Thereafter a mandate was signed by H. E. Jansen, manager of the "Arbutus" Steamship Company, who under section 3 of the byelaws of the company bound the ownership by his signature. In this mandate the registered owners of the "Arbutus" declared that the action was raised by Lars Larsen, as master, and representing them with their instructions and authority, and authorised the said Lars Larsen and Messrs Boyd, Jameson, & Kelly to continue to prosecute the action to final judgment, and to grant a receipt as binding as if granted by the owners themselves for any sum found due under the said action.

On 13th December 1892 the Lord Ordinary (STORMONTH DARLING) repelled the defenders' plea-in-law of no title to sue.

The defenders appealed, and argued—The master of a vessel was entitled to sue for breach of charter-party (1) made by himself, or (2) made by the owners of the vessel if he sued in the character of the owner's mandatory or agent. But he could not sue "as master" for breach of a contract made by third parties as representing the owners of the vessel. Here the contract had been made by Dessen Brothers, as representing the owners of the vessel, and the master sued "as such master." Therefore his title was bad. The mandate changed the character in which the pursuer sued, and no effect could be given to it—*Smith* v. *Stoddart*, July 5, 1850, 12 D. 1185.

Counsel for the pursuer were not called on.

At advising—

LORD TRAYNER—I am of opinion that there is nothing in the objection to the pursuer's title to sue. In the first place, the mode in which the instance is set forth accords with a very old and well-settled practice. But apart from practice there seems to me to be nothing in the objection. The pursuer sets forth that he is master and part-owner, and as such master represents the mastership of the vessel. That is a distinct averment that he represents the owners, and is suing this action in their name and on their authority.

I have no doubt, accordingly, that that is a perfectly good instance. Of course it may not be true that the pursuer has the owner's authority, and if that were proved the instance would be negatived. But that is not the question at present. The mandate produced from the owners seems quite sufficient, and not open to any objection.

I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer — Jameson — Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

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

Wednesday, January 11, 1893.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUTHIES *v.* AIKEN AND OTHERS.

Ship — Mortgage — Entry of Discharge — Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 68.

Section 68 of the Merchant Shipping Act 1854 provides that on an entry being made in the register-book to the effect that the mortgage of a ship, or of any share therein, has been discharged, the estate, if any, which passed to the mortgagee shall vest in the person "in whom the same would, having regard to intervening acts and circumstances, if any, have vested if no such mortgage had ever been made."

The registered mortgagee of shares in a ship sold them, and the bills of sale in the purchasers' favour were registered. At the same time the mortgages were produced to the registrar, with receipts for payment of the mortgage indorsed thereon, and the usual entry of discharge was made in the register. It subsequently appeared that the bills of sale in favour of the purchasers had been invalidly executed, and fresh bills of sale were accordingly executed by the mortgagee, but these the registrar declined to register, on the ground that the mortgagor had put forward a claim to the shares.

Held that the mortgagor could derive no benefit from the entry of discharge in the register, and that the purchasers, as the true owners of the shares, were entitled to decree ordaining the registrar to register the new and valid bills of sale granted in their favour by the mortgagee.

By two mortgages, dated respectively 30th June 1881 and 15th November 1884, James Aiken junior, shipowner in Aberdeen, mortgaged 40-64th shares of the s.s. "Telephone" to the Commercial Bank of Scotland, and these mortgages were duly registered on said respective dates. On 11th April 1888 the bank sold these shares for £3000 to James, William, and Alexander Duthie, of the firm of Duthie Brothers & Company—13-64th shares to James, 14-64th shares to William, and 13-64th shares to Alexander Duthie. On the same day the bills of sale in favour of the Duthies were registered. On the same day also the mortgages were produced to the registrar, bearing indorsed receipts for the respective sums of £1200 and £1800 "in discharge of the within written security," signed by the secretary of the Commercial Bank, and the registrar made entries in the register-book to the effect that the mortgages were discharged.

Questions having subsequently been raised as to the validity of the bills of sale above mentioned, in respect that they

were only signed by the local agent of the Commercial Bank at Aberdeen instead of being signed by two directors and the manager or secretary, and sealed, as required by the bank's charter, the Duthies obtained new bills of sale from the bank dated February 23rd 1892 in corroboration of those which they had previously received, but the registrar at Aberdeen, in accordance with instructions from the Board of Customs, refused to register these corroborating bills of sale until the ambiguity of the title was cleared.

To remove the difficulty which had thus arisen, the Duthies raised the present action, with the concurrence of the Commercial Bank, against the Lord Advocate, as representing the Commissioners of Customs, concluding (first) for declarator that they were entitled to be and were duly registered as on 11th April 1888, or otherwise were now entitled to be registered as the owners of the 40-64th shares already mentioned; and (second) to have the defender ordained to direct the registrar of shipping at Aberdeen to register the bills of sale dated 23rd February 1892.

The Lord Advocate lodged defences, in which he stated, *inter alia*, "that the said James Aiken, the original owner and mortgagor, has intimated to the Commissioners that he maintains that in virtue of the said indorsed receipts, and of the provisions of section 68 of the Merchant Shipping Act 1854, the interest of the said mortgagees vested in him as if no such mortgages had ever been made; that the alleged bills of sale dated 11th April 1888 are invalid; and that no sale of the said shares can lawfully be made without his consent."

The Lord Advocate pleaded, *inter alia*—"(1) All parties not called."

On 3rd November 1892 the Lord Ordinary (STORMONTH DARLING) ordained the defender to direct the registrar to register the bills of sale of 23rd February 1892, and found it unnecessary to dispose of the declaratory conclusions of the summons.

The Lord Advocate reclaimed, and thereafter James Aiken appeared and craved to be sisted as defender in the action, and a similar motion was also made for Alexander Scott, Registrar of Shipping at Aberdeen. A joint-minute was also lodged for the parties, other than Aiken, craving the Court to recal the Lord Ordinary's interlocutor; to allow the second conclusion of the summons to be amended so as to read, "the defender Alexander Scott ought and should be decerned and ordained . . . to register the following bills of sale," viz., those dated 23rd February 1892, and the same having been done, to decern in terms of the second conclusion as amended.

On 14th December the Court recalled the Lord Ordinary's interlocutor; sisted Alexander Scott and James Aiken as defenders; and of consent assoilzied the Lord Advocate from the conclusions of the action.

The defender Aiken thereafter lodged defences.

He pleaded—"(1) The said alleged bills of sale of 11th April 1888 being null and void, and the said mortgages having been duly discharged, this defender is, under the provisions of the Merchant Shipping Act of 1854, in right of said 40-64th shares of said s.s. 'Telephone.' (2) The said alleged bills of sale of 23rd February 1892 having been granted by the Commercial Bank when divested of all right to and interest in said shares as mortgagees or otherwise, are of no force or effect, and the pursuers are not entitled to have the same registered."

The 68th section of the Merchant Shipping Act 1854 provides as follows—"Whenever any registered mortgage has been discharged, the registrar shall, on production of the mortgage deed, with a receipt for the mortgage money indorsed thereon, duly signed and attested, make an entry in the register-book to the effect that such mortgage has been discharged; and upon such entry being made, the estate, if any, which passed to the mortgagee shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested if no such mortgage had ever been made."

Argued for the defender Aiken—If the mortgages granted by Aiken had never been granted, he would have been the person entitled to the shares, and they accordingly vested in him when the discharges granted by the bank were registered, the bills of sale in favour of the pursuers being invalid—*Bell* v. *Blyth*, 1868, 4 Ch. App. 136. The discharges were merely receipts for money, and were quite sufficiently attested by the signature of the bank's secretary.

Argued for the pursuers—The receipt discharging the mortgages required to be "duly attested." In this case the receipts had not been attested in terms of the bank's charter, and accordingly the discharges were as invalid as the bills of sale. Further, Aiken had no right whatever in equity to the shares, and the Court were entitled to disregard such technical pleas as were raised by him, and enforce the true equities of the case—Merchant Shipping Acts Amendment Act 1862 (25 and 26 Vict. c. 63), sec. 3. A mortgagor could derive no benefit under section 68 of the Act of 1854 from a discharge granted by the mortgagee in error—"*The Rose*," 1873, 4 Adm. & Eccles. 6. The pursuers were therefore entitled to the decree they craved in order to clear up their title.

At advising—

LORD PRESIDENT—The claim which is made by the compearing defender James Aiken junior is, that we should give effect to his contention that he is now in right of the 40-64th shares of the ship "Telephone." Now, we can only do that if we are satisfied that the right of ownership has vested in Mr Aiken, and is not in the Messrs Duthie, who are his competitors. No doubt considerable complication has been introduced into the title and the argument by the mode in which a discharge to the mortgage was registered simultaneously with what now proves to be an informal transfer in favour of the Messrs Duthie. Whether

the pursuer had a perfectly clear and accurate view as to the proper mode of completing the title of purchasers from a mortgagee is a matter which we do not require to probe to the bottom. The material question to determine is, whether the Messrs Duthie have, or Mr Aiken has now, the beneficial right to the 40-64th shares of the ship. Now, the transaction as between the mortgagees and the purchasers was of a very simple description, there having been admittedly a personal contract of sale between them, whether the documents of title which followed were or were not in form. There is no doubt that in 1888 the mortgagees held the ship under their security title, and that from then till now neither Mr Aiken nor anybody in his right has made payment of the debt for which the mortgage had been granted. Mr Aiken's contention is, that incidentally, in the course of carrying out this *bona fide* contract of sale from the persons who held the ship to the persons who were offering the money, a mishap or miscarriage has occurred which has the extraordinary effect of ousting both the one and the other from their right to the ship, and placing him in the full beneficial right to the 40-64th shares. Now, this would be a very startling conclusion, and it appears to me that we have to determine the merits of the question in their proper sense. Does the Act of Parliament bring about this extraordinary result —because we have here ample powers to deal with the matter as the rights of parties are ultimately ascertained to exist—that in the longrun Mr Aiken gets the ship for nothing. It appears to me that the facts of the case entirely exclude such a conclusion. Mr Aiken has done nothing to bring the 40-64th shares his way at all, and all that can be said about the other parties, viz., the Commercial Bank, the mortgagees, and their transferees the Messrs Duthie, is, that it seems doubtful whether their title has been completed in the most appropriate and harmonious way. Now that we have the facts admitted by Mr Aiken before us, it appears to me that we have one duty, and one duty only, and that is to give effect to the right which, apart from the mistake in the conveyancing, vested in the Messrs Duthie, as purchasers of these shares from the Commercial Bank, and that we should declare them to be the registered owners.

The whole conclusions of the amended summons are before us, for we have disposed of one of them. I think that the Messrs Duthie are entitled to have a declarator that they are the owners, and that they should get the order which in their judgment would complete their title, and that is an order upon the registrar—who does not object—to enter them as transferees.

Lord Adam—I am of the same opinion. As I understand, the pursuers propose to sell the 40-64th shares of this ship, the "Telephone," and in the course of the negotiations for the sale they were met with the difficulty that upon the face of the title, as appearing on the register, they had no power to sell. Now, your Lordship has stated what that difficulty is, and how it arose. I am of opinion that our duty in conformity with the decisions of the English Courts is to see that the register is so framed or altered as to give effect to what are the true rights of the owners and other parties connected with this ship. Now, if that be so, and I think it is so, then I do not think there is any real difficulty in this case, because there is no doubt whatever that the pursuers are the true owners of the 40-64th shares. The only difficulty now is, how a new transfer which has been adjusted shall appear upon the face of the register, and enable them to proceed with the sale of the ship as they desire to do. I think the method proposed by your Lordship is the correct one.

The difficulty arises from what was a perfectly good transfer—in the sense of conferring a perfectly good personal right—of these shares by the bank to the pursuers not being executed in the terms required by the bank's charter. Therefore I think it is right that this being an informal transfer by the bank, they should now do, as indeed they have done, viz., execute a new and valid transfer. I think this new and valid transfer having been executed, and being ready to be put upon the register, we are entitled to order that to be done, and then the whole matter will be settled.

Lord M'Laren—It appears that the question as to which we have heard so much argument is not really a question of right at all, but one of clearing the register book in such a way as to enable the actual owners of the ship, the present pursuers, to obtain a marketable title—a title on which they may sell, mortgage, or otherwise transfer for a valuable consideration. Now, the objection to the title as it stands arises in this way, that while the banking company were vested by mortgage in those shares, their own charter of incorporation requires that their deeds should be executed under seal, and attested by two directors and the secretary. In the exercise of the powers of sale, which every mortgagee has under the 71st section of the Merchant Shipping Act, the bank sold the shares and granted bills of sale to the purchasers, but did not execute them in the form prescribed by their charter. The bills of sale were merely signed by the bank agent. Then it is said that this being a bad transfer the effect of the relative discharge which was granted to the mortgagor (on the hypothesis that his debt was paid out of the proceeds of the sale) was to re-invest the mortgagor in his property. It appears to me that that is a result which never could take place unless for the benefit of an onerous assignee deriving right from the mortgagor. It is at least conceivable that if Mr Aiken had done—what would have been a dishonest act—had made a subsequent sale or mortgage to a person who trusted to his being the true owner, that the title of his transferee might have prevailed upon the ground that *ex facie* of the register it appeared that Mr Aiken was the true owner. I doubt

very much whether consistently with the facts of the case such a state of things could have occurred, because the objection to the title of the bank did not appear on the face of the register, and I cannot see how anyone deriving a right from Mr Aiken by a bill of sale subsequent in date to that of the pursuers could have maintained that he had a title on the face of the register. But, however that may be, we have no such case here. It is Mr Aiken, the mortgagor, who, without having paid off his debt or given any equivalent consideration, claims to have the benefit of this alleged statutory discharge which he says reinvests him in his property. It seems to me that, inasmuch as no new interest has intervened, the objections to the transfer might be competently obviated by the ratification of the bank, because every corporation may execute deeds by the hand of a mandatory to whom authority is granted, and the subsequent ratification *mandato equiparatur*. It may be that this would not be accepted by a purchaser as an altogether satisfactory title, and so we are asked to declare that the pursuers are the true owners of the shares, and that they are entitled to have a new transfer, properly attested in their favour, put on the register. I think that in a case of competition of real rights, where the Court gives a decree in favour of one of the competitors, it must be within the competency of the Court to order that its decree should be registered in the register of shipping, otherwise that decree would not have its intended effect—I mean the effect of giving an indefeasible and unqualified title to the persons in whose favour it is granted. Doubtless the decree can be made effectual in another way if desired, viz., by the persons who have the apparent power of disposal (in this case the bank) granting a new title, just as is the analogous case of adjudication of heritable property, because the holder of a decree of adjudication may always go to the superior and get him to grant a charter of adjudication proceeding upon the decree.

I therefore concur in the opinions that have been expressed, holding that we have the power to put this matter of title right by granting a decree in the form which the pursuers desire.

LORD KINNEAR—I am of the same opinion. I do not think it is at all doubtful that the pursuers acquired by the transfer, which is said to have been invalidly executed, a perfectly good personal right to the 40-64th shares of the ship in question—meaning by that a right which was good against the mortgagee, and also against the mortgagor, because the mortgagor was bound by the sale effected by his creditor. Therefore if there had been no defect of title except that which arises from the imperfect execution of the bills of sale by the bank, I should have thought there was no difficulty whatever in obtaining from the bank a well executed bill of sale, and registering it as the pursuers propose. If the bank had refused without good ground they might have been compelled to execute a new transfer. But they are perfectly willing to perform what is of course their obligation, and to execute a valid transfer in accordance with their contract. Therefore the only difficulty arises from its being now alleged that at the same time as the invalid transfer was registered there was placed on the register a discharge of the mortgage; and then it is said that the effect of that operation was not to support the right of the transferee from the mortgagee but to extinguish the mortgage absolutely as a step in the title, and therefore to extinguish as a consequence the transferee's right. Now, if the transfer had been invalid and the discharge well executed and valid, it might very well be that that would have been the formal effect of those two operations, because there would have been an *ex facie* valid discharge of the mortgage duly registered, and an invalid transference registered at the same time. And again it may be that if both of them had been perfectly well executed the one would have come into conflict with the other, because a *bona fide* transferee from the mortgagor, relying on the apparent extinction of the mortgage, might have come into competition with the purchaser from the mortgagee. In that case we should have required to examine the questions of title with much greater consideration than appears to me to be at all necessary here. What might have been maintained by a transferee for value certainly cannot be maintained by the mortgagor himself, who is bound by the contract of sale effected by the mortgagee. Therefore it appears to me that the more successfully it is maintained on his behalf that the title is at present obscured by the entry of the discharge, the more clearly he establishes the pursuers' right to have it cleared by a judgment of the Court determining the true rights of parties, and authorising the correction of the register.

I agree with your Lordship that we should find that the pursuers were and have been since April 1888 the true owners of the 40-64th shares of the ship in question, and that they are now entitled to have the new transfers which have been well executed by the bank registered, and that we should direct accordingly.

The Court found and declared that the pursuers were on 11th April 1888, had been since, and were now entitled to be registered as the owners of the shares in question in the s.s. "Telephone," and therefore decerned and ordained the compearing defender Scott to register the bills of sale in their favour, dated 23rd February 1892, in terms of the second conclusion of the summons as amended.

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

Counsel for the Defenders—The Lord Advocate and N. J. D. Kennedy. Agent—R. Pringle, W.S.

Counsel for the Defender Aiken—J. A. Reid. Agents—Morton, Smart, & Macdonald, W.S.