should remain in the hands of the seller, because when an intention of taking anything comes to be imputed to persons desiring to purchase, they can have no wish that the subjects to which they have acquired right should remain in the hands of the person from whom they have bought, so that he might be enabled to make the subjects over by gift or sale to somebody else and exclude their right.

But if there had been no averment at all in this case that a title was to be taken, I should have thought that implied in the statement that the land was to be purchased. But then it is distinctly averred that it was a condition of the agreement that a title should be taken, and it could not be taken in any other way except by the defender recording it, or else by the pursuer coming in as principal and suing upon the contract. It is also perfectly true that no mandate was given to the defender to frame a conveyance, but that is a totally different thing from taking a title, because when a purchaser intimates to a seller that he requires a conveyance to be granted in his own name or in the name of somebody else, then he "takes a title" in the sense in which I have been using that expression now, and in the only sense in which it is necessary to be considered with reference to the application of this doctrine of mandate. I authorise a man to buy for me and to take a title in my name. I do not entrust him to draft the conveyance—that is not his province—but I do instruct him to demand from the seller the execution and delivery of a conveyance which will be good to me and not to him.

On the whole matter, therefore, I have come to the conclusion that there is here a perfectly relevant averment (1) that the pursuer employed the defender to make a contract of purchase and sale for his behoof, and (2) that he authorised the defender to make that contract in his own name, but with a condition that when it came to be executed the conveyance was to be granted to the pursuer himself and not to the defender.

Now, if the pursuer had postponed his interference a little longer and the defender had demanded and obtained a conveyance in his own name, which of course he could easily have done, because the seller knew nothing of the pursuer, then I can entertain no doubt whatever that that would have been a conveyance which the pursuer would have been entitled to reduce upon the averments in this action.

That is exactly the case which the late Lord President figures in *Marshall* v. *Lyell.* Where the fraud or wrong that is done to the person having truly the beneficial interest consists in the constitution of the absolute title, it is perfectly settled law that the statute does not apply in such cases. The averment being that the absolute title in your favour was taken by you by fraud, and without my consent, the pursuer is entitled to have that allegation proved by parole evidence. Does it, then, make any difference that, instead of waiting until the wrong which he apprehends has been completed, the pursuer comes in at an earlier stage and endeavours to prevent the title being taken in a wrongful way at all? I think not. I must confess that I do have considerable difficulty, arising from the form of the action, at this stage of the argument which I am now considering, because it seems to me that the natural and simple action in these circumstances would be an action against the defender in which the seller was called as a party, to have both of these parties decerned and ordained to execute a conveyance in favour of the pursuer. But, as I said at the beginning, I do not think the difficulty is created by the form of the action here. In so far as the declaratory conclusion goes, that is applicable enough to a case of mandate or agency as well as to a case of trust. But then when the pursuer goes on to the operative conclusion, and demands that the defender shall be decerned to denude, I must own that that does seem very like an assumption that the defender is a party vested with a right which it is necessary he should be denuded of. That would be a proper operative conclusion attaching to a declarator of trust. But then there are certain matters following upon that which I think would enable the pursuer to get a judgment, because although he did not take the simplest form to effectuate his right by asking a decree that he was entitled to a conveyance, he may effectuate it also by impugning the defender's right to demand a conveyance. If there were, however, any substantial difficulty in working out the matter in accordance with the actual conclusions of the summons, I think that that might be easily met by an amendment.

On the whole matter, therefore, I am unable to concur in the judgment which your Lordships propose, and I think that a proof ought to have been allowed to the pursuer.

The Court adhered.

Counsel for the Pursuer—Ure, Q.C.—J. C. Watt. Agent—Alex. Ross, S.S.C.

Counsel for the Defender—Guthrie, Q.C.—Craigie. Agents—J. & A. F. Adam, W.S.

Tuesday, January 18.

SECOND DIVISION.

[Bill Chamber.

MESS *v.* SIME'S TRUSTEE.

Bankruptcy—Voluntary Trust-Deed—Constitution of Trust—Possession.

A granted a deed in favour of B, a chartered accountant, "as trustee and in trust and as my commissioner," containing a general disposition of his whole estate, and wide powers of management, *inter alia*, for the purpose of paying his debts. B, when acting under this deed, made certain advances and outlays, and, on A's estates being subsequently sequestrated, he

claimed a preferential ranking in the sequestration for these advances and outlays and for his remuneration, which was refused by the trustee in the sequestration. In an appeal from this deliverance, *held* (*diss.* Lord Young) that the appellant's averments were irrelevant in respect that they did not unequivocally disclose that he had been in possession of A's estates as trustee for behoof of his creditors, but pointed to his having acted merely as a factor and commissioner financing his client, who still remained in possession of his estates.

On 26th July 1895 Alexander Sime, who was tenant of the farm of Moncur, Perthshire, under Lord Kinnaird, in terms of a lease which expired at Martinmas 1896, granted a deed in favour of John Mess, C.A., Dundee. The dispositive clause was in the following terms:—"I do hereby dispone, assign, convey and make over to and in favour of John Mess, chartered accountant, Dundee, as trustee and in trust and as my commissioner (but hereinafter called trustee), for the uses, ends, and purposes after specified, and to the assignees and disponees of the said trustee, all and sundry lands and heritages, leases, stock, crop, implements of husbandry, machinery and machines of every description, policies of insurance, book and other debts, contracts of every kind, and goods and gear, debts and sums of money, and all other funds, estates and effects, heritable and moveable, real and personal, of whatever kind or denomination and wheresoever situated at present belonging or addebted to me, or to which I have right or title, or in which I am interested in any way, with the whole vouchers, titles, and securities of and concerning the same, and with all that has followed or is competent to follow thereon, with full power to the said trustee to enter upon and take possession of, and to do everything in the premises which I could have done before granting hereof; surrogating hereby and substituting the said trustee in my full right and place, but declaring that these presents are granted for the uses, ends, and purposes following."

The deed conferred powers of management and sale, including power to act, transact, and manage with regard to the farm of Moncur and the lease thereof, and the stock, crop, and implements of husbandry and others thereon, and also to give up or renounce the lease on such terms as the trustee should think right. The deed also conferred power to sue and defend actions, to pay preferable debts and the expenses of the trust (including such allowances to the granter for any services of his to or in the trust as to the trustee might seem right), and to pay the debts of "my whole just and lawful creditors as to the date hereof," with other powers usual in a trust-deed for creditors.

Mr Sime's estates were sequestrated on 10th July 1896, the first deliverance on the petition being dated 2nd July.

In that sequestration Mr Mess lodged an affidavit and claim for £898, 16s. 7d., with a relative account of his intromissions "as factor and commissioner for Alexander Sime, farmer, Moncur, and as trustee upon his estate, acting under trust-deed for behoof of creditors, dated 26th July 1895." The affidavit set forth that at the date of the sequestration of Mr Sime's estates "the deponent held the said estates in security and for payment of all his advances and expenses, and remuneration as trustee foresaid," and that the trustee in the sequestration took the estates as they stood in the bankrupt. He therefore claimed to be ranked *primo loco* on the whole estate for full payment. And he further specially claimed that, having paid for the seed and labour of crop 1896, he should be preferred upon the fund realised from that crop to recoup him for his advances, expenses, and remuneration.

The trustee in the sequestration sustained the claim to the extent of £775, 11s. 4d., being the balance still due for advances and outlays and interest on advances made to and for Sime in the course of Mr Mess's actings under the deed above mentioned, but only to an ordinary ranking, rejecting the claim for a preference on the ground "that the claimant has never held the sequestrated estates in security, and that any payment by him for seed and labour for crop of 1896 did not entitle him to a preferable ranking."

The trustee rejected Mr Mess's claim altogether to the extent of £123, made up as follows:—(1) Accounts for law expenses incurred after the date of sequestration, £52, 8s. 4d.; (2) Account incurred to J. C. Dow, solicitor, Perth, *in causa Kinnaird* v. *Sime*, for appointment of manager, £12, 0s. 11d.; (3) Trustee's remuneration and postages charged at £111, 6s., rejected on the ground of overcharge to the extent of £58, 16s.

Mr Mess appealed to the Lord Ordinary on the Bills (Lord Pearson), and craved that the trustee's deliverance might be recalled, and that the trustee should be ordained to rank the appellant as a preferable creditor on the said estate, and to make payment to the appellant of his full claim of £898, 16s. 7d., under deduction of the sum of £12, 0s. 11d., being the amount of an account incurred in connection with the case of *Kinnaird* v. *Sime* for appointment of manager, which it was admitted had now been paid by Lord Kinnaird.

The appellant in the statement of facts annexed to his note of appeal set forth the material parts of the deed granted by Sime in his favour, and also made certain averments with regard to the relations between him and Sime and Sime's creditors on which he based his claim to a preference. The nature of these averments, with the exception noted below, and of the pleas-in-law stated for the appellant and for the respondent, the trustee, sufficiently appears from the Lord Ordinary's opinion, *infra*.

A letter was produced, in which the appellant, when writing to the landlord's factor requesting to know if he had any recommendation with regard to the scheme

of farming to be adopted for the last year of the lease, signed himself "John Mess, Commissioner for Mr Sime."

On 14th December 1897 the Lord Ordinary on the Bills pronounced the following interlocutor:—"Finds the averments of the appellant are not relevant to sustain the preference claimed by him in the sequestration, and affirms the deliverance of the respondent appealed against in so far as it rejects said preference: Further, affirms the said deliverance in so far as it disallows the three following items claimed by the appellant, being law expenses incurred by him, viz., (1) J. C. Dow, solicitor, Perth, 17s. 6d.; (2) J. Smith Clark, S.S.C., Edinburgh, £32, 2s. 1d.; and (3) Thomas Thornton, Sons & Company, Dundee, £18, 8s. 9d.: Further, in respect of the appellant's admission in statement 11 of the record, disallows the sum of £12, 0s. 11d. of law expenses incurred in connection with the action *Kinnaird* v. *Sime*, the disallowance of which was also appealed against, and affirms the respondent's deliverance regarding the same: Further, as regards the sum of £58, 16s., being the portion of the appellant's remuneration which has been disallowed by the respondent, before further answer remits to the Accountant of Court to inquire into the whole claim of the appellant for remuneration, and to report thereon: Reserves in the meantime all questions of expenses, and grants leave to reclaim against this interlocutor."

Opinion.—[*After summarising the facts as narrated above*]—"Mr Mess now appeals, and asks in the first place to be allowed a proof of his averments instructing that he held the estate in security.

"His averment is that he accepted the trust created by the trust-deed and commission, and in virtue thereof immediately entered into the possession and management of Mr Sime's whole estates and effects, and continued to possess and manage the same down to the date of the sequestration.

"The relevancy of the appellant's averments is challenged by the respondent, who contends that although this general averment may be relevant enough, an examination of the trust-deed on the one hand, and of the appellant's detailed averments on the other, discloses that he has no relevant case to go to proof in support of his claim for a preference. It is urged that, alike in the trust-deed and in the affidavit and claim, the appellant appears in two characters, in one of which it was admitted he has no claim to a preference, but that even assuming him to have had a title as trustee, it was never made public, was not completed by intimation, and was not followed by possession as trustee.

"Now, the bulk of Mr Sime's estate seems to have been the lease, and the farm stocking, crops, and implements. As to the lease itself, it is not averred that the appellant ever completed his title to it as assignee by intimation to the landlord. He explains that the landlord 'was aware generally of the appellant's relation to the said Alexander Sime, and notwithstanding the terms of his lease took no steps to bring the same to an end.' In other words, although the lease contained a clause of irritancy (optional to the landlord) in case the tenant should assign the lease or divest himself of his property by trust-disposition or otherwise, the landlord refrained from exercising this power, the result being that Mr Sime remained tenant. The appellant did not adopt the lease.

"The largest item in the claim of the appellant is a sum of £676 advanced by him on 16th August 1895, in payment of two years' rent of the farm. The rent had fallen into arrear, and at the date of the trust-deed a decree of sequestration for rent had been obtained at the instance of the landlord. On payment of the arrears and expenses, and consignation of the current term's rent, the sequestration was recalled. The appellant avers that he advanced the money on the faith of a letter which he obtained from Mr Hay (afterwards trustee in the sequestration), dated 14th August 1895, agreeing as a creditor of Mr Sime to postpone his own debt to Mr Mess's claim for repayment out of the first proceeds of the farm when realised. But with reference to this and various other averments pointing to personal exception against Mr Hay, I may say that they do not appear to me relevant to the present question, which is, whether Mr Mess is entitled to a preference against the estate generally.

"The appellant's detailed averments of possession are contained in the fifth and following statements. He there avers that, in virtue of the powers conferred on him by the trust-deed and commission, he continued to manage the said Alexander Sime's whole affairs, and in particular did the things there set forth. There was obviously no change in the actual possession, for the appellant says that he cultivated the farm 'by means of the said Alexander Sime as farm manager.' His statement is that he made numerous visits to the farm, sold stock and produce off the farm through Mr Johnston, an auctioneer, Mr Hay and 'Mr Sime as his manager,' gave and sanctioned orders for manure and other supplies, paid taxes, accounts, and wages (in addition to the rents), defended actions raised against Mr Sime, and among others an action by the landlord for appointment of a manager on the farm, and corresponded with all the other creditors and arranged that they should hold over their claims against Mr Sime. He also states that in March 1896 he arranged with Mr Johnston that, in order to resume his own advances, the latter should give him a bill for £500 on the crop and effects being made over and assigned to him for sale, and that thereupon Mr Johnston should enter into possession of the farm, stocking, crop, and others, and sell the same at such time and on such terms as he should think fit, or otherwise at such time and on such terms as he and the appellant should agree upon. The effects were inventoried by Mr Johnston, and on 24th March 1896 a docquet was appended to the inventory bearing that the effects 'are hereby made over and con-

signed to John Johnston, licensed valuator and auctioneer, Dundee.' This was signed 'John Mess, trustee and commissioner to Alexander Sime.—A. Sime.' The bill was granted, but was retired by the appellant. Then on 17th July Johnston advertised a displenishing sale to take place at Moncur on 22nd July, but this was stopped by interdict, in respect that sequestration had been applied for on 2nd July and awarded on 10th July, and that the meeting to elect a trustee had been fixed for 21st July.

"In addition, the appellant avers generally that he tilled the farm, and manured, sowed, and planted it for crop and year 1896, and generally provided and cared for the said crop down to the date of the sequestration, paying for all labour, manure, and seed.

"On this latter averment the appellant claims a special preference over the proceeds of that crop, but I am not aware of any principle applicable to such a case as the present which would entitle him to such a preference. I think this must stand or fall with his general claim for a preferable ranking.

"On the general claim the case intended to be made by the appellant is clear enough. It is fully and specifically stated, but in my opinion it fails on relevancy. Taking all the appellant's averments together, and reading them in connection with the admitted documents, including the trust-deed, I do not think that they set forth a case of a trustee having (when sequestration was awarded) the trust-estate in his hands, subject to his lien for outlays and remuneration.

"But further, the respondent has rejected certain items of the appellant's claim, and an appeal is taken against that. (1) He has rejected a sum of £52, 8s. 4d., being the law expenses incurred after the date of the sequestration. These were incurred wholly in connection with the note of suspension and interdict above referred to against the displenishing sale. I think that the appellant resisted that interdict at his own risk, it being then obvious that the sequestration which had already been awarded would carry the estate to the trustee in the sequestration subject to all just preferences previously acquired by the appellant. These expenses seem to be rightly disallowed. (2) The claim for £12, 0s. 11d. is departed from on record. (3) As to the appellant's claim for a hundred guineas in name of remuneration, of which the trustee has allowed one-half, I think this should be remitted to the Accountant of Court.

"The appellant asked that questions of expenses should meanwhile be reserved, and I see no objection to that course, though the reservation does not imply any doubt that the respondent will be found entitled to expenses generally."

The only averment not referred to in this opinion which was founded upon specially in argument, was one to the effect that one of Sime's creditors having poinded and taken steps with a view to selling a portion of Sime's effects, was stopped by interdict at the instance of the appellant as trustee and Mr Johnston.

The appellant reclaimed, and argued—(1) The averments in the appellant's statement of facts were relevant averments of such possession under a trust-deed as was sufficient to give the appellant the preference claimed by him. The appellant was no doubt bound to denude in favour of the trustee in the sequestration, but only under reservation of all his claims and preferences. In *Thomson* v. *Tough's Trustees*, June 26, 1880, 7 R. 1035, where the circumstances were similar, the preference of the trustee under the voluntary deed was sustained, and that case ruled the present. The deed here was primarily a trust disposition whereby the insolvent's whole estates were conveyed to the appellant. Such a deed was never granted in favour of a factor and commissioner. The appellant's actings as averred were those of a trustee for creditors—getting the sequestration for rent withdrawn, interdicting a poinding creditor, and consigning the insolvent's effects for sale. No meetings of creditors were held, but the deed was no secret to them. They all knew of it, and acquiesced in the appellant acting under it. If the creditors acted as alleged they must be held to have acceded to the trust-deed. No other creditor was entitled to found upon the want of intimation to the landlord of the assignation of the lease, as that was a matter which concerned no one but the landlord and the appellant. If the appellant was and acted as a trustee for creditors, then his possession of the estate through Sime was sufficient. (2) Apart, however, from the question whether the appellant was in possession of the estate, he was entitled to a preference for his advances and outlays. He had secured and preserved the estate for behoof of the creditors, and it was unfair that he should now be left with a mere ordinary ranking for what he had expended in doing so—see *Thomson* v. *Tough's Trustee*, *cit.* Neither in the report of that case nor in the session papers was there any indication that there was any definite arrangement between the trustee and the creditors as to carrying out the contract. (3) As regards the first item rejected altogether by the trustee, if there was to be inquiry, that question might as well be left for decision after proof had been led. The appellant did not object to the question of the amount of his remuneration being remitted to the Accountant of Court.

Argued for the respondent—The appellant's averments did not amount to more than that the appellant was acting as a professional man financing a client in difficulties, and did not unequivocally set forth such actings as were only consistent with his being a trustee for creditors in possession of the insolvent's estates. The deed appointed the appellant commissioner for Sime as well as trustee. He could not be both commissioner for the bankrupt and trustee for his creditors. The two positions were inconsistent with one another. The

appellant's averments showed that the capacity in which the appellant really acted and put himself forward was as commissioner for the bankrupt. There was no trace here of the usual administration under a trust-deed for behoof of creditors. There was no publication or intimation of the deed. The appellant never took the creditors as a body into his counsels. Nothing was done to give the creditors any right under the deed. The appellant never really got possession of the estate. The only way in which he could have done so would have been to get himself accepted as tenant in place of Sime. No doubt the lease was conveyed to the appellant under the deed, but he never took possession. Therefore the tenant still remained in possession under the lease, and it was not possible for the appellant to have possession of moveables upon a farm still in the possession of Sime. It was not indeed maintained that the appellant had actual possession, but it was alleged that he had possession through Sime as his agent. If, however, the appellant was really acting as Sime's factor and commissioner he could not have possession through Sime, because a factor could not have possession of his constituent's property through the constituent as his agent. The appellant might have taken possession under the deed, but probably to avoid personal liability he preferred not to do so, and to hold himself out as Sime's commissioner. The result was that he was not entitled to any preference for his advances, outlays, and remuneration. (2) As a mere *negotiorum gestor* and disburser he was not entitled to any preference. (3) The expenses incurred subsequent to the sequestration were incurred by the appellant in defending himself against an interdict brought for the purpose of preventing him from selling the bankrupt's effects in order to pay himself, and he was not entitled to get from the general body of creditors the expense of maintaining unsuccessfully his own interest against theirs.

LORD JUSTICE-CLERK—I think the Lord Ordinary's judgment should be adhered to. By arrangement with Sime, Mess undertook the duty of looking after the farm to the end of the lease. Unless the creditors acceded, their rights could not be affected. We find from the record that Mess represented himself in his communications with the landlord as factor and commissioner for Sime rather than as trustee for creditors, and he certainly did not obtain the landlord's accession. The averments as to the other creditors are quite vague and general. Sime remained tenant, and remained in possession. There is nothing averred which indicates that Mess obtained a transference of possession or became lessee. If he has brought himself into such a position that he can only get an ordinary ranking for his advances, that is a hardship, but not in any other sense than there is hardship to anyone who interposes to make advances to one in difficulties in the hope that all will come right, and that loss already suffered will be got over, and he will make a profit either in interest or business charges. Sequestration supervened, and in a question with the trustee Mess is in the same position with other creditors.

I quite see that behind this there is a question between Mess and Hay as an individual creditor, but that is a matter which has nothing to do with the present question.

LORD YOUNG—The purpose of the disposition by Sime to the appellant (Mess) was to insure the cultivation of Sime's farm in the last year of the lease and realise the crop. No other is suggested, and there could be no other. The appellant was not a prior creditor of Sime desiring security for his debt, and, if he had been, the disposition could not possibly give such security. He could not, so far as I can see, take any benefit beyond or other than reasonable remuneration for his services as trustee in carrying out the purpose of the trust. If that purpose was successfully achieved, the parties benefited would be the truster and his creditors, the benefit being the raising and realisation of the waygoing crop, which it was thought, I suppose on reasonable grounds, would otherwise be lost. It does not occur to me how any others could be benefited, or the creditors could be injured or prejudiced by the deed or anything done or capable of being done under it in pursuance of its purpose.

Now, in dealing with the case, I must assume that the appellant's averments in point of fact are true, and that in so far as disputed he is prepared to prove them. They amount to this, that he (the appellant) acted upon the deed, and completely and successfully executed the trust thereby committed to him for the sole benefit of the truster and his creditors, who have, as was contemplated, reaped that benefit accordingly, and that none the less because of the intervening bankruptcy and sequestration of the truster (Sime).

The question then—if I rightly apprehend the case—comes to be this, Can the truster and his creditors for whose benefit the deed was granted, and its object and purpose carried out, be permitted to take the benefit thence resulting without meeting the trustee's proper outlays and charges or allowing them to be deducted? I think it clear, as I have indicated, that the intervening bankruptcy and sequestration of the truster ought not to prejudice the apellant's otherwise legitimate claim for his proper outlays and just charges in procuring this benefit. His claim is only on the property, the creation or procuring of which constitutes the benefit—that is to say, the waygoing crop. Assuming the truth of his averments, he sowed and reaped that crop and placed it in the hands of a salesman whom he had employed to sell it, all in pursuance of his duty as trustee under the trust I have referred to. I think it is clear that the truster (Sime) would not have been entitled to seize it in the hands of the salesman, or vindicate his right to it in a question with the appellant except on the condition of satisfying the appellant's just

claims. But the respondent as trustee in Sime's sequestration could take this crop only as Sime had right to it *tantum et tale*.

The disposition by Sime to the appellant conveys the disponer's whole property, but, as I understand, he had no other property than the lease of the farm (in its last year), and his farm implements on the farm necessary for working it, and at least we are concerned with no other. It was of course incapable of conveying the lease without the landlord's consent, which was never given or asked, or I think contemplated. The landlord was not bound by it, and his rights could not be prejudiced by it. But so far as Sime or any other than the landlord was concerned, Sime was by the deed divested, and the appellant invested with everything on the farm belonging to Sime, and with Sime's right to sow and reap the waygoing crop and sell and turn it into money. Then according to the appellant's averments (if proved), he took possession of everything which Sime had on the farm, raised the crop, took possession of it, and delivered it to the salesman to be sold, and to hand the price to him.

I am therefore of opinion that the appellant's claim is good if the facts averred by him are true, and that his motion to be allowed a proof ought to be granted.

LORD TRAYNER—I think that the Lord Ordinary is right. It may be that the apellant has been unfortunate in his connection with Sime's affairs, and has incurred serious loss thereby; but if the principles of law applicable to this case require that we should repel the appellant's claim, we do him no injustice in repelling it.

The one point in this case which I consider material is, Did possession follow on the conveyance by Sime to the appellant? The mere statement that possession did follow is not sufficiently specific to be admitted to probation, and the appellant declines to make any amendment of his record. But the other statements made by the pursuer are rather inconsistent with the view that any real possession followed. They are more consistent with the view that the appellant acted in all that he did as the commissioner or agent for Sime. It may indeed be open to question whether the conveyance by Sime was a conveyance in trust for creditors, or was not rather a conveyance in trust, primarily at all events, for the benefit of the granter. If a trust for creditors, it is strange that the usual course in such cases was not followed. There was no advertisement or other public intimation that such a trust-deed had been granted, and no circular intimating the granting of the trust-deed to any of the creditors. But assuming the deed to be a trust for creditors, no creditor acquired any right under it until he had acceded to the trust, or something had been done by the alleged trustee which gave any creditor a *jus quæsitum* under the trust. Neither the one thing nor the other happened here. Now, did the deed confer any real right in the appellant until possession followed on it. It is said that the appellant took and had all the possession which he could have. I think not. He left Sime in full possession, just as he had been before he granted the conveyance. It would not have been difficult for the appellant to enter into a possession which would or might have given him a lien for his advances. If he had taken up the lease and become the tenant of the farm, he would then have been in possession of the land, and all that was on it. Or if he did not choose to become the tenant (and so become personally liable for the rent), or if the landlord had refused to accept him as tenant, he could have taken corporal possession of the whole moveables on the farm and removed them (subject to the landlord's right) to a place where they would have been under his control and subject to his orders. He did neither—he did nothing but leave the whole estate of Sime just where and as it was prior to the date of the conveyance.

The truth is that the appellant was financing for Sime, and trying to extricate him from his embarrassments, but he did so without securing himself. He did not acquire by delivery or possession of Sime's moveable estate any effectual security over it which gave him any claim thereon preferable to other creditors.

The letter by the respondent dated 14th August 1895 does not affect in any way the decision of the present case. It may give rise to some question between the appellant and Hay as an individual creditor, but with any question of that kind we are not now concerned. That letter could not, in any view of it, confer on the appellant any right on Sime's estate preferable to the general body of creditors. I am bound to say that in my opinion it does not prove what it was said to prove, namely, that the appellant in making advances on behalf of Sime was doing so as a trustee in the interest of the whole creditors.

I think therefore that the reclaiming-note should be refused.

LORD MONCREIFF—The Lord Ordinary "finds that the averments of the appellant are not relevant to sustain the preference claimed by him in the sequestration." I agree with the majority of your Lordships that this judgment should be affirmed. All the trustee did was to reject the appellant's claim for £775 as preferable, while admitting it to an ordinary ranking. All that we decide is that the appellant has not relevantly averred possession upon which his claim to a preference rests. At the date of the trust-deed the estate consisted of the right to occupy the farm as tenant, and of stock and crop. The deed may be described as a combination of a trust for creditors, and a trust for management. For some reason the former capacity was kept by the appellant in the background in the documents quoted on record, and the apellant's capacity of factor and commissioner for Sime was put forward. Hay's letter of 14th August 1895 has been referred to. In a letter from the appellant to the landlord

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.