the action, the defender would have no proper decree against her.

The pursuer argued—The report of the commission could not be looked at before trial, and only then upon proof that the witness was unwell and unable to attend personally. A disclaimer, and nothing else, would entitle the Court to stop the action.

Authorities cited—*Noble* v. *Magistrates of Inverness*, 8th February 1825, 3 S. 516; *Thomson* v. *Candlemakers of Edinburgh*, 25th May 1855, 17 D. 774; *Cowan* v. *Farnie*, 4th March 1836, 14 S. 634; *Duncan* v. *Salmond*, 6th January 1874, 1 Ret. 329; *Lawsons* v. *British Linen Bank*, 20th June 1874, 1 Ret. 1065.

At advising—

Lord President—In this case neither party has, I think, ventured to impugn the proposition that a counsel's gown is a sufficient mandate, and duly authorises him to appear and represent his client. The only question is, how is this presumption to be met? It is hardly a *presumptio juris et de jure*, although very nearly amounting to that. I think it can only be met in one way, if the object be to stop the action, viz., by the production of a disclaimer. I should be averse to check the progress of any case except on this sole ground, which would necessitate an inquiry into the circumstances of the case. But here there is only a bare averment by the defender, and I must say, a very remarkable one. A mandate from the pursuer to her agent is produced; the fact of her residence out of Scotland has required this, as it was necessary, until a recent statute (Judgments Extension Act, 1868), that a party so resident should be represented by a mandatory sisted in the process. The mandate in this case is a very formal document; it is a probative instrument, tested according to Scotch law, and, further, signed, sealed, and delivered according to English forms. The averment of the defender is that this action has been raised and carried on without the pursuer's authority. I see no other way in which to construe this statement except on the footing that the mandate is a forgery, or was withdrawn before the action was raised. The averment is utterly irrelevant as it stands. What we are asked to do is to send it to probation. But if this mandate is not to be held as good, where is the objection to such documents to stop? On the ground of expediency, which is important in matters of practice, we cannot give effect to the contention of the defender, and upon principle it is still more inadmissible. The defender may communicate with the pursuer, and the latter may intimate a repudiation of the authority she has given, if she so chooses.

I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

Lord Deas—Any specialty which might have been founded on in this case on the ground of the pursuer being out of the kingdom, has been removed by the fact that her agent holds a mandate from her. No objection has been taken that this is not a probative document, or on any other ground. It is tested according to our law, and further, bears to be tested according to the law of England. I entirely agree with your Lordship that the contention of the defender can only be supported by a disclaimer from the pursuer. There is no instance, so far as I can remember, in which an objection to the progress of a case like the present has been sustained on any other gronnd. This plea in law is an entire novelty, and it would be very inexpedient to allow its introduction and give effect to it. It would enable any defender, however pressing the action, and however objectionable delay was, to interrupt its course, that he may be enabled to ascertain whether the pursuer has duly authorised it or not. I am of opinion that the Lord Ordinary's interlocutor must be adhered to.

Lord Ardmillan—I entertain no doubt. The presumption with which the law covers a counsel at the bar is that he represents his client under a sufficient mandate. I don't say that the presumption is *juris et de jure*, but it can only be rebutted by a disclaimer. In the absence of this, the power of counsel cannot be questioned. In this case we have more; there is a mandate completed according to the forms of both England and Scotland, which must be held to be quite conclusive. The pursuer's deposition has been taken, and we are asked by the defender to inquire into it; but it cannot be opened up or referred to at this stage, and must continue to lie *in retentis*. I think the interlocutor of the Lord Ordinary is right.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuer—Fraser—Campbell Smith. Agents—Messrs T. &. W. A. M'Laren, W.S.

Counsel for Defender—Dean of Faculty (Watson)—Asher. Agents—Hill & Fergusson, W.S.

Tuesday, November 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MILLER & CO. *v.* POTTER, WILSON, & CO.

Ship—Liability as Shipowners for Advances to Master—Bond of Bottomry.

A firm of shipowners acting as agents for a navigation company, ordered a ship on commission, advanced money for her outfit, and employed a captain, who, under their direction, took her out to a distant port, there to await the instructions of the company. The ship was registered in name of the firm, though afterwards transferred in security for a loan to that of a bank. The captain on his voyage out, for sums advanced to him for necessary repairs, granted a bond binding himself, heirs, executors, and administrators, and also the ship with her tackle, &c., and the freight, and at the same time drew a bill on the firm for a similar amount. The navigation company having failed, the firm obtained a transfer from the bank, sold the ship and received her price. In an action against them at the instance of the holders of the bill, *held* (1) that as the captain was employed by, and received his authority from the firm, he had power to bind them, although not at the time the registered owners of the

vessel, for necessary debts incurred by him, as master of the ship, and that they were liable for the amount contained in the bill; (2) that this liability was not affected by the fact that the captain had granted, as an additional security, a bond which was invalid as a bond of bottomry.

Observations per Lords Justice-Clerk and Gifford on the essentials of a valid bottomry bond.

This was an appeal from the Sheriff-court of Lanarkshire in an action at the instance of Alexander & George Miller & Company, merchants in Glasgow, against Potter, Wilson, & Company, merchants and shipowners there. The summons concluded for payment to the pursuers of "the sum of £250 sterling, being the contents of a bill drawn by William Graham, master of the steamer 'Pareora' of Glasgow, then at Paramaribo, upon the said Potter, Wilson, & Co. in favour of Messrs Miller, Bros., & Co. of Paramaribo, and endorsed by them to the pursuers, dated 17th July 1867, and payable thirty days after sight, and which bill was duly protested for non-payment and non-acceptance—which bill the said Potter, Wilson, & Co. were bound to have accepted and paid, in respect that it was drawn by the said master in security or payment of necessary furnishings or advances made to or on account of the said vessel, which had put into Paramaribo aforesaid in distress, and which advances and furnishings could not otherwise be obtained, the defenders being at the time of the drawing, and when the said bill was presented for acceptance, the employers of the said master, and the real owners or parties beneficially interested in the property of the said steamship, and *lucrati* by the advances and furnishings foresaid, and having ultimately sold and received the full price thereof, notwithstanding a bottomry bond granted by the said master to Mr Duncan Cameron Munro, now deceased, British Consul at Paramaribo aforesaid, dated 19th July 1867, which bottomry bond was held by the said Duncan Cameron Munro in trust for the pursuers to the extent of the amount of the bill founded on in the present action, and the sale of the said vessel was allowed by the said Duncan Cameron Munro on the faith of the representation made by the defenders' attorney or mandatory at Bahia, where the sale took place, that the said debt, and all other debts secured by the said bottomry bond, would be duly paid."

The defenders in their defences stated that the steamer "Pareora" had been supplied, and the master, Captain Graham, engaged by them on the instructions of Messrs George G. Russell & Co., merchants, Dunedin, acting on behalf of the 'Southern Steam Navigation Company (Limited)" in New Zealand, who required the ship for their trade between Dunedin and Lyttleton, New Zealand. They alleged that Captain Graham, when engaged, was specially informed that he was to look for further instructions to Messrs G. G. Russell & Co., and that the real owners of said steamer, and the parties beneficially interested therein, were the said Southern Steam Navigation Company (Limited) and George G. Russell & Co., their agents. They were the employers of the master, and they alone were liable for furnishings or necessaries to the steamer or her crew. They denied that the master had any authority to pledge their credit, or that he had granted any valid bond, and called upon the pursuers to produce the alleged bottomry bond.

The defenders further stated, that as they had not received the last instalment of the price of the steamer from the Navigation Company, they had paid it, and drawn on the company therefor, negotiating their drafts with the Bank of New Zealand, London. Before the bank would discount these drafts they required that the steamer, which at first was registered in the name of the defenders only, should be registered in the name of one of the bank's directors, which was done, the director being Mr William Johnston Steel. As the bills drawn upon the company were not honoured, they were retired by the defenders, and a bill of sale or transfer having been obtained from the bank, the steamer was sold, and the proceeds remitted to the defenders. They denied, however, that at the sale their attorney had made any such representation as that set forth in the summons. At the date of the action the Navigation Company had become insolvent.

The pursuers pleaded—"The bill in question having been drawn by the master for necessaries not otherwise obtainable upon the defenders, his employers, and the real owners of the ship, they were bound to have accepted and paid the same. The defenders having sold the ship and received the proceeds, are bound to pay the bill in question, in respect that the said bill was secured by the bottomry bond referred to, which fell to be ranked first on the price. The defenders are bound to pay the said bill and bond in respect that they are bound by the representations and statements of their said attorney or mandatory."

The defenders pleaded—"The defenders are not liable for the sum sued for, in respect—(1) They did not authorise the master to pledge their credit therefor; (2) Said steamer 'Pareora' was not in any way pledged for said debt. The defenders are not liable for the alleged representations of their attorney, in respect said representations were not made, and if made, were not authorised. The defenders, not being *lucrati*, are not liable as concluded against."

A proof was led in the case on 18th December 1872, the evidence being chiefly documentary.

The following was the alleged bond of bottomry granted by Captain Graham:—"Know all men by these presents that I, William Graham, master of the screw-steamer 'Pareora' of Glasgow, belonging to William Johnstone Steele, of No. 50 Old Broad Street, London, banker, am held firmly bound unto Duncan Cameron Munro, Her Britannic Majesty's Consul and Lloyd's agent at Surinam, in the sum of Six hundred and seventy-five pounds sterling of British lawful money, to be paid to the said Duncan Cameron Munro, or to his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made I bind myself, my heirs, executors, and administrators, and also the said screw-steamer 'Pareora' of Glasgow, with her tackle, apparel, machinery, and furniture, and the freight to be earned by her on her voyage aftermentioned, by these presents, sealed with my seal on this the nineteenth day of July One thousand eight hundred and sixty-seven. WILLIAM GRAHAM.

"Witnessed by A. Hepburn.
"Sam. T. Samson. (Seal.)

"The said screw steamer arrived at Paramaribo

Surinam, on the first day of April One thousand eight hundred and sixty-seven from Greenock, Scotland, she being unable to proceed to her port of destination, viz., Dunedin, New Zealand, from the want of proper sails and rigging, and the hindrance caused by two large iron elbows under the quarter for supports to the shafts of the screw propellers, rendering said steamer quite unmanageable, and obliging her to put into this port in distress for want of provisions, and to have that done to the steamer that was necessary to enable her to prosecute her voyage to the port of destination, such as to procure coals or fuel, as also engineers, with all other necessaries, to enable her to prosecute the voyage successfully to Dunedin, New Zealand, aforesaid; and the said William Graham, in order to be enabled to pay for the necessary and lawful disbursement and expenses to enable him to proceed to sea with her on the said intended voyage, hath requested the said Duncan Cameron Munro to lend and advance the sum of Six hundred and seventy-five pounds sterling, for which amount the said William Graham has given off three setts of bills of exchange, all dated the seventeenth day of July Eighteen hundred and sixty-seven, at thirty day's sight, on Messrs Potter, Wilson, & Co., Glasgow, one sett in favour of Messrs Miller, Brothers, & Co. for the sum of Two hundred and fifty pounds sterling, one sett in favour of D. C. Munro, Her Britannic Majesty's Consul, endorsed to Thomas Green, Esq., for the sum of Two hundred and fifty pounds sterling, and the other sett for the sum of One hundred and seventy-five pounds sterling, in favour of D. C. Munro, Her Britannic Majesty's Consul, and endorsed over to Alexander Denoon, Esq., 34 Old Broad Street, London. On the acceptance and due payment of the aforesaid bills of exchange, amounting in all to Six hundred and seventy-five pounds sterling, this bond, given on vessel, machinery, furniture, and freights as well so far as in my power binding self, owner, and agents of said vessel, viz., Messrs Potter, Wilson, & Co. of Glasgow, for the due and proper fulfilment of this my engagement, which, when duly fulfilled and implemented, this bond shall be thereby nullified and cancelled. WILLIAM GRAHAM.

"Witnessed by A. Hepburn.
"Sam. T. Samson. (L.S.)

"Signed, sealed, and delivered in the presence of Duncan Cameron Munro, Her Britannic Majesty's Consul at Surinam, on this the nineteenth day of July in the year of our Lord, One thousand eight hundred and sixty-seven.
(L.S.) D. C MUNRO,
"*Her Britannic Majesty's Consul at Surinam.*"

By a joint-minute of admission it was agreed to admit that "(1) the bills and alleged bottomry bond founded on in the summons were granted by the master for sums advanced to him as master, required by him to pay, and expended in payment of accounts for necessary repairs of or supplies to the 'Pareora' at Paramaribo, at a time and place, and under circumstances, which entitled the master to grant bottomry bond for said sums; (2) With reference to the sale of the 'Pareora' at Bahia, referred to in the proof and productions, the parties agree and admit that said sale was without prejudice to the rights of parties, and that the proceeds of the sale received by the defenders are to be dealt with as a surrogatum for said ship."

In the following interlocutor of the Sheriff-Substitute (ALEX. ERSKINE MURRAY) all the facts in the case are clearly stated:—

"*Glasgow, 13th July* 1874.—Having heard parties' procurators and made avizandum, Finds (1) that the defenders Potter, Wilson, & Co., merchants, Glasgow, as agents for the Southern Steam Navigation Company in New Zealand, ordered on commission in Britain the steamship 'Pareora,' and advanced considerable sums for her outfit, and put in command of her a Captain Graham, with instructions to take her out to New Zealand, and thereafter to take instructions from the Southern Steam Navigation Company: Finds (2) that she was originally registered in name of defenders, but transferred to that of Mr Steele, manager of the New Zealand Bank (in whose office three bills drawn by defenders on the Local Steamship Co. were to be paid by the latter company) in security for his having cashed the same to the defenders: Finds (3) that the 'Pareora,' on her voyage out, suffered damage, and put into Paramaribo to refit: Finds (4) that Captain Graham granted to Mr D. C. Munro, British Consul at Surinam, for sums advanced to him as master, required by him to pay, and expended in payment of, accounts for necessary repairs of or supplies to the 'Pareora' at Paramaribo, the bond 12/2 of process, for £675: Finds (5) that the bond was granted at a time and place and in circumstances which entitled the master to grant a bottomry bond for said sums: Finds (6) that at the same time Graham granted bills on defenders for the like amount: Finds (7) that after leaving Paramaribo the 'Pareora' got into more difficulties, and had to stop at Bahia, before reaching which the captain died, it is said, out of vexation at not being able to succeed in taking the vessel out: Finds (8) that after the steamer had lain some time at Bahia the crew were paid off, the defenders having sent out a gentleman to take possession of her; and she, having been retransferred from Steele's name to that of defenders', was sold there without prejudice to the rights of parties, and the proceeds of the sale, £4720 were received and held by defenders, who paid all expenses at Bahia, and fall to be dealt with as a *surrogatum* for the ship: Finds (9) that the Southern Steam Navigation Company became insolvent, and took nothing more to do with the 'Pareora:' Finds (10) that the bills drawn by Captain Graham aforesaid were in favour of Messrs Miller, Bros. & Co. of Paramaribo, who endorsed them to pursuers, A. & G Miller & Co., merchants, Glasgow: Finds (11) that pursuers now sue on the bills, pleading that the defenders are liable because they received the price as a *surrogatum* for the 'Pareora,' which was liable for the amount of the bond 12/2 of process, that document being a bottomry bond; and secondly, that the defenders are liable, because the master was their agent to do what was necessary for the ship, and they were *lucrati* by his so acting, and took advantage of it, receiving the price of the ship, which contained fittings, &c., bought with money received under the bond; while defenders deny that 12/2 of process is a bottomry bond, or that they were *lucrati* by it, the repairs not having been done for their behoof, but to enable the steamer to proceed out to New Zealand: Finds on

the whole case and in law (I) that the bond 12/2 of process is substantially a bottomry bond, although not corresponding in every particular with the usual form of that document; (II) that the defenders retained all along an interest in the 'Pareora,' as the Southern Steam Navigation Company could not claim her until they paid into the Bank of New Zealand the balance of defenders' advances, up to which time the defenders were entitled, on their retiring themselves the bill they had cashed into the bank, to redemand a transfer, as they ultimately did; (III) that Graham, the captain, appointed by defenders, was no doubt bound, after the vessel should have been transferred to the Southern Steam Navigation Company, to act under their orders, but up to that time his powers over the vessel were subordinate, not to the Southern Steam Navigation Company, but to the defenders; (IV) that thus Graham, in granting the bond and bills, was, to a certain though limited extent, acting on behalf of defenders; (V) that as the advances received under the bond 12/2 of process refitted the 'Pareora,' and enabled her to proceed to Bahia, where she was sold, and defenders received the proceeds, defenders were undoubtedly *lucrati* by the advances in question; (VI) that therefore on both grounds the defenders must be held liable in repayment of these advances: Therefore repels the defences, and decerns against the defenders as libelled," &c.

On appeal, the Sheriff (DICKSON), upon 7th April 1875 pronounced the following judgment: —"Having heard parties' procurators on the defenders' appeal, and considered the record and proof, Adheres to the findings under heads (1) one to eleven (11) inclusive, and to the finding under head I., 'On the whole case and in law,' in the interlocutor appealed against. For the reason stated in the note hereto, recals the remaining findings therein: Finds that the master of the 'Pareora' had not power to bind the defenders by bills for the repairs or furnishings to the vessel, and finds that the defenders are not liable for the said repairs and furnishings on the ground that they have been *lucrati* thereby: Finds that the defenders are liable therefor, in respect of having become owners of the vessel while the same was hypothecated under the said bottomry bond. Therefor adheres to the interlocutor in so far as it repels the defences, and decerns against the defenders as libelled: Adheres also thereto as regards expenses, and decerns.

"*Note.*—The Sheriff has experienced great difficulty in this case. Upon the main ground of action, viz., that No. 12/2 of process is a bottomry bond, he concurs, but with considerable hesitation, with the Sheriff-Substitute.

"The principles on which it has to be decided whether the document is a bottomry bond or not are thus stated in the most recent treatise on the law of merchant shipping—'It is an essential part of the contract of hypothecation that the repayment of the money should be dependent upon the ship's arrival at her destination. If the deed makes the loan repayable at all events, the contract is invalid as an hypothecation. But as these instruments are the creatures of necessity and distress, and usually contain the language of commercial men, and not of lawyers, they receive a liberal construction. It is not, therefore, necessary that the risk should be mentioned in express terms; it is sufficient if it can be fairly and reasonably inferred from the whole document that it was the intention of the parties to make the repayment of the money dependent on this contingency. (See Mande and Pollock on Merchant Shipping, 2d ed. 391.)

"The chief circumstances against the view that the document in question is a bottomry bond are—(1) That it does not bear to be so in express terms; (2) That it does not bear a rate of interest indicative of a maritime risk; (3) That it contains a clause in these terms—'on the acceptance and due payment of the aforesaid bills of exchange, amounting in all to £675 sterling, this bond, given on vessel, machinery, furniture, and freights, as well so far as in my power binding self, owner, and agents of said vessel, viz., Messrs Potter, Wilson, & Co. of Glasgow, for the due and proper fulfilment of this my engagement, which when duly fulfilled and implemented, this bond shall be thereby nullified and cancelled.'

"Of these considerations, the first is of little or no moment. The second is important, because it may be assumed in general that a merchant will not make advances on a security subject to the risks of the sea without such an extra rate of interest as will cover the extra risk. The absence of such a rate has been held in several cases to shew that the document is not a bottomry bond. (See The 'Emancipation,' 1840, 1 Robertson's Appeal Cases, 124). But it is settled law that while it is an element, and an important one for consideration, it is not conclusive. (See MacLauchlan on Merchant Shipping, p. 49, 'Royal Arch,' 1840, 1 Swab. Admiralty Reports, 269.)

"In the present case the bond seems to have been taken, not so much as a direct and primary obligation in favour of the party making the advances, but as an additional security on account of it being doubtful whether the master could bind the defender by the bills of lading.

"The defenders' argument that the existence of these bills shews that the lender dealt with the case as an ordinary trade risk might be good, if they admitted their liability under the bills. But it will hardly do for them to deny that the master had power to secure the advances by these bills, and at the same time contend that the granting of the bills proves that the advances were made on the security which they were supposed, but erroneously, to afford. It is more reasonable to hold that the lenders took the same view as the defenders do of the master's authority to grant the bills; while knowing that he had authority to give security on the vessel by a bottomry bond, and to hold that accordingly the lenders trusted to the bond rather than to the bills for repayment.

"Besides, it is settled that a bottomry bond is not rendered ineffectual by the existence of bills as collateral securities. (See the 'Emancipation,' cited above, and other cases in Mande and Pollock, page 390).

"The Sheriff cannot adopt the defenders' argument that the idea of a maritime risk is excluded by the master having pledged his personal credit to the lenders, from having used the words 'I bind myself, my heirs, &c.' These words, being followed immediately by those which give security on the ship, would seem not to infer personal liability by the master for the advances. (See

Simons v. *Hodgson*, 3 Barnwell and Adolphus, p. 50.)

"Looking to the scope of the document as a whole, and taking into view the doubts which it indicates, and which the defenders' pleas shew to have been well founded as to the sufficiency of the bills; looking especially to the strong terms in which the security is taken on the vessel and her freight 'for her voyage;' looking to the narrative of the objects for which the advance was required, and to the absence of any other security or obligation for its repayment—the Sheriff considers that the parties must be held to have intended the document to be a bottomry bond.

"As to the other grounds of action, it is thought that the defenders are not liable under the bills drawn on them by the master, because they were not the registered owners of the vessel at the time; because they put in the master not on their own account, but with the view of carrying out the directions of the shipping company on whose orders the ship was commissioned by them, and because they did not give the master authority to incur obligation on their credit.

"Nor again is it sufficient to infer liability that the defenders had an interest in the ship, or were afterwards *lucrati* by the transaction; as witness the case of mortgage creditors or owners under a time charter, all of whom may profit eventually by repairs and furnishings to a ship in which they are interested, but who are not liable for debts incurred for these purposes by the master.

"Besides, it is not proved that the defenders have been *lucrati;* for there is nothing to shew that they would have been in any worse position if the vessel had been sold at Surinam, unincumbered by the debt there incurred, than now held, in consequence of her having been sold at Bahia."

The defenders appealed to the Court of Session.

Argued for them—The master had no authority and no power to hypothecate the ship upon an ordinary bond, but only on the peculiar contract of hazard called a bottomry bond. The bond which he granted was not a valid bottomry bond. Further, the captain could not bind them, as they were not the owners of the ship.

Argued for the respondents (pursuers)—The bond in question is in every essential respect a good bottomry bond. Even if it were not, the defenders are liable under the bills drawn on them by the master.

Authorities—1 Bell's Com. 588; *Stainbank* v. *Shepard*, June 15, 1853, 22 L.J. E.C. 341; "The Emancipation," Jan. 31, 1840, 1 Rob. Admin. Rep. 134; "The Atlas," Feb. 27, 1827, 2 Hag. Admin. Rep. 48; *Nelson*, July 2, 1823, 1 Hag. 169; Juridical Styles, "Moveable Rights," 775-810.

At advising—

Lord Gifford—This is an important case, and in many respects is attended with a good deal of difficulty. It raises several questions of great general interest in mercantile and maritime law.

After full consideration, however, I have formed a pretty clear opinion that the defenders Messrs Potter, Wilson, & Company, are liable to the pursuers in the sum sued for. I think that the result which has been reached by both the Sheriffs is well founded, although I have come to this conclusion upon different grounds from those relied on by the Sheriffs.

It is admitted that the sum sued for (£250) forms part of larger sums which were advanced to the master of the steamship "Pareora" at or near Surinam, which sums were required to pay, and were actually expended in paying, for necessary repairs of and supplies to the "Pareora," to enable her to proceed on her voyage. It is also admitted that the said sums were borrowed "at a time and place and under circumstances which entitled the master to grant bottomry bond for said sums." There is therefore no question as to the necessity or propriety of the advances, or as to their actual and beneficial application, and there is also no question as to Captain Graham's power to borrow the sums for the parties, admitting that he borrowed the money in circumstances which entitled him to grant bottomry bond therefor.

It is also admitted, or sufficiently proved, that the pursuers Messrs Miller & Company are in right of the £250 now sued for. They are indorsees of the captain's draft for that amount, the authority of the indorser being admitted in the joint minute, and although there is no formal assignation in favour of the pursuers of the so-called bottomry bond, still the bond, whether one of bottomry or not, is, by the very terms of it, so connected with the captain's drafts that I have no doubt of the pursuer's right to found upon the bond, whatever its true legal effect may be.

The only question in dispute therefore is, whether the present defenders Messrs Potter, Wilson. & Company, are in point of law liable to the pursuers for the £250 now in question, and that either by reason of their position when the advances were made to the captain, or by reason of the so-called bottomry bond, or on any other grounds in law.

Now, I am of opinion that, apart altogether from the so-called bottomry bond, the defenders, by their position and actings, became liable for the necessary and indispensable advances made to Captain Graham at Surinam, and of which the sum now sued for forms part.

The captain of a ship at a foreign port who is without the means of communicating with his owners or employers, and where repairs or supplies to the vessel are indispensable, is entitled to get such necessary repairs executed or necessary supplies made, and to pledge therefor the credit of his owners or employers, and if that credit fails, that is, if the captain cannot obtain what is absolutely necessary on the personal credit of his owners or employers, he is entitled to get the money on a bond of bottomry, or if he requires, to pledge the cargo also on a bond of respondentia. It seems quite fixed, however, that the captain's first duty is to obtain the necessary money or supplies on the personal credit merely of his owners or employers. This is the best and the cheapest mode of raising the money, and it is only when this fails or is found impossible that the captain can resort to the far more costly and expensive mode of raising money on a bond of bottomry or respondentia. The maritime interest, as it is called, or the price of the hazard or risk for which in a bond of bottomry the lender stipulates, is often very high, sometimes even a third of the sum ad-

vanced, and the law very properly will not allow the captain to impose this heavy burden upon his owners if he can raise the money on their credit or on cheaper terms. I need not cite authorities for this doctrine, for it was not disputed at the bar, and is completely established by many cases, and is laid down by most of the institutional writers. Professor Bell states the rule shortly thus—Bell's Com. (M'Laren) i. 579 —"In a foreign country the master is allowed to enter into bottomry if he can no otherwise procure the supply, but where he has already received the money on the footing of a personal credit, he has no power to convert the personal contract into a bottomry transaction;" and, again (Note 4)—"It is the master's duty, if possible, to obtain the advance on the personal credit of his owner." See the cases cited.

Now, I am of opinion, on the facts proved in the present case, that Captain Graham, proceeding strictly according to law, tried to obtain, and did obtain, the advance in question, not on a bond of bottomry strictly so called, but on the personal credit of the present defenders Messrs Potter, Wilson, & Company, whom he regarded, and with whom he dealt, as his owners and employers, and upon whom, as such, he drew bills for the sums advanced. No doubt, besides the drafts, he also granted the bond which has raised so much difficulty in the present case, and the effect of this bond I shall consider by-and-bye, but it seems to me perfectly clear upon the proof that Captain Graham intended to pledge, and attempted to pledge for the advances, the personal credit of Messrs Potter, Wilson, & Company, and it was upon them alone that he drew the bills for the amounts advanced.

Now, the question is—and I think it is the first question in the case—Had Captain Graham power to bind the defenders for the necessary debts he incurred at Surinam? I am of opinion that he had. No doubt the rule of law is generally stated that in circumstances like the present the Captain can only bind his owners, and the defenders maintain that at the date of the advances they were not the owners of the "Pareora," but merely the agents for the owners, "The Southern Steam Navigation Company (Limited)," holding a security over the ship for their advances, and the ship being then registered in name of Mr Steele, one of the directors of the Bank of New Zealand, London. I think in law, however, and for the purposes of this action, the defenders at the time of the advance must be regarded as the owners whom the captain had power to bind, and did actually bind, for the necessary supplies. It is not necessarily the person whose name is on the register who is to be regarded as owner in a question like the present, but it is the person who has the real control of the ship, and from whom alone the captain derives his authority. The expression "the captain can bind his owners" is a little ambiguous and misleading. The language of the Roman law which we have adopted is more accurate. The captain binds the exercitors of the ship, and does so in virtue of his exercitorial power. The exercitor of a ship is the person who employs the ship and captain, by whom the captain is *prepositus navi*, and with whom alone the captain has a contract. The real question is, For whom did the captain act? who gave him power to act? who was his mandant? for the captain after all is only the mandatory of his employers. Lord Tenterden (Tenterden on Shipping, 11th edition, p. 108) says, in reference to cases like the present:—"It should be observed also that the owners here spoken of are not in all cases the persons in whom the absolute legal title of the ship may be vested, but rather those from whom the master derives his authority and whose agent he is on the particular occasion," and this doctrine is recognised in a great many of the cases which have occurred.

It appears to me to be quite clear not only that the present defenders were the only mandants with whom Captain Graham had any contract, and from whom alone he derived his powers, but that the defenders were the only parties who had the real control of the ship, and as it turned out, the real interest in her. No doubt the defenders were agents for the Southern Steam Navigation Company, and if everything had gone right she would ultimately have been delivered to that company, but she never was delivered, and the Southern Company never had any active title or *jus in re* in the ship. The defenders apparently ordered her from the builders on their own credit and responsibility. The defenders registered themselves at first as the only owners, and though for a while the defenders pledged her to a London bank in name of Mr Steele, one of the bank directors, that was a mere temporary security. The defenders paid the money they had borrowed, and took her back, again registered her in their own names, and ultimately sold her for their own behoof, and received the whole proceeds of the sale. I think the defenders cannot successfully maintain, as in a question with the foreign creditor, who advanced necessaries in the ship's exigency, that they are not the owners, and that the captain had no right to bind them. Admittedly the captain, in the straits to which he was reduced, had power to bind somebody who in law must be held to be his owners or exercitors, and it seems to me that the defenders are the only parties who can bear that character. It was hardly maintained—I think it could not be maintained—that the captain had power to pledge the credit of Mr Steele, the London Bank director, or to bind Mr Steele personally merely because he at the time stood as registered owner. Steele never granted any mandate or power in favour of the captain. As little I think can it be maintained that the captain could bind the Southern Shipping Company merely because it was intended that they should ultimately get the vessel, although with that company the captain had no communication, and from them he had received no powers. The captain's only constituents were the defenders—they only were his employers—they only were liable for his salary or wages, and from them alone did he take his only instructions. The defenders, in their letter of 26th October 1866, addressed to Captain Graham, prescribe clearly Captain Graham's duty:—"Your duty is a very simple one, namely, to take out the vessel in as short a time as you can, and to deliver her on arrival to our friends Messrs George Gray, Russel, & Co. of Dunedin, from whom you will take all farther instructions." Nothing can more clearly show that Captain Graham was the defenders'

servant until he should deliver the vessel at Dunedin. I think as shipmaster, and until he got to Dunedin and gave up his charge there, he had full power to bind the defenders as in law his owners or exercitors, and that he had power to bind no one else.

Supposing the case had stopped here, and that no bond had ever been granted, I think the defenders' liability would be clear. It is true that a captain cannot liquidate such a debt as this and bind his owners absolutely by granting a bill in their name. He cannot cut his owners out of the defence that the advances were unnecessary or unjustifiable. But this is an action for the sum contained in the captain's draft which the defenders refused to accept, and have never accepted, and the defenders' liability for which sum is the question raised in this action. I think the defenders are liable, and that the moment they admitted the necessity and the application of the advance, that moment they were bound to have accepted the captain's draft therefor.

Now, in my view, the only remaining question in the case is, Does it make any difference on the defenders' liability that the captain, besides drawing on the defenders for what was really the defenders' just debt, granted in addition the bond No. 12/2 of process. I have come very clearly to be of opinion that the granting of this bond—let the nature of the bond be what it may—does not affect the liability which the defenders have otherwise incurred for the necessary, the indispensable, and the beneficial advances sued for.

In the first place, I have come to form, and ultimately without much difficulty, a pretty strong opinion that the bond in question is not in the legal and strict sense a bottomry bond at all. My reasons for this opinion I may mention in a very few words, for the decision of the case does not depend upon this point. I think the bond is not a bottomry bond (1) Because it does not either in words or by implication bear to be so. It is expressed absolutely without any contingency mentioned for a definite sum payable at a definite date, and it bears to bind the captain, his heirs, the steamer 'Pareora,' with apparel, &c., the freight of the existing voyage, and (if the captain had power) the owners and agents of the vessel. I cannot gather from the bond any of the elements of proper bottomry. (2) So far from being made contingent on the voyage, the advance is made payable at a precise date (thirty days after sight of the bills), a date which might be before or which might be after the completion of the voyage, but which was no way dependent thereon. (3) No maritime risk is mentioned or can be inferred upon the occurrence of which the bond and bills should be void. This is essential to bottomry—it is the meaning of the very name. The only circumstance from which such risk can possibly be inferred is the clause by which the captain pledges the freight of the existing voyage, and of course if the voyage was not completed, no such freight would be earned. But the failure of this special freight leaves all the rest of the bond untouched, and it seems to me far too strong a step to hold that because an unearned freight is pledged, or attempted to be pledged, the whole bond is made conditional on the completion of the voyage. (4) To me it is conclusive that no maritime interest or premium for risk is either stipulated for or promised. The lender is not even to get legal interest or simple interest at the lowest rate. He is to get no interest at all till the bills fall due thirty days after sight, and this would or might be many months after the advance, and on payment of the bills at maturity without interest the bond is declared void. It is to me absolutely incredible that the lender should not only lend his money for a long time without interest, but should actually be willing for nothing to run the risk of the whole principal if the vessel should be lost, a contingency by no means improbable, as appears from the proof. It is said the lenders had charged a commission, and this may explain why no interest was to run for a certain time, but I cannot possibly hold that if this vessel had gone to the bottom the British Consul at Surinam and the present pursuers, whose money he advanced, were to lose their whole debt, although they got nothing whatever for running such a risk. A contract more unfair I cannot imagine, for it would virtually say—if the vessel arrives, the generous lender will get his own without either premium or interest; but if it does not arrive, the simple-minded lender shall be held to have made a gratuitous present of the whole advance. For these and other reasons I cannot hold the bond to be a proper bottomry bond.

Then if the bond be not a bottomry bond, what does it come to? It is simply an attempt by the master to impledge the ship for his owners' or exercitor's personal debt. It rather appears from the authorities that a master has no power to mortgage the ship otherwise than by bottomry, and if this be so, then the attempted mortgage is bad, but this will not affect the personal obligation of the owners to repay the advances for repairs and necessaries which in the ship's emergency the captain was obliged to get. The case really may be brought to this. The bond in question is either a good bottomry bond, or it is nothing—nothing I mean having the force of a mortgage. If, contrary to my opinion, it should be held to be a good bottomry bond, then the defenders are liable under it as having taken and sold the vessel. On the other hand, if the bond is bad as a bottomry and bad as a mortgage, then it must just be laid aside as void or *pro non scripto*, and the defenders remain bound as the owners, exercitors, or mandants, bound by the act of their duly appointed captain, and bound just as they would have been if the bond in question had never been granted. It seems to me that this last is the sound and true view of the case, and upon this view I am for deciding in favour of the pursuers.

LORD ORMIDALE concurred.

LORD JUSTICE-CLERK—I should have been inclined to hold on general principles of maritime law that it being admitted that the repairs were necessary, and that the sum in question was duly expended, the creditor to whom the master granted this hypothecation or bottomry bond has a valid claim on the vessel on the completion of the voyage, and I should think it manifestly unjust, in that state of circumstances, to allow the owners, on any mere technicality, to retain and sell the vessel and leave the creditor unpaid. In one sense such a contract must be strictly con-

strued, that is to say, it must clearly appear that the master, being in a foreign port, could not otherwise have obtained the money necessary to enable the vessel to proceed, but that is substantially admitted here. But that being admitted or proved, the form or expression of the instrument ought to receive the most liberal construction, and technical objections are not to be favoured. Looking to the substance rather than the form of the transaction, I think that the master had power to bind the vessel in the event which happened, and that it is idle technicality to object that an event which has not occurred, and under which the bond would not have been valid or binding, was not specially excluded by the words of the obligation. Such, I think, were the principles on which the Admiralty in England used to proceed. Lord Stowell, in words which have been often quoted in such cases, thus expressed the rules of construction which prevailed in that court,—"Here we don't take the bond *in toto* as is done in other systems of law, and reject it as unsound in the whole if vicious in any part. But we separate the parts; reject the vicious and respect the efficiency of those which are entitled to operate." (The "Nelson," 1 Nav. Act, 166.)

This principle has been often applied in England, either by importing into the bond conditions which are not expressed, or rejecting general words within limits more narrow than the sense which they do express. Thus, while holding that the creditor in a bottomry bond must take the risk of the voyage, I should have been prepared in this case to have given effect to the act of the master so far as his power extended, while I rejected the generality of the words so far as they might reach further. This view would be entirely in consistency with the grounds of judgment in the case of the Nelson, to Lord Stowell's opinion in which I have already referred, and in the case of *Symonds*, 6 Bing 114, decided by Lord Tenterden, and often quoted with approval. Indeed Lord Tenterden went much further (*Samson* v. *Braggington*, 1 Vesey 443), and sustained an hypothecating deed which was not conditional on the arrival of the vessel, and on the authority of that judgment the law was laid down in Abbot on Shipping, and so remained down to and including the edition of 1862, as follows:—"But if the person who thus advances money does not choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, there seems to be no reason why the master should not pledge both the ship itself and the personal credit of the owner."—(P. 156.)

But the difficulty I feel in giving effect to what I believe to be the general principle of maritime law in deciding the present case, arises from the comparatively recent cases in the Common Law Courts—that of *Stainbank* v. *Turner*, 11 C. B., and the subsequent case in 13 C. B., in which the Common Bench held that the creditor in a hypothecating bond which did not bear to be dependent on the arrival of the vessel had no insurable interest, and that Lord Tenterden's ruling in *Samson's* case was wrong, Chief Justice Erle differed from that judgment, and it has been adversely criticised by continental jurists. But if it be sound, it places an impediment in my way which it is difficult to surmount. This would leave the only question whether it be a condition expressed in this bond, or to be inferred from its words, that the vessel should arrive at her destination. The indications relied on are very slender, and I am glad to be relieved of the necessity of coming to a conclusion in regard to them.

For the case is thus reduced to alternatives. If the hyopthecation is good, as the defenders sold the vessel, the pursuer prevailed on that ground. If it is invalid, it is because it was not intended to make the hypothecation dependent on the maritime risk. This leaves the obligation incurred by the master as a simple and unlimited undertaking on behalf of his employers to repay the amount expended in repairing the vessel; and if the repairs were necessary, which is not disputed, and the defenders were the employers of the master, they must be liable. It is laid down by all the authorities that the element to be searched for in such cases is not the ownership on the register, or even the legal ownership, but who gives the mandate,—who confers the authority. I entirely concur with Lord Gifford's remarks on this head. The defenders were in fact owners in every sense; for the right of Steele, the bank agent, was a mere incumbrance; and as the defenders had never parted with the possession, and retained the title on the register, the right of the New Zealand Co. resembled that of creditors rather than owners. But it is enough that the master was employed by the defenders, and was subject to their orders. I entirely concur in Lord Gifford's views on this head, and adopt them without reserve.

Lord Neaves absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and find as follows—(1) That the appellants (defenders in the Sheriff-court) as agents for the Southern Steam Navigation Co. in New Zealand, ordered on commission in Britain the steamship 'Pareora,' and advanced considerable sums on her account, which have not been repaid; (2) that the appellants appointed Captain Graham to the command of the vessel, and that he continued throughout to be under the orders of the appellants; (3) that the vessel was registered in name of the appellants, but the title was transferred to Mr Steele, manager of the New Zealand Bank, for the purpose of securing payment of certain bills for the price of the vessel discounted with the bank; (4) that the 'Pareora' on her voyage out to New Zealand suffered damage, and put into Paramaribo to refit; (5) that Captain Graham granted to Mr D. C. Monro, British Consul at Surinam, for sums advanced to him as master, required by him to pay, and expended in payment of, accounts for necessary repairs of, or supplies to, the 'Pareora' at Paramaribo, the bond No. 12/2 of process, for £675, and also bills for the same amount, conform to the document No, 9/36 of process; (6) that after leaving Paramaribo the 'Pareora' got into more difficulties, and had to stop at Bahia; (7) that after the said steamship had lain sometime at Bahia, the crew were paid off, and the appellants sent out a person to take

possession of the vessel, and the appellants having retired the bills from the bank, the vessel was again registered in the name of the appellants; (8) that the appellants then sold the vessel without prejudice to the rights of parties, and the proceeds of the sale (£4457, 18s. 2d.) were received and held by the appellants—who paid all expense at Bahia—and fall to be dealt with as a *surrogatum* for the vessel; (9) that the bill No. 7/1 of process, drawn by Captain Graham, was granted in favour of Messrs Miller, Brothers, & Co. of Paramaribo, who indorsed it to the respondents (pursuers in the Sheriff-court); (10) that at the date of these repairs the appellants were in possession, and had control of the vessel, and were in the position of being the employers of the master, and responsible for his legal contractions for the ship: Therefore recal the interlocutors complained of, and of new repel the defences, and decern against the appellants (defenders) in terms of the conclusions of the libel," &c.

Counsel for Pursuers—Dean of Faculty (Watson)—Asher. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Defenders—Balfour—Macintosh. Agents—J. & R. D. Ross, W.S.

Tuesday, November 16.

SECOND DIVISION.

[Lord Young.

ROSS, SKOLFIELD, & CO. *v.* STATE LINE STEAMSHIP CO. (LIMITED.)

Principal and Agent—Company—Manager, Powers of—Bill.

The sub-agents of a company accepted two bills drawn upon them by the managers of the company in anticipation of the freight of one of the company's steamers. The bills passed through the managers' books, were discounted by them, and were retired at maturity by the sub-agents. The managers ceased to hold that office during the currency of the said bills, and were sequestrated the day after they came to maturity, and the sub-agents brought an action against the company for the amount due to them in respect of the above transaction. The Court *assoilzied* the defenders, in respect that the pursuers had failed to prove (1) that the bills were granted by the managers under the powers conferred upon them by the terms of their appointment; (2) that the managers had, subsequent to their appointment, received from the company authority, either direct or implied, to borrow money; and (3) that the proceeds of the discount of the bills had been applied for the behoof of the company.

This was an action raised by Ross, Skolfield, & Company, shipping agents in Liverpool, against the State Line Steamship Company (Limited). The amount sued for was £3731, 19s. 6d. (being a sum of £4000 less £268, 0s. 6d. admitted to be standing at the defenders' credit in the pursuers' books.) The circumstances under which the case arose were as follows:—The State Line Company was established for the conveyance of goods (1) between Glasgow and New York; (2) between Liverpool and New Orleans—the registered office of the company being at 65 Great Clyde Street, Glasgow. Under the powers conferred on them by their Articles of Association, the State Line directors, in October 1872, appointed Lewis T. Merrow & Company, merchants, Glasgow, to be managers of the company. The leading terms of that appointment were as follows:—"*First*, Messrs Lewis T. Merrow & Coy. are hereby appointed the principal agents or managers of the company's trading business and affairs both at home and abroad, the whole of which shall be under their management, they being bound, however, to carry out any instructions which the directors of the company may at any time see fit to give in the conduct of the business. *Second*, The managers shall be bound to devote their whole time and attention to the company's business, and on no account shall they be entitled or allowed to engage in other business, or to undertake other employment of any kind whatever, which can interfere with or be detrimental to the company. *Third*, The managers shall be entitled to a commission at the rate of ten per cent. on the gross freights, passage-money, or other earnings of the ships of the company, the managers paying all expenses incident to the management of the business of the company or its affairs, including the maintenance of the different agencies both at home and abroad, and travelling and advertising expenses, and guaranteeing the due payment of all freights, passage money, or other earnings. *Fourth*, The managers shall provide themselves with suitable offices in Glasgow, and it shall be imperative on them to keep a proper set of books, showing the whole of their transactions, and all sums received or disbursed by them, which books shall be open at all times to the inspection of the directors of the company, or any party employed by them to examine the same, and shall form the property of the company. The directors shall be entitled to make such provision for the control of the finances of the company as they see fit."

The pursuers were, under the powers thus conferred on Merrow & Co., appointed by them agents at Liverpool in 1872 "for the State Line Co.," as they alleged in their condescendence; and they further averred that "it was the pursuers' duty as agents aforesaid to attend to the loading and unloading of the company's steamers at Liverpool, to collect the homeward freight, to pay such portion of the ships' disbursements as they might be directed by the managers to do, and generally to attend to the company's business in Liverpool. Regularly after each voyage the pursuers rendered their accounts to the company's managers in Glasgow, and accounted to them for the balances of money arising thereon, and all their business with the directors was transacted through the managers Messrs Merrow & Company, by whom all instructions were communicated to the pursuers, and to whom also the pursuers wrote all letters relating to the company's affairs."

This the State Line Company denied, and averred that Merrow & Co. did not carry on the whole business of the company, and that they