writers on the law of testamentary succession as a leading authority, for the proposition that a destination to heirs and assignees of the legatee implies that the legacy is to vest immediately. It in no way conflicts with the decision in *Bell* v. *Cheape*, May 21, 1845, 7 D. 614. For in *Bell* v. *Cheape* it was clear, and was conceded (as appears from the opinion of Lord Mackenzie), that there could be no vesting, the legatee having predeceased the period of vesting.

Such being my opinion on the effect of the deed, I think that the legacy stood vested in the person of Mrs Kippen as moveable estate belonging to her at the time of her death, being merely a claim to the sum which she might have demanded during her life. The amount and position of the estate, as explained to us, were such as permitted of the sum being paid without selling the heritable subjects, and I think that her right to it is carried by her testament as a part of her moveable estate.

I think it contrary to the meaning of the trust-settlement to recognise a right in her heir-at-law to dispute her power of testing upon the amount bequeathed to her under the description of "a sum or sums of money not exceeding one-half of the residue and remainder of the trust-estate."

Lord Rutherfurd Clark was absent.

The Court pronounced the following interlocutor:—

"The Lords having considered the special case, and heard counsel for the parties thereon, are of opinion that the sum of £477 mentioned in the question therein stated is moveable: Find and declare accordingly, and decern."

Counsel for the First and Second Parties—Guthrie—Gunn. Agents—Whigham & Cowan, S.S.C.

Counsel for the Third Parties—D.-F. Mackintosh, Q.C.—Young. Agents—John Baird, L.A.

Wednesday, March 20.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

LAMING & COMPANY *v.* SEATER AND OTHERS.

Ship—Charter-Party—Rights of Mortgagees.

Mortgagees of a ship are entitled to prevent her sailing under a charter-party if their security would thereby be materially prejudiced.

The owner of a steamship, who had obtained advances by mortgages upon the ship, sent her in October to have certain repairs executed. In February, with the view of paying for such repairs, he got additional advances from the same parties by increasing the amount of their mortgages. He made a part payment of their account to the shipbuilders, and gave promissory-notes for the balance, and he also granted them a second mortgage over the ship. The shipbuilders in return renounced any right of lien they might have over the ship, and undertook to have her ready for sea within one month. The owner further undertook to keep the ship insured in favour of the mortgagees, but this was never effected.

Upon 15th April, and while he was still in possession of the ship, the owner chartered her to a firm of merchants for a voyage. On 22nd April the mortgagees entered into possession, declined to give up the ship to the charterers, and on 20th June the ship was sold under the orders of the Court of Session.

The ship was unfit for sea in April, and probably until the middle of August, when she was delivered to the charterers.

Upon 27th June the charterers demanded immediate delivery as they had re-chartered the vessel, and the sub-charterer was pressing them for delivery, and upon 4th July they brought an action against the new registered owner and the mortgagees for delivery, and failing delivery for damages. After delivery had been made in August they restricted the action by minute of 15th November to one of damages.

Held (Lord Lee *diss.*) that the defenders should be *assoilzied*, as the mortgagees had only protected and rendered effectual their legal rights, which would have been materially prejudiced had the vessel been allowed to sail uninsured and in an unseaworthy condition.

Process—Amendment of Record—Court of Session Act 1868, *sec.* 29.

An action was raised to have a steamship forthwith delivered to the pursuers, "or alternatively, in the event of the defender . . . failing so to deliver to the pursuers the said steamship," to have the whole defenders found liable in damages. After evidence had been led, which dealt with damage sustained before the raising of the action, and judgment had been pronounced in the Outer House, the pursuers and reclaimers moved to be allowed to substitute for the words quoted above, the words "and in any event."

Held that the amendment was incompetent, as thereby a "larger sum" and "another fund than that specified in the original summons" would be submitted to the adjudication of the Court.

By charter-party dated 9th October 1886 Messrs William Hunter & Company, shipowners, 12 Waterloo Street, Glasgow, chartered the steamship "Mula," of which Mr William Hunter was the registered owner, to Messrs Alfred Laming & Company, steam shipping agents, 8 Leadenhall Street, London, for a voyage from the United Kingdom to the Mediterranean and back. The voyage under the charter-party was to commence on 25th October 1886, at which date the "Mula" was to be placed at the disposal of the charterers at Tyne, Tees, or London, in their option, the vessel being then in every way fitted for the service. The ship was not delivered to the charterers in terms of the charter-party, but by agreement dated 15th April 1887 the parties thereto agreed that the charter-party should remain in force, the hire being reduced to £240 per calendar month for the first

voyage, and the charterers having the option of re-chartering the steamer for certain further periods upon giving certain notices at £250 per month.

Hunter & Company had in September 1886 mortgaged the ship to Messrs Thomas Barr, John Forrester, and David Inglis Urquhart, all merchants in Glasgow, in security for a loan of £1350. In the following month (the month when the first charter-party was entered into) the "Mula" was by her owners put into the hands of Messrs Ramage & Ferguson, shipbuilders and engineers, Leith, for the execution of extensive alterations and repairs. The owners being unable to pay the shipbuilders' account an agreement was entered into in February 1887 between Barr, Forrester, and Urquhart, of the first, second, and third part respectively, Ramage & Ferguson of the fourth part, and William Hunter of the fifth part. It was arranged that the first three parties should increase their total advances to £2650, and receive a first mortgage over the ship for that amount; that the fourth parties should receive £1300 in cash, and promissory-notes, and a second mortgage for the balance of their account; and that the fifth party should keep the ship insured at Lloyd's for the sum of the £4000 at least in name of the first, second, third, and fourth parties. The fourth parties (Ramage & Ferguson) further "renounce and discharge any claim for a lien present or future over the said vessel in connection with or arising out of said repairs, and undertake and bind and oblige themselves fully to execute and complete all repairs on said vessel which may be required to make her fit and ready for sea in every respect, and they further undertake and bind and oblige themselves that the said vessel shall, when said repairs are executed, pass the Board of Trade's Surveyor at Leith, and that all within the space of one month from the last date hereof (9th February)." . . .

The insurance promised was never effected.

Upon 22d April 1887 Barr and Forrester and Urquhart entered into possession of the ship as mortgagees. Upon 28th April they obtained an interim interdict forbidding its removal, and on the following day they raised an action of payment, declarator, and sale in the Court of Session against the said William Hunter, to which Messrs Laming & Company were not called, and upon 9th June the following advertisement appeared in the *Glasgow Herald*, *The London Shipping Gazette*, and other newspapers:—

"To be SOLD by AUCTION

(*By Warrant of the Court of Session, Scotland*)

"Within the COMMERCIAL HOTEL, COMMERCIAL STREET, LEITH, on Monday the 20th June 1887, at Two o'clock afternoon (subject to such Conditions of Sale as will be there and then produced), UPSET PRICE, £4500 Sterling,

"The Iron Screw Steamer 'Mula,' of London, 671 tons gross, 513 net register, as she now lies in the Edinburgh Dock, Leith, together with her boats, stores, &c., as per inventory.

. . . . . .

"The articles and conditions of sale, the inventory of the steamer and her stores, and a copy of the charter-party or contract betwixt the late managing owners and Alfred Laming & Co., can be seen." . .

This advertisement only appeared once, and as subseqently inserted omitted all reference to the charter-party.

The interdict was declared perpetual upon 9th May. Upon 14th June an agreement was entered into between Barr, Forrester, and Urquhart of the first part, and Ramage & Ferguson of the second part, to have the ship bought in if no one bid more than the upset price of £4500. By said agreement Messrs Ramage & Ferguson also undertook "(first) that they shall bear the whole maintenance, risk, and expense as aforesaid of the vessel in implementing the said charters entered into by the owner until after the completion of the first voyage under the charter-party with Laming & Company as aforesaid; and (second), that they shall bear and pay the whole claims against the ship, including as aforesaid up to the date of raising the said action (29th April 1887), and the expense of disputing such claims if they elect to do so, all charges and expenses subsequent to said 29th April being borne by the parties hereto, according to their respective interests as aforesaid, until the vessel sails on her first voyage from Leith: It being the meaning and intention of the parties that until the ship is freed from all obligations entered into by, or incurred on behalf of, the owner, in so far as enforceable against the vessel as preferable to the mortgages under Laming & Company's charter up to the end of the first voyage and she is in a position to earn clear freight for the whole parties, any charges or expenses enforceable against the vessel preferably to the mortgagees shall be borne solely by the second party."

Upon 20th June the ship was sold under decree of the Court to John White Seater, shipbroker, 56 Bernard Street, Leith, who proved to be the nominee or agent of Messrs Ramage & Ferguson.

Messrs Laming & Company, the charterers, after repeatedly pressing Messrs Hunter & Company for delivery of the "Mula," and after writing to them and to the mortgagees that they would hold them liable for any loss they might sustain through the ship not having been delivered in terms of the charter-party, raised an action against J. W. Seater, Messrs Barr, Forrester, and Urquhart, and Messrs Ramage & Ferguson, and also against Messrs Hunter & Company and their sole partner William Hunter.

The summons was signeted upon 4th July 1887, and sought to have it found and declared "that the defender John White Seater is bound forthwith to deliver to the pursuers the iron screw-steamship or vessel called the 'Mula,' of which he is now the registered owner, in the state, for the purposes, and under the terms and conditions expressed in a charter-party entered into between the defenders William Hunter & Company and the pursuers, dated the 9th day of October 1886, and agreement endorsed thereon between the defenders William Hunter & Company and the pursuers, dated the 15th day of April 1887, together with the bunker coals, belonging to the pursuers, on board of the said steamship or vessel, amounting to 215 tons or thereby: And it being so found and declared, the defender John White Seater ought and should be decerned and ordained, by decree foresaid, forthwith to deliver to the pursuers the said steamship or vessel in the state, for the pur-

poses, and under the terms and conditions expressed in the said charter-party and agreement endorsed thereon, together with the said bunker coals belonging to the pursuers as aforesaid: Or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel, and coals therein, the whole defenders ought and should be decerned and ordained, by decree foresaid, conjunctly and severally, to make payment to the pursuers (1) of the sum of £1000 in name of damages; and (2) of the sum of £100 as the value of the said bunker coals, with interest on these two sums at the rate of five per centum per annum from the date of citation hereon until payment: Together with the sum of £100, or such other sum as our said Lords shall modify as the expenses of the process to follow hereon." . . .

Delivery of the "Mula" was afterwards given to the pursuers in August 1887, and in consequence thereof the pursuers upon 15th November 1887 lodged the following minute of restriction:—

"GUTHRIE, for the pursuers, stated that since the action was raised negotiations had been entered into and concluded between the defenders and them, whereby the steamship or vessel called the 'Mula,' and the coals on board thereof, both referred to on record, had now been delivered to the pursuers on the terms and conditions set forth in the correspondence between Messrs Beveridge, Sutherland, & Smith, S.S.C., Leith, and Mr David Turnbull, W.S., Edinburgh, agents for the defenders and pursuers respectively, a copy of which correspondence is herewith produced and referred to; and he accordingly restricted, as he hereby restricts, the conclusions of the summons to a conclusion against the whole defenders, conjunctly and severally, for the sum of £500, in name of damages sustained by the pursuers prior to the delivery of the said vessel, with interest thereon and expenses as concluded for."

The pursuers averred in condescendence 7 that "the said mortgagees at the date of their respective mortgages were fully aware of the existence of the said charter-party between the defenders William Hunter & Company and the pursuers, and when the terms of the said charter-party were altered by the said agreement endorsed thereon, they were also made fully aware of these alterations by the defender William Hunter and others." They also averred that they did not know of the proposed sale of the ship until it was advertised, and that they believed any sale of the ship would be made under burden of their charter-party. They further averred in condescendence 14 that they "had, for part of the period included in their charter-party, re-chartered the said steamship for a cargo of pitch, but through the unwarrantable delay in delivering the said ship they were unable to fulfil their contract, and the pursuers are informed that the re-charterers were obliged to charter the ship 'Greta' to perform the said pitch voyage at an increase of freight amounting to £124, 5s., of which the defenders are aware. Not only have the pursuers been deprived of reaping the benefits which would have accrued to them had their charter-party with the defenders William Hunter & Company been duly implemented, but they have been subjected to claims for damages at the instance of the re-charterers, which with brokerage and commissions will amount to £150, and which presently form the subject of an action in the English Courts at the instance of the re-charterers against the pursuers. The pursuers have been deprived of the services of the said vessel, and have made disbursements on the faith of the charter-party, and in connection therewith, which will amount in all to £500, which is the loss and damage which they have thus suffered through the breach of contract of the defenders."

The defenders denied the statements in Cond. 7 and 14, referred to the proceedings in the action of sale, and "explained that the pursuers got delivery of the vessel as soon as she was fit for sea. Till the pursuers got delivery of her she was unfit for sea and unfit to fulfil her charter. The mortgagees after they took possession of her had to expend large sums in repairing her in order to make her fit for sea, and though they were not bound to do so, they repaired the vessel, and as soon as the Board of Trade certificate was got, handed her over to pursuers." They also stated that "at the time when these mortgages were granted the defenders were not aware of the terms of the charter-party founded on by the pursuers. . . . In the month of April 1887 Messrs Barr and Forrester, who had never given up possession under their original mortgage, in conjunction with the defender Urquhart entered into possession of the ship in virtue of the said mortgage for £2650, and instituted an action of declarator and sale which is still depending in Court, and under which the vessel has been sold. . . . When formal possession was taken as aforesaid in 1887 on behalf of Barr, Forrester, and Urquhart, Messrs Ramage & Ferguson maintained that the ship was and had been in their possession and subject to their lien as shipwrights from December 1886, and that their claim was preferable to all others. The said ship from December 1886 till she was sold was uninterruptedly in the possession of the mortgagees or of Ramage & Ferguson, claiming under their lien." They further stated—(Stat. 6) "The said charter-party is not a fair charter-party, and the owner had no right to enter into such a contract. Said charter-party if carried out would very largely reduce the value of the defenders' securities under their mortgages, and it was entered into at a time when the pursuers knew that the owner Hunter was not in possession of the 'Mula' or entitled to charter her, and when he knew of said mortgages and that the defenders were in possession of the vessel. The defenders, however, with the view of avoiding all questions, ultimately resolved to tender the vessel to the pursuers whenever she was ready for sea, and accordingly the pursuers got delivery of her for the purposes of said charter whenever the repairs on her were completed. The defenders were no parties to the charter in question, and were in no way responsible for the disrepair of the ship."

The pursuers pleaded—"(1) The pursuers having suffered loss and damage to the extent sued for in consequence of the defenders' failure to deliver to them the said steamship 'Mula,' in terms of the charter-party and relative agreement founded on, decree should in the circumstances be pronounced against the whole defenders, in terms of the conclusions of the summons as amended, with expenses. (2) The defenders

Barr, Forrester, and Urquhart having wrongfully taken possession of the vessel, and having unwarrantably refused to deliver her to the pursuers, and the pursuers having thereby suffered loss and damage to the extent concluded for, the said defenders are liable in damages therefor. (3) The defenders Seater and Ramage & Ferguson having purchased the said vessel subject to the pursuers' rights, and having refused to deliver her to the pursuers for fulfilment of the said charter-party, are liable in damages for the loss which the pursuers have thereby sustained."

The defenders (other than Messrs William Hunter & Company and William Hunter, who did not appear in the action) pleaded—"(1) The pursuers' statements are irrelevant. (5) The pursuers having got delivery of the vessel from the defenders whenever she was ready for sea, the defenders are not liable for any loss or damage the pursuers may have suffered."

A proof was led upon 22nd May 1888, from which, and from the correspondence produced thereat, it appeared that after the agreement of 15th April 1888 Messrs Laming & Company immediately chartered the "Mula" with a Mr Dasnieres for a cargo of pitch to Port de Bouc, near Marseilles. Mr Dasnieres could still have taken the vessel up to the end of June, but eventually he could wait no longer and chartered another steamer called the "Greta," put his cargo of pitch into it, and recovered from Messrs Laming & Company £124, 5s. as damages, and £13, 11s. 3d, as costs because of increase of freight.

On 12th May 1887 pursuers wrote to Messrs Hunter & Company:—"The London merchant with whom we have fixed the 'Mula' outwards is now clamouring for her delivery, and writes holding us responsible for all losses and damages, &c., and we in our turn must therefore hold you responsible for all consequences that may arise through your failure to deliver the steamer as arranged. We consider we shall have a claim against your mortgagees, failing you, as they are cognisant of our charter and are bound to deliver her."

On 14th May 1887 they wrote to Barr:—"We understand from a letter from Mr Murray to our brokers that you have now entered into possession of the 'Mula,' and that you have no intention of carrying out the engagements of the steamer in accordance with the terms of the charter dated 9th October last, and the endorsement on same dated 15th April last. We shall be glad to know whether this information is correct, and whether you really intend not to carry out the charter of which you were cognisant. If such should be your intention, we must hold you responsible for all consequences for breach of charter-party, we having entered into engagements for the steamer, and being ourselves already threatened with damages." To which Barr's agents on 17th May replied:—"It is not correct to say that our clients have no intention of carrying out the arrangements of the ship in accordance with the terms of the charter. On the contrary, they have every intention of respecting your rights, and the sale will be carried out expressly under burden of the charter."

On 27th June the pursuers telegraphed to Seater:—"Charterers of 'Mula,' Dasnieres, pitch merchant, just given us notice we must tender 'Mula' at once or he will charter steamer 'Greta' at four shillings increased freight and claim difference, namely £160. Says must decide immediately. Telegraph you will deliver 'Mula,' and when."

On same date Seater's agents replied by letter:—"Our client is not in a position to take up the charter to which you refer, and the parties to whom you allude in your telegram must just take their own course." And also on same date pursuers' agents wrote to the agents of Seater, who were also the agents of Messrs Ramage & Ferguson:—"We have yours of Saturday. Since the sale we have since seen a print of the conditions. We applied for the conditions before the sale, but Messrs Mitchells, Cowan, & Johnston, whose names appeared in the advertisement, had not then got a copy. The eighth clause of the articles does not in our opinion touch the charter-party. It declares the ship to be free of all bonds, liens, rights of retention, and other incumbrances, but a charter-party is not an incumbrance, it is a contract of hire. We are not in error in supposing that the charter-party was referred to in the advertisement of the ship. We cut out the advertisement from the *Glasgow Herald* and sent it to our clients, who relied on the charter-party being carried out. We think the memorandum endorsed on the charter-party is easily understood. It contains not a proposed new arrangement but a completed contract of hire. Our clients in the face of your clients' refusal to implement the charter-party will now proceed with an action, and if need be will apply for reduction of the title to the ship."

The Board of Trade's restriction upon the "Mula's" sailing was removed upon 23rd April, but S. Jones, a witness for the pursuers, who was on board from May 1886 until August 1887, said—"At the time we were stopped we could have gone to sea, but there was one little defect in the pumps which we found out on starting the engines a second time, which it would have been necessary to put right. The vessel could have gone to sea, but it would have been judicious to have made the necessary alterations first." The valuator, who reported to the Court on 1st June 1887, said the ship was at that date apparently ready for sea.

Mr Ramage (of Messrs Ramage & Ferguson), a witness for the defence, said his firm had from the first asserted their right of lien over the ship, which was all along in their possession, and moved about subject to their orders. He also stated that the ship was not fit to go to sea until August, when she was given up to the pursuers.

Upon 20th April 1887 Barr telegraphed to Ramage & Ferguson—"Referring to interview yesterday as stamped policies not forthcoming, consulted Mitchells, Cowan, & Johnston (Barr's agents in Glasgow), who are making arrangements protect joint interests." And upon same date Ramage & Ferguson's agents wrote to Barr's agents—"With reference to our interview with Mr Kelly, we have just ascertained that this vessel is so situated that she cannot sail for a considerable time to come, and Ramage & Ferguson will do all in their power to prevent her getting away until the terms of the minute of agrement have been fulfilled. In these circumstances it appears to us to be scarcely necessary to resort to interdict."

Upon 27th April 1887 Hunter & Company wrote to Ramage & Ferguson — "The position of matters is this — the mortgagees demand that I hand over Lloyd's stamped policies to Messrs Mitchells, Cowan, & Johnston at once. I had the steamer covered and had arranged with the brokers as regards payment but the stamped policies could not be delivered immediately. The steamer is now ready for sea, but stopped on that account. I cannot possibly place the policy in the hands of the writers just now."

Upon 17th May 1887 Barr's agents wrote the agents of Ramage & Ferguson—"Referring to Mr Barr's telegram to you of to-day, we again send you the draft agreement for approval as now altered. As it is of the utmost importance that we should be able to inform the charterers whether the charter is likely to be carried out or not, please wire us on Monday whether you agree to the terms now proposed and that you will not defend the action." And again on 4th June—"We to-day obtained a warrant to sell, the exposure being fixed for Monday the 20th current. There is therefore very little time to advertise. We enclose herewith, for your approval, proof of the advertisement. You will observe that we have inserted in it that the purchaser is bound to carry out the charter. We understand your clients are strongly averse to the vessel being exposed subject to such a burden. We enclose copy of a letter we have from our Glasgow correspondents, from which you will see that their clients are willing that the exposure should take place free of the charter providing your clients undertake all responsibility of satisfying the charterer's claims. If you will write us on Monday, giving our clients such an undertaking, we shall delete from the advertisement all reference to the charter." To which the following reply was sent:—"Our clients quite understand that they have to settle the matter with Laming under their arrangement with Messrs Barr and Forrester, and in these circumstances we have deleted the reference in the advertisement to Laming & Co.'s charter."

Upon 17th July 1888 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"Finds that the mortgagees, Barr and others, when they entered into possession of the ship 'Mula' were not entitled to disaffirm the contract of affreightment into which the owners had entered while they were, with the mortgagees' consent, retaining the possession of the ship, such contract being of a usual and reasonable description: Finds also that the said mortgagees were entitled to insist on the fulfilment of conditions necessary for their protection, and in particular that they were entitled to prevent the 'Mula' from sailing until a policy of marine insurance had been effected available for their protection against sea risks: Finds that the owners were not able to effect such an insurance and that the detention of the ship by the mortgagees was justifiable: Finds further, that the defenders Ramage & Ferguson were entitled to detain the said ship under their right of lien until their account for repairs should be paid or satisfied: Therefore assoilzies all the defenders who are parties to the closed record from the conclusions of the action, and decerns: Finds these defenders entitled to expenses, &c.

"*Opinion.*—In this case the pursuers, the hirers, under a charter-party of the steamship 'Mula,' sue for damages for breach of charter-party, in respect that the vessel was not delivered to them as stipulated. The parties immediately interested as defenders are (1) Barr and others, mortgagees, and (2) Ramage & Ferguson, claiming on the customary shipbuilders' lien for repairs, by whose acts it is alleged the vessel was prevented from sailing. The question is as to the nature and limitations of the rights of a mortgagee and holder of a lien against a charterer or hirer. These are to be considered separately.

"1st. As to the right of a mortgagee. This is to be determined with reference to the quality of the subject of the mortgage. It is not the same as that of a pledgee of ordinary corporeal moveables, because actual possession is not necessary to the efficacy of the mortgage of a ship. The mortgagee has civil possession of a qualified kind by the registration of his mortgage, and if it be necessary that he should enter into actual possession to secure his rights, he must use his rights with a due regard to the interests of the owners. Neither is the right of a mortgagee in all respects the same as that of a heritable creditor. The latter on entering into possession may by known methods secure that the rents shall be payable to himself, and he has no power to interfere with the tenant's right under an existing lease. But the mortgagee of a ship holds a security over a floating subject which in the very act of use is liable to be withdrawn from the jurisdiction of the Courts of the country in which the right of mortgagee is constituted, and which also in the act of use is exposed to the perils of the sea.

"My general view of the mortgagee's rights may be stated under two heads—(1) As to the right of the mortgagee in a question with the owner—supposing he does not desire to bring the ship to sale, the mortgagee, if he finds the ship in a British port, may at once enter into actual possession, ousting the owner from the management. He may dismiss the master, and appoint another responsible to himself, or he may re-engage the master, making the master responsible to himself, and may thus acquire all the asssurance which is possible in the nature of the case, that the ship will be returned to him on the completion of her voyage. (2) As to the mortgagee's rights in a question with the charterer or hirer of the ship, it is evident that if the mortgagee does not enter into possession at the time of making the advance, he does, as a matter of fact, assent to the owner exercising all ordinary powers for the joint benefit of owner and mortgagee. Accordingly if the owner enters into a reasonable charter-party for the purpose of enabling the ship to earn freight this must be held to be done with the mortgagee's consent. One of the conditions of a reasonable charter-party is that the ship shall be insured against sea risks for the voyage by one of the parties to the contract, usually by the owner. From the point of view of the mortgagees' interest it is not enough that there shall be an agreement to insure. A suitable insurance must be effected, failing which the mortgagee is, as I conceive, entitled to prevent the ship from sailing. He is also entitled to prevent the ship from putting to sea in an unseaworthy condition. Generalising, the mortgagee must recognise existing contracts of affreightment

subject to this, that he can insist on the preliminary fulfilment of all conditions which are necessary for the safety of the subject and for his own indemnification against sea risks. He is not bound to advance money for such purposes.

"According to these conditions, the case against Messrs Barr and others will in my judgment entirely fail, and that for two reasons—(1) The mortgagees were not in possession at the date of the original charter-party, but possession was finally taken on 22nd April, and the agreement was renewed on 27th May; (2) the ship was not in seaworthy condition at the time when the voyage ought to have commenced. She was in the hands of Messrs Ramage & Ferguson for repair, and the work of repairing had proceeded slowly because instalments of the cost were not forthcoming. Eventually certain of the mortgagees advanced a sum towards the completion of the repairs. They were not bound to do so, and if they had not made the advance the 'Mula' would probably have remained in the shipwrights' hands subject to their lien for repairs until she came to be sold under judicial authority in the action of sale referred to on record. When the 'Mula' was eventually got ready for a voyage the owners were not in a position to satisfy the mortgagees that the ship was covered by insurances. The owners had instructed their brokers to insure her, but the brokers would only insure subject to their own lien for a balance due to them on past transactions. Consequently any insurance that might be effected in this way would be valueless to the mortgagees as an indemnity to them against the loss of the ship. They accordingly took up the position that they would not allow the 'Mula' to proceed to sea until policies were delivered or assigned to them to the extent of their debt. This could not be done, and my opinion is that Barr and others were within their rights when they refused to allow the 'Mula' to commence her voyage.

"The case of Messrs Ramage & Ferguson is stronger. I consider that they had a lien for their repairs which was not lost by the ship going out of their yard to a pier or harbour where the work of repairing was continued, but which would have been lost if the ship had commenced her voyage. Their right then was to detain the ship until their account should be paid or provided for.

"It is true that through the exercise of the rights of the mortgagees and the builders the pursuers have lost money. But this is through the fault of the owners, and does not, as the case presents itself to me, render the parties who are responsible for the detention of the ship responsible in damages.

"It follows from this opinion that the defenders Barr and others, and the defenders Ramage & Ferguson, are entitled to be assoilzied from the action. If a different view were taken I think that damage has been proved (approximately) to the extent claimed in the proof."

The pursuers reclaimed.

They asked to be allowed to amend their summons under the provisions of the Court of Session Act 1868, sec. 29, which provides that "The Court . . . may at any time amend any error or defect in the record . . . in any action . . . in the Court of Session; . . . and all such amendments as may be necessary for the purpose of determining in the existing action . . . the real question in controversy between the parties shall be made: Provided always, that it shall not be competent by amendment of the record . . . under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment" . . . They proposed to substitute for the words "or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel, and coals therein," the words "and in any event," so as to raise clearly their claim of damages for loss sustained before the raising of the action.

Argued for the reclaimers *upon the proposed amendment*—They were within the provisions of the section of the Act allowing amendments, as they were not altering "the real question in controversy." The best proof of this was that no alterations required to be made on the condescendence, and the whole evidence led related to loss sustained before the summons was signeted. They only desired to bring out more clearly what both parties intended.

Upon the merits—(1) As to lien—Ramage & Ferguson had no right of lien. The ship was never in any private dock of theirs, but in the open roadstead, and in such cases possession so as to found a lien was not presumed, but must be proved to have been given—*Cooper, &c.* v. *Barr & Shearer*, June 6, 1873, 11 Macph. 651, *reversed*, but the general principles laid down in Court of Session recognised February 26, 1875, 2 R. (H. of L.) 14. Even if they had a lien, it was renounced by the agreement of February 1887, under which they got a second mortgage. (2) As to mortgagees—The mortgagees were bound to respect the rights of the charterers, especially as there were no mortgagees in possession at the date of the renewal of the charter-party 15th April 1887, and the charter-party was not of an unusual description. The mortgagees had no right to cut off the ship from earning freight even while subject to their mortgages. The obligation undertaken by owner in February 1887 to insure was in favour of the mortgagees. The question of insurance did not affect the right of the charterers. It was not proved the ship was unseaworthy at the end of April. If it was, why were the mortgagees in such a hurry to stop its sailing by interdict? The correspondence showed that Ramage & Ferguson did their best to stop the ship's sailing. The other mortgagees were willing to let her go, and yet they were under an obligation to have her fit for sea within a month from February 1887. One of the partners of the firm admitted nothing was done to her between April and July, and in these circumstances it was not for them to plead unseaworthiness as a reason for not letting her go. The reclaimers had had a further action of damages raised against them for breach of contract with Dasnieres, and altogether, as the Lord Ordinary had found, the sum claimed in name of damages was not excessive—*Collins* v. *Lamport*, December 1864, 34 L.J. Chan. Div. 196 (Lord Chancellor Westbury); "*The Maxima*," June 18,

1878, 39 L.J. 112; "*The Fanchon*," April 21, 1880, L.R., 5 Prob. Div. 173; *Cory & Company* v. *Stewart*, April 7, 1886, Times' L.R., vol. 2, 508; "*The Innisfallen*," June 15, 1866, L.R., 1 Ad. and Eccle. 72; *Keith* v. *Burrows*, July 1877, L.R., 2 Ap. Ca. 636.

Argued for the respondents *upon the proposed amendment*—The amendment was incompetent. The summons as raised was to recover damages sustained after 4th July. By the very words of the summons it was implied that if delivery of the ship had been made upon 4th July there would have been no room for an action of damages. The proposed amendment violated both the conditions laid down in the 29th section of the Act, because it proposed "to subject to the adjudication of the Court" a "larger sum," and also an "other fund than such as are specified in the summons." Unless the proposed amendment of the record was allowed the reclaimers had no case. The ship had been delivered to them, and all the damages, if any, had been sustained before the raising of the action. Even if the amendment were allowed they had no claim against the respondents, who had acted within their legal rights. There was no privity of contract between them and the respondents. Their right of action, if any, was against the owner. The owner could not have obtained delivery, and the charterers had certainly no higher rights. The rule to be derived from the cases cited by the reclaimers was that mortgagees were not bound to respect any charter-party if by doing so their reasonable rights under their mortgages would be materially prejudiced. They would have been so prejudiced if the ship had been allowed to sail, as she was unseaworthy until August 1887, and uninsured. By getting the ship sold under the orders of Court the mortgagees had simply made their rights effectual in the only way recognised by law. Even if they had not entered into possession the ship would not have been allowed to sail, as there were other creditors who would have prevented her going.

At advising—

The Lord Justice-Clerk read the following opinion of Lord Rutherfurd Clark, with which he concurred:—

The pursuers entered into a charter-party with Messrs Hunter & Company, the owners of the steamship "Mula," dated 15th April 1887, and founding on that contract they have raised this action, which is directed against (1) John White Seater, who at the date of the action was the registered owner of the vessel; (2) Thomas Barr, John Forrester, and David Inglis Urquhart, who were mortgagees; (3) Ramage & Ferguson, who were mortgagees, and had also been employed to repair the "Mula;" and (lastly) William Hunter, the sole partner of William Hunter & Company, the owners. No appearance has been entered for Hunter, who is said to be insolvent, and it is admitted that Seater is no more than the nominee of the mortgagees, who are the real defenders in the case.

The pursuers seek declarator that the defender Seater is bound forthwith to deliver to the pursuers the steamship "Mula" in the state, for the purposes, and under the terms and conditions of the above-mentioned charter-party, and decree to enforce the declarator. And after that conclusion the summons proceeds—"Or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel and coals therein, the whole defenders ought and should be decerned and ordained by decree foresaid, conjunctly and severally, to make payment to the pursuers (1) of the sum of £1000 in name of damages, and (2) of the sum of £100 as the value of the said bunker coals." I omit any reference to the coals which are mentioned, because they were delivered to the pursuers, and no question arises in regard to them.

The steamer was delivered to the pursuers in August 1887, and on 15th November 1887 the pursuers lodged a minute of restriction of their summons, which is No. 8 of process. It restricts the conclusions of the summons to a conclusion for damages sustained by the pursuers prior to the delivery of the vessel.

The first question which presents itself for consideration is, what damages can be recovered under that conclusion? The conclusion for damages being expressly dependent on the failure of the defender Seater to deliver the ship, the result seems to be that if Seater delivered the ship in terms of the pursuers' demand there is no conclusion for damages. In other words, the damages concluded for are the damages which will result from the failure to deliver, which of course can only be damages arising after the date of the action. The pursuers proposed an amendment of the summons so as to enable them to recover the damages incurred by them between the date of the charter-party and the date of the action. The motion was made under the 29th section of the Act of 1868; but in my opinion we cannot sustain that, for if we did we should, I think, be violating the express declaration of the statute to the effect that it shall not be competent by amendment "to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading." Under the summons as it now stands we can only in my opinion give a decree for such damages as arise after the date of the action. To allow the summons to be altered to the effect of enabling us to give a decree for damages which have arisen prior to the date of the action would be to enlarge the subject-matter of the action, and would in my opinion be contrary to the provision of the statute which I have just quoted. The pursuers urged that the proof was, *inter alia*, led with a view to seeing the damages which had arisen prior to the action, and that it was led without objection on the part of the defenders. That is true; but I do not think that by reason of the fact we are the less bound to act in conformity with the statute, for I cannot hold that the failure of the defenders to object is equivalent to that consent which the statute requires before we can enlarge the conclusions of the summons. The case as it stands could not be disposed of without an inquiry into the conduct of the parties prior to the date of the action. If evidence as to damage arising before that date had been introduced, all that can be said of it is that it was irrelevant. To admit irrelevant evidence is not the same thing as to consent that the Court shall adjudicate upon it. If I am right, so far

there is an end, or almost an end, to the case. I think the greater part of the damage, if not the whole of it, arose prior to the date of the action. But various questions of importance have been argued to us, and I think it right to consider these, all the more as another view may be taken of the summons than that which I have adopted.

As I have said, the pursuers' charter-party is dated 15th April 1887. They had a prior charter-party which they cancelled in terms of a power therein contained. It is not necessary to refer to the prior charter-party further. The "Mula" was mortgaged to the defenders Barr & Forrester for £1350, conform to mortgages dated September 1886. In October of that year she was placed in the hands of the defenders Ramage & Ferguson for extensive repairs which were proceeded with, but it became evident that Hunter & Company were unable to meet the cost. Ultimately an agreement was entered into between them and (1) Barr & Forrester and Urquhart, and (2) Ramage & Ferguson, dated February 1887, the effect of which was (1) that Barr & Forrester, in conjunction with Urquhart, advanced Hunter & Company £1300, and obtained a mortgage for £2650, which included the sum contained in the prior mortgage for £1350; and (2) that Ramage & Ferguson obtained £1300 towards payment of their account and a mortgage for £500. These mortgages were dated in February 1887. Ramage & Ferguson further bound themselves to have the vessel fit for sea by 9th March, and they renounced all claim for lien for the repairs which they had made. By the same agreement Hunter, the owner, undertook to have the vessel insured in the name of the other parties to the agreement. It is admitted that no such insurance was ever effected. On 22nd April 1887 Barr & Forrester and Urquhart entered into possession of the ship as mortgagees. On 28th April they raised a note of suspension and interdict to prevent its removal, and obtained interim interdict, which was declared perpetual on the 9th of May. Further, on 29th April they raised an action of declarator and sale, and under decree of the Court the ship was sold on 20th June to Seater, who, as I have already said, was the mere nominee of the mortgagees. The pursuers were not called to this action as the raisers of it were not aware of the charter-party. But when they came to be aware of it, it was at first proposed that the sale should be made under burden of the charter-party, but this proposal was not carried out. The pursuers did not intervene in the proceedings, for the reason that they expected the sale to proceed under the burden of the charter-party as it stood. The ship was detained till August, when, as I have said, she was delivered to the pursuers.

It is in these circumstances that the pursuers bring their action of damages. It is to be observed that they do not maintain that the defenders were bound by the charter-party, or that they could sue the defenders in virtue of any contract. Their case is that the defenders were bound to respect the rights of the charterers, and to deliver the vessel to them in implement of the charter-party, that they wrongfully failed to do so, and that they are therefore liable in damages. The pursuers referred to the case of *Collins* v. *Lamport* as determining the rights of mortgagees in a question with the charterers. The defenders admit its authority. The passage in the Lord Chancellor's judgment on which the pursuers rely is as follows:—"As long therefore as the dealings of the mortgagor with the ship are consistent with the mortgagee's security, so long as these dealings do not materially prejudice and detract from or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there Parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner, he has of necessity authority to enter into all these contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property." I accept that declaration of the law to its full extent. The limit of the owner's right to deal with the ship is to be found in the prejudice of the security of the mortgagee. So long as the mortgage is not materially prejudiced or detracted from the owner may deal with the ship as he pleases. When the security is prejudiced—or to keep to the language of the Lord Chancellor more closely, is materially prejudiced—he may not. It is, I think, obvious that the right of the charterer cannot be higher than the right of the owner. That right is to obtain delivery of the ship from the owners for implement of the charter-party. If the owner cannot in a question with the mortgagees legally give delivery, the charterers cannot claim it, and if the mortgagees have a right to withhold the use of the ship from the owner they have an equal right against the charterer.

We have thus to consider the position in which the mortgagees were placed in regard to the owners. It is plain enough that their mortgage was in jeopardy. The owners were in great pecuniary embarrassment, and could not meet the cost of repairing the ship. Further, the owners had become bound to effect an insurance over the ship in the name of the mortgagees, which they did not do, and which, so far as I judge from the evidence, they were never in a condition to do. The mortgagees thereupon took the ordinary steps for realising their security. They first prevented the removal of the ship by interdict, and thereafter proceeded with an action for a sale. In all this they were, I think, quite justified. But the pursuers demanded that the ship should be given to them in order to implement the charter-party. Could the owners have insisted on this? I do not think that they could. The conclusive answer of the mortgagees would be that their security would be thereby materially prejudiced. If the ship had been sent to sea without being insured, it is hardly necessary to say that the mortgagees would have been put into serious peril, and that a sale could only have been effected at great disadvantage. It is true that the charterer had nothing to do with the insurance of the ship, but that is in my opinion beside the question. The owners had undertaken to insure it in the name of the mortgagees, and they could not in a question with the mortgagees have insisted on sending the ship to sea while that obligation remained unfulfilled. The charterers are in the same position, and in my judgment they cannot have a higher right than the owners. For these reasons I am of opinion that the defenders did not act wrongfully in failing to deliver the ship to the pursuers.

But the defenders have a further defence. They say that the ship was not in a seaworthy condition up to the date of the action, and in my opinion that is proved. It is said that very little remained to be done, but I think it is proved that there were serious defects. The pursuers' witness, Jones, admits that it would not have been judicious to allow her to sail without the necessary alterations being made. I entirely agree with him, and I think that where it is judicious to have repairs made in port the mortgagees were not at all wrong in preventing the ship from going away till these repairs were made. It is true that Ramage & Ferguson undertook to have the repairs completed by the middle of March. I do not think that that is material. This contract was with the owners. The pursuers as charterers were not in right of it. The owners could not have insisted to the prejudice of the mortgagees in sending the ship to sea in an unseaworthy condition, and it follows from what I have said that the charterers were under the same disability.

It was urged that Ramage & Ferguson could not found on the breach of their obligation to complete the repairs; but as the charterers were not in right of their obligation they cannot, I think, found upon it, neither can the owners in this question. For beyond doubt Ramage & Ferguson have committed a breach of contract as shipwrights, but they could not compel them because of such a breach to surrender their rights as mortgagees. Besides, the other mortgagees were not affected by this breach, and they had an independent right to retain the ship. I do not think that Ramage & Ferguson had any lien for the repairs, and I cannot concur with the Lord Ordinary on that point.

The result is in my opinion that the defenders should be assoilzied.

Lord Lee—I have the misfortune to differ from the opinion which has been delivered, and from the Lord Ordinary; but I do not find it at all necessary to question the proposition in law upon which the Lord Ordinary proceeds, viz., that the first mortgagees were entitled to refuse to allow the ship to go without delivery of a policy of assurance. They did so in the month of April; but the ground upon which I arrive at the conclusion that there was a wrongful detention of the vessel, and that Ramage & Ferguson are responsible, is that the delay of the ship—the refusal to allow it to go when it was demanded ultimately—was not caused by Barr & Urquhart, the first mortgagees, I think, but was caused entirely by the conduct of Ramage & Ferguson. I think that they acted not only contrary to their legal rights, but contrary to their obligations in refusing to allow the ship to go, as I shall endeavour to explain.

The action was originally an action for delivery of the ship. It was raised upon the 4th of July 1887, but it had been intimated on the 27th of June. It was subsequently converted into an action of damages by an arrangement to which Ramage & Ferguson were parties, and which is contained in a minute of the 15th of November, as the ship had been given up, and the only question that was left was the question of damages. The conclusion for delivery was directed against Seater as the registered owner. He had been put forward by Ramage & Ferguson as the purchaser of the ship at a public sale, as a person quite independent of them, as a person who held the ship by his judicial title, and under conditions fixed by the Court, and which freed him from the charter-party. That appears from the joint print, where they meet the demand which was made upon them by the pursuers at that time for delivery of the ship. They had on the 25th June put forward Seater as a person with whom they had nothing to do, saying—"You are in error in supposing that the charter-party was referred to in the advertisement of the ship, or that she was sold subject to the fulfilment of any charter-party which her former owner had entered into," and so on. Now, Seater admittedly turns out not to have been an independent party at all. He was a mere agent or trustee for Ramage & Ferguson. But the conclusion for delivery was quite properly and sufficiently directed against him as the registered owner. And the question of damages which is now alone left in the case in my view depends upon this question, whether Ramage & Ferguson, and their nominee or agent Seater, were not bound to deliver the ship at the time when that action was raised.

I say my view is that the question of damages depends upon the question whether they were not bound to make delivery at that date for this reason, that I hold it to be clearly proved that the whole damage which was actually suffered arose after the 27th of June and ended with the 4th of July. Even down to the 4th of July, when the summons was signeted, no damage would have been suffered if delivery had been made upon that day according to the evidence. I say that is proved, in the first place, because I think the oral testimony is clear upon that point. In the proof Mr Laming says distinctly that Dasnieres, the person who had chartered the "Mula" for a cargo of pitch out to the Mediterranean, "could still have taken the vessel up to the end of June." And he says No. 69 of process is the charter-party which he entered into; and I think it was explained that the charter-party is subsequent in date to the end of June. Further, there is real evidence in the correspondence at the time that the whole damage arose after 27th June in the letter written by the pursuers to Seater, Ramage & Ferguson's nominee, and which is printed. For in that letter, or rather telegram, by the pursuers to Seater, they say—"Charterers of 'Mula,' Dasnieres, pitch merchant, just given us notice we must tender 'Mula' at once or he will charter steamer 'Greta' at four shillings increased freight, and claim difference, namely, £160. Says must decide immediately. Telegraph you will deliver 'Mula,' and when." So that on the 27th of June they had an opportunity to deliver the "Mula," and to avoid any damage. They refused to deliver the vessel in terms of their letter which follows, saying—"Our client Mr J. W. Seater has handed to us your telegram of date, and with reference thereto we beg to send annexed copy of a letter which we addressed to your representatives in Glasgow on Saturday on the same subject, and to which we beg to refer you. Our client is not in a position to take up the charter to which you refer, and the parties to whom you allude in your telegram must just take their own course." That is followed by a letter upon the same day, which ends by the agents of the

pursuers intimating that "our clients, in the face of your clients' refusal to implement the charter-party, will now proceed with an action," and so on. So that the whole damage was suffered after the 27th of June, the date when the action was instituted. If delivery had been made even on the 4th of July, when the summons was signeted, there is little reason to doubt, so far as I can see, that the damage might have been avoided. Therefore the question of damage comes to depend, as I said, upon the question whether there was or was not incumbent upon Ramage & Ferguson an obligation to deliver that ship? whether they were entitled to set at nought the charter-party altogether as they did?

Now, the position of the ship was this—The original charter-party was dated October 9, 1886. Under that charter-party it is unnecessary to notice the history of the delays which took place. I am disposed to think that these delays arose from the difficulties of Hunter, the owner of the ship. And I am clear that there is no claim in this action founded upon any delay under the original charter-party, nor indeed any claim under the amended charter-party of April 15th down to the 27th of June. No loss is alleged to have happened by the non-delivery of the ship prior to the 27th of June. But the delays which had arisen under the first charter-party are important in this respect as matter of history, for they resulted in an agreement in February 1887 between the owner Hunter and the first mortgagees Barr & Company, and Messrs Ramage & Ferguson, and Mr Urquhart, as an individual partner, who also had a share of Barr's interest, the object on the part of the owner, and on the part of all concerned, being obviously to enable this ship to begin earning freight. On the narrative that whereas the fourth party (that is Ramage & Ferguson) were engaged in certain repairs for which they claim a lien "preferable to the claim of the first and second parties under the said mortgages, but which lien the whole other parties hereto refuse to recognise;" and on the further narrative, that for the purpose of avoiding litigation, "and with the view of completing said repairs and making the said vessel ready for sea in every respect, the first and second and third parties have agreed to advance to the fifth party the further sum of £1300." Thereupon arrangements were made by which this advance is to be given and a mortgage is to be given to Messrs Ramage & Ferguson. By the third article of that agreement Messrs Ramage & Ferguson, "in consideration of said payment of £1300, and promissory-notes and mortgages to be granted by the fifth party as aforesaid, renounce and discharge any claim for a lien, present or future, over the said vessel in connection with or arising out of said repairs, and undertake and bind and oblige themselves fully to execute and complete all repairs on said vessel which may be required to make her fit and ready for sea in every respect." And they bind themselves when the repairs are executed that the vessel shall "pass the Board of Trade's Surveyor, and that all within the space of one month from the last date hereof." They renounce their lien, and they agree to the owner of the ship at that time that they shall make all repairs "which may be required to make her fit and ready for sea in every respect." Now, what happened under this? I do not go over the correspondence. I think it appears that at first there was a temporary delay caused by Barr & Company requiring that a policy of insurance should be delivered. That was in the month of April, but the result was undoubtedly that on the 15th of April a new or rather an amended charter-party was given to Messrs Laming & Company, and although Messrs Barr & Company caused some delay by their demanding a policy of insurance it is quite plain upon the correspondence that the delay caused by the demand for delivery of a policy of insurance passed off, and was not the ultimate cause of the detention of the vessel at the time the final demand was made.

That appears to me to be quite plain by two letters which are contained in the print. The first is a letter dated 17th May 1887, in which Barr & Company's agents, writing to the pursuers, say they find it necessary to sell the ship, and they go on to say—"It is not correct to say that our clients have no intention of carrying out the arrangements of the ship in accordance with the terms of the charter. On the contrary, they have every intention of respecting your rights, and the sale will be carried out expressly under burden of the charter." So that they were ready to go on selling the ship under her arrangements. Moreover, there is another letter, which shows that they made Ramage & Ferguson acquainted with their willingness that the ship should fulfil her engagements. On the 21st May they write to Ramage & Ferguson saying—"Referring to Mr Barr's telegram to you of to-day, we again send you the draft agreement for approval as now altered. As it is of the utmost importance that we should be able to inform the charterers whether the charter is likely to be carried out or not, please wire us on Monday whether you agree to the terms now proposed, and that you will not defend the action." Now, that was the position of Barr. It appears that the matter of the insurance had been arranged, and Barr was willing to sell the ship under her engagement. But Messrs Ramage & Ferguson's position from the correspondence—indeed from an early part of the correspondence, from the 20th of April—was that of insisting, contrary to their agreement of February, upon the right to take every step they could to detain the ship.

The letter of April 20th, I am afraid, it may be necessary to notice, because really in my mind it comes to be one of the links by which Ramage & Ferguson's liability is clearly demonstrated. They apparently began negotiations with Barr for the purpose of what they call "protecting the joint interests." Upon the 20th of April they write to Messrs Boyd, Jamieson, & Kelly, who, I think, are Barr's agents, as follows:—"With reference to our interview with Mr Kelly we have just ascertained that this vessel is so situated that she cannot sail for a considerable time to come, and Messrs Ramage & Ferguson will do all in their power to prevent her getting away until the terms of the minute of agreement have been fulfilled." Now, were Ramage & Ferguson fulfilling the minute of agreement? The minute of agreement bound them to make all necessary repairs in consideration of the £1300 and the mortgage which they got to fit her for sea. They go on writing, making it still more plain that they are determined to make a

stand against the ship being allowed to go. I do not need to read these letters, but Hunter & Company write on the 27th April—"The steamer is now ready for sea, but stopped on that account." That is the question about the policy of insurance which went off. But all through the correspondence it will be found that from the 20th of April Ramage & Ferguson's position was that of taking every step they could to have the vessel detained.

Now, I pointed out that Barr & Company's proposed sale was under the burden of the ship's engagements. Barr & Company's agents write to Ramage & Ferguson's agents on 4th June 1887 as follows—"We to-day obtained a warrant to sell, the exposure being fixed for Monday the 20th current; there is therefore very little time to advertise. We enclose herewith for your approval proof of the advertisement." That is an advertisement which contained a clause bearing that the sale was under the burden of the charter-party. Then they go on to say—"You will observe that we have inserted in it that the purchaser is bound to carry out the charter. We understand your clients are strongly averse to the vessel being exposed subject to such a burden. We enclose copy of a letter we have from our Glasgow correspondents, from which you will see that their clients are willing that the exposure should take place free of the charter provided your clients undertake all responsibility of satisfying the charterers' claims." That letter showed that Barr & Company were willing, indeed desirous, to act upon their undertaking to the owner Hunter that the sale should be subject to the charter. But the answer by the agents of Ramage & Ferguson is this—"We have your favour of Saturday. Our clients quite understand that they have to settle the matter with Laming under their arrangement with Messrs Barr & Forrester, and in these circumstances we have deleted the reference in the advertisement to Laming & Co.'s charter." And accordingly the result is that by the action of Ramage & Ferguson upon their own sole responsibility the sale was effected, and effected by them without any reference to the charter-party. It set at nought the engagement of the ship. It was in substance a sale by Ramage & Ferguson to themselves, or to a person who is their mere nominee, for the purpose of ignoring and putting aside the charter-party which I have referred to.

Now, that is done by persons who in a question with the owner had undertaken within a month of the end of February to do everything that was necessary to make the vessel ready for sea in consideration of a sum of £1300. Now, were they entitled to do that? or were they not bound to allow Hunter to fulfil his engagement? It is perfectly clear that Hunter was bound to the charterers. It is equally clear that Ramage & Ferguson were bound to Hunter to do what was necessary to enable the ship to fulfil her charter. I fail to see how Ramage & Ferguson can justify what they did. I have not thought it necessary to notice the fact that their position as regards responsibility is made abundantly clear by the formal agreement between themselves and Barr & Company. I think it is dated in June, and by it they undertake all responsibility to the charterers. But apart from that altogether, being bound to Hunter, who was bound to the charterers—bound to Hunter in the way that I have mentioned—I entirely fail to see how they were entitled to take these steps for the purpose of defeating the charter. Therefore I am of opinion that at the 27th of June, when the action was intimated, before the damage had begun to arise, at the time when it was telegraphed to them from their agents that the charterer of the "Mula," Mr Dasnieres, was still willing to take the vessel, they were under an obligation to make their nominee Seater give up the vessel, and they were altogether wrong in going on to hold out Seater as being a person entirely independent of them, holding under a decree of sale which had itself set aside the charter. But it now appears that the setting aside of the charter-party in the proceedings of sale was entirely the work of Ramage & Ferguson. I say therefore that they were bound to deliver on 27th June. I say further that if they had delivered on 27th June no damage would have arisen, because the vessel would have earned her freight under the pitch contract, and would have earned her coal freight, and no damage would have arisen. That being so, I think that under the agreement, after what had taken place, they must be held as responsible for the damage so arising. I think, in my view of the claim for damage, that no amendment is necessary. It is perfectly rightly concluded for as a substitute for a claim to the ship. That is to say, the claim of damages arising out of the refusal to deliver the ship at the date when the action was intimated on 27th June.

I do not know that it is necessary to say more. Some importance has been thought to attach to the fact that Messrs Ramage & Ferguson had a lien for repairs. I concur entirely in the opinion of Lord Rutherfurd Clark that they had no such lien. Something has also been said about the ship being unseaworthy and unfit to go to sea down to the 27th of June. Well, let it be supposed for a moment that it was so, who is responsible for that? I say most clearly Ramage & Ferguson, for it was Ramage & Ferguson's breach of their engagement to the owner that prevented the ship being made ready for sea. Therefore on the whole I am sorry to say that I am obliged to differ from the proposed judgment.

The Court adhered.

Counsel for the Pursuers—Lord Advocate, Q.C.—Graham Murray. Agent—David Turnbull, W.S.

Counsel for the Defenders—Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.