debt. It was only to protect her against the diligence of creditors that the trustees interposed and made over the money till the rents came in. But then follows upon that another fact which has been much founded on by the cautioner, and that is, that upon the 22d October 1874 there was a docqueting of the factorial accounts, bringing out a balance which there is no doubt was inaccurate. The mode in which the inaccuracy was produced was that Brock brought down and entered a sum of £230 on one side of the account but omitted to enter it upon the other. That was a mistake in the framing of the account, there can be no doubt. But it is not alleged that it was done in bad faith, or that the trustees wilfully allowed it to pass. It is said that it amounts to gross negligence. It occurs only once, for there was no balance afterwards, and therefore it was a mistake made once for all. Brock got into difficulties, and he was unable to account for the rents he received. The real and only question therefore comes to be, whether, on account of a mistake committed by the trustees in looking over the accounts, we can attribute to them gross negligence. I think not. The mistake was one to which any one is liable. Therefore the defence fails upon that ground too.

A difficulty has been suggested as to the form of the judgment to be pronounced, and as the summons originally came into Court I should have hesitated to pronounce an interlocutor in favour of the trustees. The conclusions were for £94, the balance of the rents due, and for £133 9s. 3d., the balance due to the bank upon an account-current. The latter sum never could be brought out *eo nomine* as a balance due against the cautioner. That was an awkward mistake, and it was remedied by the addition of a conclusion for payment of £227, 9s. 3d. There is no doubt that that sum was owed by Brock.

On these grounds I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—The difficulty which I find in this case is whether there was not, *prima facie* at least, an enlargement of the liabilities undertaken by the cautioner, which amounted to a change entitling him to be freed from his obligation. Coupling that with the fact that none of the docqueted accounts being in the bank-account, that the cautioner was entitled to be present at the docqueting, and that transactions were going on with the bank about which he was kept in ignorance, it would have been difficult to resist the contention of the defender had the trustees retained the conclusions of their summons as they originally stood.

I need not go over the other points. It is out of the question to say that the cautioner was relieved by the discontinuance of a law-agent.

Looking to the whole circumstances of the case, I am not prepared to differ from the result at which your Lordship has arrived.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuers—Asher—Strachan. Agents—Waddell & M'Intosh, W.S.

Counsel for Defender—Scott—Rhind. Agent—D. Milne, S.S.C.