in December of the same year he signs as "commissioner for Sime." I think that all the averments of possession in statement 5 are referable to actings such as a factor or commissioner who makes advances for his constituent might perform, and therefore that they are not relevant to support the claim to a preference.

The Court adhered.

Counsel for the Appellant — Sol.-Gen. Dickson, Q.C.—Macfarlane. Agents—J. & D. Smith Clark, W.S.

Counsel for the Respondents — D. F. Asher, Q.C.—Cullen. Agents—Carmichael & Miller, W.S.

Wednesday, January 19.

SECOND DIVISION.

[Lord Low, Ordinary.

PARK AND OTHERS (OWNERS OF "PROGRESS") *v.* DUNCAN & SONS.

Shipping Law — Charter-Party — Time Charter — Indemnity Clause — Whether Shipowner or Charterer Liable for Fault of Master.

By a time charter-party of a steamer at a certain rate of hire per month, which did not amount to a demise of the vessel, it was stipulated that the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for the service, and that the charterers should provide and pay for all the coals required. The charter-party contained an indemnity clause providing "that the captain, although appointed by the owner, shall be under the orders and directions of the charterers as regards employment, agency, or other arrangement. Bills of lading are to be signed at any rate of freight the charterers or their agents may direct if without prejudice to this charter . . . the charterers hereby indemnify the owners from all consequence or liabilities that may arise from the captain doing so." It also contained an exceptions clause, excepting accidents of navigation although occasioned by the negligence of the master.

While under the charter-party the vessel, owing to the negligence of the master, sailed from a foreign port with an insufficient supply of coal, and had in consequence to accept salvage services for which the shipowners were found liable. The vessel at the time of her disablement had on board goods belonging to sub-charterers, for which the master had signed bills of lading containing a similar exception of liability for negligence of the master in navigating his vessel. The sub-charterers having refused to pay any part of the loss, the shipowners brought an action of relief for the part of the salvage expenses, effeiring to cargo, against the time charterers, founding (1) upon the indemnity clause, in respect that their liability arose from the captain having signed bills of lading in obedience to the instructions of the time charterers; and also (2) upon the exceptions clause in the time charter. *Held* (*diss.* Lord Young) that as regards the duty of sailing upon the voyage in a seaworthy condition the master was the servant of the shipowners and not of the charterers, and that the former were consequently liable for the whole loss caused by his neglect of this duty, and were not entitled to relief.

Question — Whether an indemnity clause in such terms imports anything more than a right to relief in the event of bills of lading being signed for a freight or freights which would amount to less than the stipulated hire.

This was an action at the instance of the registered owners of the steamship "Progress," of Glasgow, and R. B. Ballantyne & Company, shipbrokers, Glasgow, the managing owners of that vessel, against P. M. Duncan & Son, shipowners and merchants, Dundee, in which the pursuers sought decree for the sum of £208, 0s. 2d., being part of the general average resulting from a salvage claim satisfied by them as owners of the "Progress," for which as the part of the general average effeiring to cargo they now claimed relief from the defenders as time charterers.

By charter-party, dated 27th June 1894, it was mutually agreed between R. B. Ballantyne & Company, on behalf of the owners of the "Progress," and the defenders as charterers, that the pursuers should let and the defenders should hire that steamship for the term of three calendar months from the date when she was delivered to the charterers in the port of Sunderland about 9th July 1894, she being then tight, staunch, strong, and every way fitted for the service, and with full complement of officers, seamen, engineers, and firemen duly shipped for a vessel of her tonnage, to be employed in such lawful trades between good and safe ports between Brest and Hamburg as the charterers or their agents should direct.

This charter-party provided, *inter alia*, as follows:—"That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel; also, for all the engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service. That the charterers shall provide and pay for all the coals, port charges, ballast, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated. That the charterers shall pay for the use and hire of the said vessel at the rate of £240 (two hundred and forty pounds sterling) per calendar month, commencing on the day of delivery, and at and after the same rates for any part of a month.

. . . Payment to be made in cash in Glasgow, half monthly in advance. . . . That the whole reach, burthen, and passenger accommodation of the ship, if any (not being more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions and stores. . . . That the captain, although appointed by the owners, shall be under the orders and directions of the charterers as regards employment, agency, or other arrangement. Bills of lading are to be signed at any rate of freight the charterers or their agents may direct if without prejudice to this charter, the captain attending daily at the offices of the charterers or their agents to do so; the charterers hereby indemnify the owners from all consequence or liabilities that may arise from the captain doing so. That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments. The master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the vovage or voyages, which are to be patent to the charterers or their agents. That the charterers shall have the option of continuing the charter for a further period of three months on giving notice thereof to owners fourteen days prevous to expiration of first-named term. , . . The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, robbers, arrests and restraints of princes, and all rulers and people, collisions, strandings, losses and damages caused thereby, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. . . . That the owners shall have a lien upon all cargoes and all sub-freights for freight or charter-money due under this charter, and charterers to have a lien on the ship for all moneys paid in advance and not earned."

The "Progress" was duly delivered to the defenders, and continued for some months to trade for their account under the charter-party above mentioned. The defenders availed themselves of the option of continuing the charter on the expiration of the first period, and in the month of December 1894 she was still trading under the charter-party.

On 3rd December 1894 the defenders entered into a charter-party with Messrs J. H. Friedlander & Company of Hamburg, merchants, under which it was provided that the "Progress," which was therein stated as being tight, staunch, and strong, and every way fitted for the voyage, should sail and proceed to Hamburg, and there, after discharge of inward cargo, load a cargo of about 400 tons wheat in bulk and 50 tons barley in bags, and being so loaded should therewith proceed to Sunderland and deliver the same on being paid freight at the rate therein stipulated. In terms of this last-mentioned charter or sub-charter the "Progress" proceeded to Hamburg, and there loaded a cargo of wheat and barley, in respect of which the master signed three bills of lading in the same form. By these bills of lading the master undertook to deliver the parcels of wheat and barley therein mentioned at the port of Sunderland, subject, *inter alia*, to the following provisions:—"Barratry and collision, . . . all accidents, loss, and damage of whatsoever nature or kind, and however occasioned, from machinery, boilers, steam, and steam navigation, . . . or from any act, neglect, error, misfeasance, or default of masters or mariners, engineers, or other persons in the service of the vessel in navigating the ship excepted, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, . . . and it being agreed that the agents, captain, pilots, officers, and crew of the vessel in transmission of the goods as between the shipper, owner, and consignee thereof and the ship or shipowners be considered the servants of such shipper, owner, or consignee. . . . This bill of lading to be only binding between the ship and the consignees as regards delivery of the cargo and for freight. . . . The ship or owners are not liable for any act, neglect, or default whatsoever of the agents, stevedore, pilots, master or mariners in loading, stowing, transmitting, and discharging the cargo, and in navigating the ship, ... freight, and all other conditions as per charter-party and average accustomed." These bills of lading did not exclude the warranty of the vessel being seaworthy as at the time when she started on the voyage from Hamburg to Sunderland.

The "Progress" sailed from Hamburg for Sunderland on 11th December 1894. When about fifty miles from the Tyne she accepted salvage services from the steam fishing vessel "George Baird," and was towed by that vessel into Sunderland.

Thereafter litigation having arisen as to a salvage claim made by the "George Baird," in which the pursuers were not successful, the pursuers brought the present action, in which they set forth the facts narrated above, which were all admitted, and further averred that the "Progress" was not in a seaworthy condition as at the time when she sailed from Hamburg having an insufficient supply of coal on board to enable her to complete the voyage in safety, and that in consequence of this want of coal she became helpless at sea, and had to accept salvage services from the "George Baird." They also averred, *inter alia*—"(Cond. 8) No agreement was made between the masters of the 'Progress' and the 'George Baird' as to the amount of salvage payable to the latter for said services, and as the claims of the 'George Baird' were extravagant, the pursuers were unable to come to terms with her owners. The result was that an action was raised in the Admiralty Court, in which the 'George Baird' claimed a large

sum for the salvage of the 'Progress.' The action was defended by the pursuers, who paid a sum of £300 into Court on the advice of their solicitor to meet the claims, but ultimately this tender was held insufficient, and the sum of £350 and costs was awarded against the ship and cargo. As the pursuers had to give bail for the full amount that might be awarded both against ship and cargo on obtaining an average bond signed by the receivers of the cargo Messrs French & Laird, they were obliged to pay the sum awarded in addition to the costs payable to their own solicitors for defending the action. (Cond. 9) On the action being decided as above mentioned, the whole papers were put into the hands of Messrs Richard C. Chancy & Company average staters of Liverpool and Hull, with a view to their apportioning the various expenses rateably on the value of ship and cargo. The average statement prepared by them, which is correctly made up, is produced and referred to. It shows that of the general average expenses, amounting to £631, 15s. 9d. in all, the proportion falling to be borne by the cargo amounts to £208, 0s. 2d. (Cond. 10) The pursuers, in the first instance, applied to French & Laird to make payment of the said sum of £208, 0s. 2d. They, however, repudiate responsibility on the ground that the expense would not have been rendered necessary but for the fact that the vessel was not seaworthy at the time when she started on the said voyage, and that accordingly there had been a breach of the implied warranty contained in the bill of lading of which they were endorsees and onerous holders. This contention the pursuers stated they had been advised was a good answer to any claim against the cargo owners, and that consequently the pursuers now sought relief against the defenders for the share of the salvage expenses effeiring to the cargo.

The pursuers pleaded, *inter alia*—"(1) The pursuers having become liable to pay, and having paid the sum sued for in respect of their captain having signed bills of lading as directed by the defenders, they are entitled, in terms of said charter-party, to be indemnified by the defenders against same."

The defenders pleaded, *inter alia*—"(2) The averments of the pursuers are irrelevant and insufficient to support the conclusions of the summons. (3) On a sound construction of the charter-party dated 27th June 1894, the defenders are not liable to indemnify the pursuers against the alleged loss of £208, 0s. 2d. (5) The exhaustion or any shortage of bunker coal having arisen from no fault of the defenders, but being due to the extraordinary severity of the weather encountered, or to the negligence or to an error of judgment of the servants of the pursuers, the pursuers are not entitled to recover the loss arising in consequence thereof from the defenders."

By interlocutor dated 15th November 1896 the Lord Ordinary (Low), after having heard counsel in the procedure roll, sustained the second plea-in-law for the defenders, and dismissed the action with expenses.

Opinion.—[*After summarising the pursuers' averments above set forth*]—"The ground upon which the claim is made against the defenders is this. When the salvage services were rendered the 'Progress' was under a time charter entered into between the pursuers and the defenders. In the charter-party it was provided that 'bills of lading are to be signed at any rate of freight the charterers or their agents may direct, if without prejudice to this charter, the captain attending daily at the office of the charterers to do so; the charterers hereby indemnify the owners from all consequences or liabilities that may arise from the captain doing so.' The pursuers' contention is that their liability to disburse the salvage charges effeiring to cargo arose, as in a question between them and French & Laird, from their master having signed the bills of lading, and that the defenders are bound to indemnify them in terms of the clause of the charter-party which I have quoted.

"It is not alleged that the defenders were to blame for the ship being insufficiently supplied with coal, and the case was argued upon the assumption that there had been negligence on the part of the master or engineer, who were the pursuers' servants. The question therefore is, whether a liability, the direct cause of which was the negligence of the pursuers' servants, was a consequence or liability arising from the master signing the bill of lading within the meaning of the charter-party. I do not think that it was. The consequence and liabilities contemplated in the charter-party appear to me to be those which arise directly and naturally from the granting of a bill of lading, and not liabilities caused by the fault or negligence of the pursuers' servants. For example, if goods for which a bill of lading was granted were injured during the voyage by the fault of the master or crew, I do not think that the defenders would be bound to indemnify the pursuers. The argument of the pursuers, as I understood it, was that in a question with French & Laird they would not have been liable to pay the portion of the salvage effeiring to cargo if the master had not signed the bill of lading, because it was the warranty of seaworthiness implied in the bill of lading which justified French & Laird in refusing to contribute any part of the salvage money. That is quite true, but the implied warranty of seaworthiness arose because there was a contract for the conveyance of goods, and not because that contract was put in the form of a bill of lading. If the goods had been carried upon a mere receipt, I apprehend that the result would have been the same. Further, in a question with the salvors, I suppose that French & Laird would have been liable so far as the cargo was concerned, but they could have obtained relief from the pursuers on the ground that it was their negligence which had created the necessity for the salvage services. I think it would be an unwar-

rantable straining of the language of the charter-party to hold that it bound the defenders to indemnify the pursuers against such a claim of relief arising out of their own negligence. It was the implied warranty in the bill of lading which gave French & Laird a title to demand that the pursuers should relieve them of contribution to salvage, but the necessity and liability for salvage were caused by the negligence of the pursuers' servants, and not by the bill of lading. That appears to me to be sufficient for the disposal of the case, and I shall accordingly sustain the second plea-in-law for the defenders and dismiss the action."

The pursuers reclaimed.

On 26th January 1897 the following interlocutor was pronounced by the Second Division—"Recal the interlocutor reclaimed against; and on the motion of the pursuers, and of consent of the defenders, before answer allow to both parties a proof of their averments, and to the pursuers a conjunct probation and remit to the Lord Ordinary to proceed in the cause as accords."

Thereafter joint minutes of admission were lodged, and the parties having renounced probation the diet of proof fixed by the Lord Ordinary in conformity with the interlocutor of the Second Division was discharged.

By the joint minutes it was, *inter alia*, admitted—"*First*, That owing to the fault of the master the said steamship 'Progress' sailed from Hamburg on or about 11th December 1894 bound for Sunderland with an insufficient supply of coal; *Second*, That the master could and would have got a further supply of coal at Hamburg had he deemed it necessary; *Third*, That the said vessel sailed from Hamburg to Sunderland or about 10th December 1894, and when about 50 miles from the Tyne, having run short of coal, accepted salvage services from the 'George Baird,' which were necessary in consequence of the captain's said fault, and was towed by the latter vessel to Sunderland." It was also admitted that the averments contained in articles 8 and 9 and in the part of article 10 of the condescendence quoted above were true, subject to the qualification that the sum of £631, 15s. 9d., the amount of the general average expenses, was made up as follows—(*a*) £355 salvage, (*b*) £262, 16s. 5d., expenses of the owners of the "George Baird" and expenses incurred by the pursuers themselves in defending the action, in which £1200 was claimed, and (*c*) £13, 19s. 4d. miscellaneous items—and that the defenders were not notified of or consulted in regard to, nor were they made parties to the Admiralty Court proceedings, or the adjustment of the general average on ship or cargo, and that no claim of any kind was made or intimated by the pursuers against the defenders until after the conclusion of the said proceedings. It was also admitted that the proportion of the sum of £355 effeiring to cargo was £116, 17s. 5d., and that the corresponding proportions of the other two parts of the whole amount of the general average were £86, 10s. 7d. and £4, 12s. 2d.

On 20th November 1894 the defenders telegraphed to the master of the "Progress" at Newcastle-on-Tyne—"Take sufficient bunkers enable steamer reach Cardiff; Have telegraphed Sharp supply same."

On 23rd November 1894 the defenders wrote to the master of the "Progress" at Teignmouth—"Dear Sir,—We beg to advise that the 'Progress' is fixed to load South Dock, Swansea, for Hamburg, and you will therefore proceed to Swansea when discharged. . . . Please advise us what quantity of bunkers you will require to take steamer to Hamburg and north to Sunderland on the Tyne."

On 24th November 1894 the master of the "Progress" wrote to the defenders—"Gentlemen,—I am in receipt of your favour of the 23rd, and note contents. . . . 50 tons of Welsh coal, with what we will have in, should take us to Hamburg and back to coal port."

On 27th September 1897 the Lord Ordinary issued the following interlocutor:—"Assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses."

Opinion.—"It is admitted that it was owing to the fault of the master that the steamship 'Progress' put to sea for the voyage from Hamburg to Sunderland with an insufficient supply of coal, and the main question seems to me to be, whether, when he committed that fault, the master was acting as the servant of the owners (the pursuers) or of the charterers (the defenders). That question depends upon the construction of the charter-party.

"The charter-party was, in my opinion, a time charter, the owners retaining possession of the ship by their master and crew.

[*The Lord Ordinary then stated the material provisions of the charter-party, and proceeded*]—"I think that it is clear that the master was the servant of the pursuers alone. He had no contract with the defenders. The only sense in which he could be said to be the servant of the defenders was that the pursuers undertook that he should take his orders and directions from the defenders as regarded employment, agency, or other arrangement.

"In these circumstances was the master the servant of the defenders as regarded the duty of seeing that the ship was properly provided with bunker coal? I am of opinion that he was not. The amount of coal required for a voyage was not one of the matters in which the master was to be under the orders and directions of the defenders. A proper supply of coal is a matter upon which the safety of the ship depends, and the defenders could not have compelled the master to set sail with what in his judgment was an insufficient supply. I do not think that it makes any difference that the defenders were taken bound to provide and pay for the coal. That was merely part of the money arrangements of the contract, which in no way affected the relationship of the defenders and the master. If the defenders had refused to

supply the master with coal the case would have been different. But it is admitted 'that the master could and would have got a further supply of coal at Hamburg had he deemed it necessary.' I am accordingly of opinion that the exhaustion of the coal which rendered the salvage services necessary was caused by the fault of the master, acting as the servant of the pursuers, to whom they had entrusted the care of their ship.

"The next question is, whether the indemnity clause applies. I adhere to the opinion which I previously expressed, that it does not do so, and upon the same grounds. I think that the consequence and liabilities that may arise from the master signing a bill of lading referred to in the indemnity clause are those which are distinctive to bills of lading, and not such as would attach whether there was a bill of lading or not. The defenders undertook to indemnify the pursuers from all consequences and liabilities arising from the captain signing a bill of lading, but they did not undertake to relieve the pursuers from the consequences of the captain setting sail with a ship which owing to his own carelessness was unseaworthy.

"I am, therefore, of opinion that the pursuers have not made out their claim against the defenders. When the action was previously before me I decided it upon relevancy, and therefore dismissed it. The present judgment proceeds upon proof, and I think that the defenders are entitled to absolvitor."

The pursuers reclaimed.

The argument, in so far as dealt with by the Court, sufficiently appears from the opinions of the Lord Ordinary and the Judges.

The following authorities were referred to:—

For the pursuers—(1) On the question of the primary liability of the shipowners—*Duncan* v. *Dundee, Perth, and London Shipping Company*, March 8, 1878, 5 R. 742; Abbott on Shipping, 740; *The Ettrick* (1881), 6 P.D. 127; *Steel & Craig* v. *State Line Steamship Company*, July 20, 1877, 4 R. (H.L.) 103, 3 App. Cas., 72; *Gilroy, Sons & Company* v. *Price & Company*, November 21, 1892, 20 R. (H.L.) 1; *The Ferro* [1893], P. 38; Scrutton on Charter Parties, 171; *Manchester Trust* v. *Furness* [1895], 2 Q.B. 282 and 359. (2) Upon the indemnity clause:—*Manchester Trust* v. *Furness*, *cit.*, *per* Matthews, J., at p. 288; and in the Court of Appeal, *per* Lindley, L.J., at p. 544; *per* Lopes, L.J., at p. 547; and *per* Rigby, L.J., at p. 549; *Baumwoel Manufactur von Karl Scheibler* v. *Castlegate Steamship Company* [1893], A.C. 8; *Morgan* v. *Castlegate Steamship Company* [1893], A.C. 38; *Shand* v. *Sanderson* (1859), 28 L.J., Ex. 278; *Gledstanes* v. *Allen* (1852), 12 C.B. 202. (3) As regards excepting the warranty of seaworthiness in bills of lading—*Steel & Craig* v. *State Line Steamship Company*, *cit.*, *per* Lord Blackburn, at p. 193; *The Cargo ex Laertes* (1887), 12 P.D. 187.

For the defenders—(1) On the exceptions clause in the charter-party—*Steel & Craig* v. *State Line Steamship Company*, *cit.*; *Gilroy, Sons & Company* v. *Price & Company*, *cit.* (2) Upon the obligation to make a ship seaworthy before leaving an intermediate port—*Worms* v. *Storey* (1855), 11 Ex. 427: *Thin* v. *Richards & Company* [1892], 2 Q.B. 141 (time charter).

An argument was also presented upon the question whether the pursuers were entitled to recover the expenses of the salvage litigation in spite of the fact that they had not given the defenders notice, the pursuers maintaining that notice was not necessary if the action of the pursuers was reasonable, and the defenders on the other hand arguing that notice was essential. In the view which the Court took of the case it was not necessary to decide this question.

The following authorities were referred to in argument:—

For the pursuers—*Barkley & Sons* v. *Simpson*, January 16, 1897, 24 R. 346; *Duffield* v. *Scott* (1789), 3 T.R. 374, *per* Buller, J., at p. 377; *Smith* v. *Compton* (1832), 3 B. and Ad. 407; *Mors-le-Blanch* v. *Wilson* (1873), L.R., 8 C.P. 227, *per* Grove, J., at p. 233; *Hammond & Company* v. *Bussey* (1887), 20 Q.B.D. 79; *Struthers* v. *Dykes*, July 7, 1847, 9 D. 1437, *per* Lord Cockburn, at p. 1457; *Collier* v. *Beath*, December 6, 1836, 15 S. 195; *Clason* v. *Black*, February 15, 1842, 4 D. 743.

For the defenders—*Barkley & Sons* v. *Simpson*, *cit.*; *Clarke* v. *Scott*, January 30, 1896, 23 R. 442: and *Struthers* v. *Dykes*, *cit.*

At advising—

LORD JUSTICE-CLERK—The facts are: The defenders chartered the pursuers' vessel on a time charter to make such voyages to safe lying ports as they might require. The pursuers undertook that the vessel "should be tight, staunch, strong, and every way fitted for the service . . . . and to keep her in an efficient state for the service." It was stipulated that the charterers should provide and pay for the necessary coals. What happened was that on a voyage with a cargo the vessel became unfit to fulfil the service from an insufficient supply of coals for the voyage having been taken on board by the captain. He was salved, and her owners paid the salvage both for vessel and cargo, the owners of the cargo having refused to pay on the ground that the ship was unseaworthy, which it was implied she should be under the bill of lading. The pursuers having thus paid the salvage both of vessel and cargo, sue for that part of the salvage award which relates to cargo. They claim that although there was no demise of the vessel, and that therefore the captain was the servant of the owners and not of the charterers, that nevertheless the defenders are liable. They make this claim in respect of a clause in the charter-party in the following terms:—[*His Lordship read the indemnity clause.*] I do not read that clause as covering any loss from any cause arising from the terms inserted in a bill of lading by the captain on the

charterer's request. But even if it did, the liability under which the pursuers fell to pay salvage was brought about by the vessel going to sea when she was unseaworthy for the service to be done. The failure to provide a seaworthy vessel was the only cause, which was quite a separate thing from the bill of lading, and in no way a consequence of it. But the pursuers further say that under the exceptions in the charter-party they are not liable for the negligence of the master causing loss, such exceptions being repeated in the bill of lading. But as I read these exceptions, they refer to the navigating of the vessel at sea, and give exemption from the consequences of negligence or default of master or crew in so navigating. They do not cover the case of the vessel proceeding to sea in a state which did not admit of her being duly navigated. The condition was unseaworthy when she set out on the voyage, and that is a breach of the conditions of the charter-party. It is true that the defenders were bound to provide and pay for the coal necessary, but it did not lie with them to decide what was necessary. That was the business of the shipowners, and they could fulfil it by whom they pleased. If the master took the duty he did it as their servant, and not as the servant of the defenders. The pursuers were responsible that the ship should be seaworthy, and if they sent her to sea unseaworthy anything that happened in consequence could not be called fault or negligence of master or crew in navigating the vessel. The fault consisted in her not being a well-equipped vessel to make the voyage. And that fault was in breach of the contract undertaking of the pursuers.

On these grounds I think that the Lord Ordinary was right in the conclusion to which he came, and that his interlocutor should be adhered to.

Lord Young.—The pursuers as owners, and the defenders as charterers, are the parties to the charter-party of the steamer "Progress." The original term of three months was subsequently extended, and on 8th December 1894 during its subsistence the master of the chartered ship (the "Progress") by direction of the defenders signed the bill of lading. The ship sailed on the voyage specified therein on 11th December, and on the 14th was towed into Sunderland short of coal, by a trawler, having sailed with an insufficient supply. The owner of the trawler claimed and got judgment for salvage against the pursuers as owners of the "Progress," the proportion effeiring to cargo carried on the bill of lading (with which only we are concerned) being £116, 17s. 5d. This judgment having been satisfied by the pursuers, they claim relief from the defenders, under a clause of the charter-party to them which I shall refer to more particularly, after premising generally that the charter-party was a hire for three months of the ship with the officers and crew at the rate of £240 per month, and that (besides that clause) the only material terms of it were—1st, that the ship should be delivered to the defenders at Sunderland on 9th July 1894, "she being then tight, staunch, and strong, and every way fitted for the service, and with full complement of officers, seamen, &c., duly shipped for a vessel of her tonnage;" 2nd, that she was to be employed in such lawful trades between good and safe ports as charterers or their agents shall direct; 3rd, that the owners shall pay the wages and for the provisions of the captain and crew, and for the insurance of the vessel, and maintain her in an efficient state in hull and machinery for the service; 4th, that the charterers shall provide and pay for all the coals; 5th, that the vessel unless lost shall be returned to the owners "in the same good order and condition as when accepted."

I now notice particularly the clause to which I have referred as that on which this action is founded. It is in these terms:—"Bills of lading are to be signed at any rate of freight the charterers or their agents may direct, if without prejudice to this charter, the captain attending daily at the office of the charterers or their agents to do so; the charterers hereby indemnify the owners from all consequences or liabilities that may arise from the captain doing so."

The pursuers contend that the meaning and purpose of this clause is that the defenders shall indemnify them of consequences or liabilities arising to them from bills of lading signed by the captain on the direction of the defenders in the conduct of their business and for their behoof, and with which the pursuers, though exposed to the liabilities, have really no concern.

I think this is the intent and meaning of the clause.

It was suggested that it had relation only to the rate of freight, "at any rate of freight," and only meant to provide against the shipowners not having a sufficient security or lien on cargo for their rent of £240 a-month. I do not think that can possibly be the meaning, because such a meaning would be idle. It would only import a personal obligation on the charterers of the vessel to pay the £240 a-month, an obligation which is on them irrespective of this clause. Therefore I cannot accept that as the meaning, or take any other than that which I have expressed.

But the defenders on their part maintain that although a bill of lading may have been signed by the master on their direction and for their behoof, having relation only to their business, so that *prima facie* they would on the clause in question be bound to indemnify the pursuers from all liabilities arising upon it, yet if a liability arose upon it in consequence of the pursuers' fault or a breach of their contract with the defenders, they would be precluded from claiming indemnity from such liability. This seems reasonable, and if so, the question is whether the liability on the bill of lading in question, which the pursuers satisfied, and for which they are now claiming indemnity from the defenders, is of that character, that is to say,

arose in consequence of the pursuers' fault or breach of contract.

It is perhaps superfluous to point out that the liability to the salvers was not on the bill of lading but on the salvage services rendered, which were and are admitted. The only question with them regarded the amounts claimed, which the pursuers without (as I assume) unnecessary litigation succeeded in reducing to the amounts for which the judgment, which they satisfied, was given. With respect to the salvage effeiring to the cargo (the amount being admitted), the cargo owners (the holders of the bill of lading on which it was being carried when salved) were of course ultimately liable, and so bound to relieve the shipowners who paid it to the salvers—unless the need for it was occasioned by non-fulfilment of their rights under the bill of lading, which was ostensibly, and so far as they were concerned really, a contract between them and the shipowners.

The pursuers say (Cond. 10) that the cargo owners "repudiate responsibility on the ground that the expense would not have been rendered necessary but for the fact that the vessel was not seaworthy at the time when she started on the said voyage, and that accordingly there had been a breach of the implied warranty contained in the bill of lading of which they were endorsees and onerous holders. The pursuers are advised that this contention is sound."

I am of opinion that to send the ship to sea, as she was sent, insufficiently coaled, was in violation of the bill of lading contract with the cargo owner, and that this violation put on the pursuers a liability under the bill of lading to pay the salvage charge effeiring to the cargo without relief from the owner thereof. This liability they have satisfied. Are they, or not, entitled to be indemnified by the defenders? The question, as I have pointed out, with, I fear, unnecessary repetition, depends on whether or not the pursuers are, as in a question with the defenders, responsible for the fact that the ship was sent to sea insufficiently coaled. It was so sent on 11th December 1894, when the charter-party of 27th June 1894, between pursuers and defenders, was by admitted prolongation still subsisting. What is the term of that charter-party (for there was no other contract between the parties) on which the pursuers are responsible for the proper coaling of the ship before she sailed from Hamburg for Sunderland on 11th December 1894? That the bill of lading made them responsible therefor to the holders thereof is admitted; but if that alone made them responsible it would seem to follow clearly enough that the clause in the time charter-party, under which alone it was or could be procured by the defenders, obliges them to indemnify the pursuers. I have already expressed my assent to the argument that if the pursuer's liability on the bill of lading, which excluded recourse against the cargo owner, arose from their breach of contract with the defenders their right to indemnity by them will also be excluded. The Lord Ordinary has held, *first*, that it was owing to the fault of the captain that the ship sailed from Hamburg insufficiently coaled, and *second*, that he was thus in fault as the servant of the pursuers and not of the defenders. The first proposition, which is one of mere fact, is admitted, but the second, which involves a question of law, is disputed.

Had the defenders hired the ship only, they themselves providing the officers and crew required by them during their employment of it in their business, it could not, I think, have been reasonably contended that the owners were, on any clause of the time charter we are dealing with, bound to see that the ship was sufficiently coaled before sailing on any voyage directed by the hirers, and so responsible as for breach or failure of their contract obligation by the charter-party if she was not. The question then comes to be this—Are the pursuers responsible to the defenders as having let to them the officers and crew? This seems to me to be a very general and important question, and attended with difficulties. But we were referred to no authority on it, if any exist, and had not the benefit of much argument.

It was, I assume, a condition of chartering the ship to the defenders that they should hire and take over the officers and crew as they existed at the date of the charter. They hired the ship to be placed at their disposal at a certain time and place, with—I quote the words—"full complement of officers, seamen, engineers, and firemen, duly shipped for a vessel of her tonnage," and the hire in the lump for both ship and crew was £240 a-month. The ship, officers, seamen, &c., were placed at their disposal, and taken over by them on 9th July, as being according to contract in all respects, and thereafter, and without complaint, were employed by them in their business till 11th December, when they sent the ship to sea on a voyage for which she was insufficiently coaled. They were bound to "provide and pay for all the coals" required for the voyages, which they themselves "as charterers or their agents shall direct." The voyage directed by them which is immediately in question was from Hamburg to Sunderland, and commenced on 11th December 1894. It was, I should have thought, clearly their duty to ascertain what quantity of coal, to be provided and paid for by them, was necessary for that voyage. It appears from the correspondence produced that they consulted and acted on the advice of the captain of the ship. See letters of 23rd and 24th November 1894, which are, I think, important. Was this advice asked and taken and acted upon by them on their own responsibility, or on that of the pursuers? I have said that I see no reason for thinking that as owners of the ship the pursuers are responsible for this advice or for the consequence of its being acted on by the defenders. Are they so responsible because they engaged the officers and crew, paid their wages and food, and let the defenders have them on hire so long as

they were charterers of the ship? The Lord Ordinary thinks they are, because, and as I understand his note, only because, the captain who gave the advice on which the defender acted was when he gave it not the servant of the defenders, and was the servant of the pursuers? It is true that he was continuously and all through the servant of the pursuers in the sense of having been engaged by them and having them bound for his wages and food, but it does not, I think, follow that he was not also the servant of the defenders, who had hired him from the pursuers to serve them in their business. The defenders were entitled to command his services. He was "under the orders and directions of the charterers as regards employment, agency, or other arrangement." I quote from the charter-party. The question, then, seems to be this—when the defenders, who were bound to "provide and pay for all the coals" needed for any voyage directed by them, consulted him as to the quantity required for a particular voyage directed by them, did they consult him as their servant or as the servant of the pursuers? The defenders certainly hired from the pursuers the officers and crew of the ship on the terms that they should serve the defenders and be under their orders and directions. Was it or not according to the contract of hire that the pursuers should guarantee their services so as to be liable for the consequence of "any negligence, default, or error in judgment" attributable to any of them? The language of the contract—"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, robbers, arrests and restraints of princes, and all rulers and people, collisions, strandings, losses and damages caused thereby, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners"—seems to me to compel a negative answer to this question. I cannot read this clause otherwise than as meaning that the defenders hired the officers and crew from the pursuers on the express condition that the pursuers should not be responsible for any "negligence, default, or error in judgment" by all or any of them. But it is contended that a steamer insufficiently coaled for a particular voyage, being unseaworthy for that voyage, the shipowner is responsible accordingly to the holder of a bill of lading for that voyage. The proposition is true, but then the question here is not upon seaworthiness and who is responsible for unseaworthiness to the holder of a bill of lading subscribed by the master of the ship, but upon a contract of hire of the officers and crew of a ship. The defenders' contention really comes to this, that although it was agreed that the pursuer should not be responsible for the "negligence, default, or error in judgment" of the officers and crew or any of them regarding the navigation of the ship, they should nevertheless be responsible for any "negligence, default, or error in judgment" of any of them should it regard the quantity of coal required for a particular voyage. I have already observed that I attach importance to the term of the charter-party—"that the charterers shall provide and pay for all the coals"—for it seems to me, *prima facie* at least, to put on them the whole duty and responsibility, as in a question between them and the owners, of coaling the ship while in their employment.

I do not regard the admission of fault on the part of the master as excluding or affecting the pursuer's contention that the fault was not one for which under the charter-party they are legally responsible. It is not, I understand, disputed, and is I think clear, that the pursuers are not responsible to the defenders for any negligence, error, or fault of the master, officers, and crew relating to the navigation of the ship. It follows that there was a contemplated possibility of fault for which the pursuers should not be responsible. But the defenders maintain that proper coaling for a voyage having, as they contend, no relation to navigation, the exemption does not apply. Assuming this, the question presents itself somewhat strikingly. Are the pursuers, irrespective of this exempting clause, responsible for the officers and crew or any of them in a matter having no relation to navigation?

There is in the bill of lading a similar exemption from liability for faults of navigation by the officers and crew, and I repeat what I have already said, that this did not affect the liability under it to the cargo owner for sending his goods to sea in a ship not properly coaled. This was a breach of the contract by the bill of lading, no matter whose bad advice led to it. In the case of *Gilroy* v. *Price*, 20 R. (H.L.) 1, it was, under a bill of lading with a very similar clause of exemption, held that there was liability in respect the ship was sent to sea with a dangerous structural defect, of which the captain was quite aware. Under an ordinary contract of affreightment by bill of lading, the cargo owner is not concerned with who the person or persons may be on whose judgment and advice the ship is sent to sea as seaworthy when it is not. But I have been unable to see how this bears on the fair meaning and import of the contract between the parties before us. It seems reasonable to assume that in making the contract both parties contemplated that the defenders would have agents at the ports from time to time selected by them for their trade, where contracts of affreightment were made for them, and from which the ship they had hired was sent to sea coaled for them and on their account.

I am disposed to think that the time charter here did not import a demise of the ship, and consequently that the owners were not thereby relieved of their responsibility and liability as owners to parties with whom they had no contract relation. But the question here being between them and parties (the defenders) with whom they had a contract relation, it must, I think, clearly be determined, according to the

true meaning and import of the contract. If it means and imports that the pursuers shall be responsible to the defenders for the sufficient coaling of the ship for any voyage appointed by the defenders, this action must fail, and if not, then I am of opinion that the pursuers are entitled to judgment.

LORD TRAYNER — The pursuers are the owners of the steamship "Progress," which they chartered to the defenders in June 1894. By the charter-party the pursuers agreed to let said ship, "she being then tight, staunch, strong, and every way fitted for the service," fully equipped for a period of three months, with an option to the defenders to continue the charter for a further period of three months, of which option the defenders availed themselves. The charter-party was therefore current at the time when the events took place out of which the present claim arose. The pursuers also bound themselves by said charter-party to maintain the "Progress" in an efficient state for the service" during the currency of the charter, and to pay the wages and provisions of the captain and crew, and also pay for the insurance of the vessel. The pursuers alone had the power of dismissing or changing the captain of the vessel. The defenders on their part undertook to pay for the hire of the vessel £240 per month.

On 10th December 1894 the "Progress" sailed from Hamburg for Sunderland with a cargo of grain, but while prosecuting that voyage she became helpless at sea, and had to accept salvage services from another steamer, which towed the "Progress" into Sunderland. It is now admitted that it was the fault of the captain of the "Progress" which led to the helpless condition of that vessel at sea, and rendered the salvage necessary. The fault was that he had failed before sailing from Hamburg to take on board a sufficient supply of coals for the voyage, and had thus started on his voyage with a ship that was not seaworthy. The salvor's claim was the subject of litigation, which ended in the pursuers being held liable for the sum of £350 and costs. This included the sum due for salving the cargo, for which in ordinary circumstances the owners of the vessel would not be liable; but the owners of cargo repudiated any liability for salvage, on the ground that the "Progress" when she started on her voyage was not seaworthy, in breach of the implied warranty in the bill of lading. The pursuers were advised (obviously well advised) that this contention of the owners of cargo was sound, and they therefore acknowledged liability for and paid the salvage, as I have said, for cargo as well as ship.

The present action is brought by the pursuers to recover from the defender the amount so paid for the salvage of the cargo. The Lord Ordinary has assoilzied the defenders, and I think his judgment is right. I have been unable to discover any ground on which the present claim can be sustained. It is admitted that it was owing to the fault of the master of the "Progress" that that vessel sailed from Hamburg with an insufficient supply of coals, and that the salvage services were rendered necessary as the direct consequence of that fault. It is also admitted that, looking to the terms of the charter-party, it cannot be regarded as amounting to a demise of the vessel, and therefore throughout its currency the captain was the servant and agent of the pursuers, the owners, and not of the defenders, the charterers. Accordingly, the pursuers, and they only, are *prima facie* responsible for the consequences of their servant's fault. This is conceded by the pursuers. But they claim to be relieved of these consequences in respect of a clause of indemnity in the charter-party, which, as I understand the pursuers' argument, entitles them to be relieved by the charterers of the consequences of the captain's fault. That clause of indemnity is as follows:—"Bills of lading are to be signed at any rate of freight the charterers or their agents may direct if without prejudice to this charter . . . . the charterers hereby indemnify the owners from all consequences or liabilities that may arise from the captain doing so." Now, what is the meaning and effect of that clause? For my own part I have no doubt that it only covers any loss which might arise to the shipowners from the captain signing bills of lading for a freight or freights which would amount to less than the stipulated hire. But I will assume that the clause has a wider specification, and that it covers everything which might bring loss to the shipowners in consequence of the terms inserted in a bill of lading by the captain at the request or on the direction of the charterer. What then? The liability of the pursuers for the salvage of the cargo does not arise out of or depend on anything in the bill of lading signed by the captain under which that cargo was carried. It arose from the ship going to sea in an unseaworthy condition, and the bill of lading, whatever it contained, had no connection with the unseaworthiness of the vessel. This clause of indemnity, therefore, is quite inapplicable to the claim which is now made. The pursuers, however, maintain that the clause of indemnity covers not only loss or prejudice which might arise from what the captain inserted in the bill of lading, but also indemnity from loss or prejudice which might arise from the captain failing to insert something that he should have inserted. I think this could only be so if the thing omitted was omitted on the direction of the charterers. But it is not said that there is any clause usual in bills of lading left out of the one in question, or that the captain refrained from inserting any condition, usual or unusual, at the request of the charterers.

The pursuers, in addition to the argument founded on the clause of indemnity, maintain their right to succeed in their present claim on a clause of exceptions to be found in the charter-party. That clause runs thus—"The act of God, perils of the sea, fire, . . . collisions, strandings, losses,

and damages occasioned thereby, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner." That clause is of no avail to the pursuers in the present case. It is a clause exempting the pursuers from liability to the defenders (and perhaps also exempting the defender in certain possible contingencies from liability to the pursuers) on account of failure to fulfil the obligations imposed by the charter-party, if such nonfulfilment arose from any of the excepted causes. It has nothing to do with the liability of either the pursuers or defenders to third parties. The pursuers try to make use of this clause by saying that if the defenders had inserted in the bill of lading a similar clause to that which I have quoted from the charter-party, then the negligence of the captain in not taking on board a sufficient supply of coal would have been thereby covered, and the holders of the bill of lading thereby barred from maintaining that they were not liable for the salvage on cargo on the ground of unseaworthiness—that this being what the captain had done or left undone by bill of lading, the defenders must answer for the consequences under the indemnity clause. In my opinion the pursuers are wrong in each step of this argument. In the first place, the bill of lading did contain the clause which it is said should have been there. It is distinctly stipulated that the consignees of cargo shall not be entitled to make any claim for non-fulfilment of the bill of lading arising from any neglect, error, or default on the part of the master or mariners "in navigating the ship," which is just another way of saying that the pursuers should not be liable for "accidents of navigation" arising from the negligence, error, or default of the master. The expressions are synonymous, and are found expressed in charter-parties and bills of lading as often in the one way as the other; any advantage, therefore, or protection to be gained by having the exception clause in the charter-party repeated in the bill of lading was afforded to the pursuers. In the second place, neither the clause in the charter-party nor the clause in the bill of lading exempted the pursuers from the duty of supplying a seaworthy ship at the commencement of her voyage. They were bound under this charter-party to supply a seaworthy vessel and to maintain her so throughout its currency, and if they failed so to do they are responsible for all the consequences of the failure. The pursuers can scarcely maintain that the unseaworthiness of their vessel was a thing covered by the exception of liability for the faults or neglect of the master "in navigating the ship," or that it arose from "an accident of navigation" through his fault or neglect. It is well settled that unseaworthiness is not covered by such an exception.

I therefore think that the interlocutor reclaimed against should be affirmed.

LORD MONCREIFF—I am of opinion that the Lord Ordinary's interlocutor should be adhered to. It is now admitted that owing to the fault of the master of the "Progress" she sailed for Hamburg bound for Sunderland with an insufficient supply of coal, and in consequence thereof had to accept the salvage services of a vessel called the "George Baird." Under the time charter between the pursuers and the defenders there was no demise of the ship, and the master remained the servant of the pursuers. This was conceded by the pursuers, and there is ample authority to establish it, and therefore they are responsible for all the consequences of his fault, including the sums which had to be paid in respect of salvage services, unless liability is shifted to the defenders by any of the stipulations in the charter-party. Now, the charter-party does not contain any exemption from liability in respect of the vessel not being seaworthy. In the absence of any such stipulation in a time charter the shipowners must be held to undertake that their ship is seaworthy on leaving each place where the master has an opportunity to refit or refurnish the vessel. If a vessel is sent to sea not properly supplied with coals it is not seaworthy.

It is said that disablement during a voyage owing to an insufficient supply of coals is an "accident of navigation," and so within the exception clause. I am clearly of opinion that this is not so. Such exceptions in a bill of lading do not apply till the voyage has begun. Here the defect existed when the "Progress" left Hamburg. I need only refer to *Steel* v. *State Line Steamship Company*, L.R., 3 App. Ca. 72; *Gilroy, Sons, & Company* v. *Price & Company*, L.R., App. Ca. 1893, p. 56; and "*The Undaunted*," L.R., 11 P. Div. 46.

The pursuers, however, also rely upon the following clause in the charter-party—"Bills of lading are to be signed at any rate of freight the charterers or their agents may direct if without prejudice to this charter, the captain attending daily at the offices of the charterers or their agents to do so; the charterers hereby indemnify the owners from all consequence or liabilities that may arise from the captain doing so."

If I properly followed the argument of the pursuers' counsel, he pleaded that under such a clause, if loss occurs through the vessel not being seaworthy, the charterers are bound to indemnify the shipowners against claims at the instance of the holders of the bill of lading if they, the charterers, fail to insert in the bill of lading an exception of unseaworthiness, and this although there is no such exception in the charter-party, and that the defenders having failed to do so in the present case they must relieve the pursuers of the proportion of salvage expenses effeiring to the cargo.

On the construction and scope of this clause I appreciate the view that it is limited in its application to the case of the shipowner's rights under the charter-party being prejudiced by the rate of freight stipulated for in the bill of lading. If that

is the proper construction of the clause, no liability attaches to the defenders under it, because no question of freight or lien is raised. But I think that it is sufficient for the purposes of this case to adopt another ground of judgment which proceeds on the assumption that the clause has a wider scope, viz., to ensure that the shipowner's position is not prejudiced in any respect by the terms of the bill of lading. In order to establish liability to indemnify the owners, the loss for which they seek to be indemnified must be shown to have resulted from the bill of lading being signed. If I am right in holding that the accident in connection with which the salvage services were rendered necessary resulted from the vessel not being seaworthy, and that unseaworthiness forms no exception to the owner's liability under the charter-party, it cannot be said that the bill of lading was granted to the prejudice of the charter simply because it does not contain the exception of unseaworthiness. The charterers were not bound to place the owners in a better position under the bill of lading than they held under the charter-party.

Again, if, contrary to my opinion, the accident can be regarded as an accident of navigation, claims in respect of such accidents occurring through the negligence of the master are as well excepted in the bill of lading as in the charter-party. The bill of lading contains an exception of, *inter alia* —"Any act, neglect, error, misfeasance, or default of masters, &c., in the service of the vessel in navigating the ship."

Therefore, taking the most favourable view of the clause for the pursuers, viz., that it is not confined to prejudice caused by the rate of freight in the bill of lading, the defenders have not rendered themselves liable to indemnify the pursuers. If the accident occurred through the vessel not being seaworthy, the sole liability properly rests with the pursuers, whether in a question with the owners of the cargo or the defenders. If, again, it was an "accident of navigation," the holders of the bill of lading had no claim of relief against the ship, because such a claim is excluded by the terms of the bill of lading; and the pursuers having thought fit to take upon themselves, as in a question with the holders of the bill of lading, liability for expenses effeiring to the cargo, without giving any notice whatever to the defenders, against whom they now make a claim of relief, they, the pursuers, must bear the consequences.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Ure, Q.C. — Aitken. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders and Respondents—Balfour, Q.C.—Cullen. Agents—J. & D. Smith Clark, W.S.

Tuesday, January 25.

FIRST DIVISION.

[Sheriff Court of Inverness.

MACGREGOR *v.* MACLENNAN'S TRUSTEES.

Bankruptcy — Sequestration of Estate of Deceased Debtor — Charges Incurred in Administration — Retention.

A law-agent who was employed by a testamentary trustee in connection with the administration of the trust-estate, obtained decree against the trustee for the amount of his account. The estate was, with the knowledge and consent of the agent, handed over to the beneficiaries and subsequently sequestrated while in the hands of their nominee. A claim was lodged in the sequestration by the agent, in which he claimed to be preferably ranked for the sum for which he had obtained decree, and for a sum due under a subsequent account. The trustee in the sequestration rejected the claim, but admitted it to an ordinary ranking.

Held that the agent was not entitled to a preferential ranking.

Question—Whether he was entitled to an ordinary ranking.

Mr Alexander MacGregor, solicitor, Inverness, acted for some years as law-agent to Mr Murdo Mackenzie, the testamentary trustee of the deceased Duncan MacLennan, farmer, Muir of Ord, Ross-shire, and was employed by him to do work in connection with the management of the trust-estate. In respect of this work Mr MacGregor had accounts for the sums of £93 and £45, and in May 1894 he obtained of consent in the Sheriff Court of Inverness a decree against Mr Mackenzie, as trustee aforesaid, for the first of these sums.

About that date the whole estate was handed over by Mr Mackenzie, with the knowledge and consent of Mr MacGregor, to Mr Robert Munro, accountant, Alness, on behalf of the beneficiaries under Mr MacLennan's settlement.

Two years later the estate was sequestrated and Mr John Sandison was appointed trustee in the sequestration.

An affidavit and claim was lodged by Mr MacGregor, in which he stated that the trust-estate was at the date of the sequestration indebted to him in the two sums mentioned above, "being the amount of accounts for professional business and cash disbursements incurred to him on the employment of Murdo Mackenzie . . . as trustee and executor acting under the trust-disposition and settlement of Duncan MacLennan . . . in connection with the administration of the said trust." In the affidavit as originally lodged he asked merely for an ordinary ranking, but being allowed to amend he claimed to be ranked preferably for the two sums.

The trustee pronounced the following deliverance—"The trustee rejects the claim