The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for Pursuer (Respondent)—Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for Defender (Reclaimer)—Morison, K.C.—Hon. W. Watson. Agents—Webster, Will, & Company, S.S.C.

Thursday, July 16.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

CLARK AND OTHERS *v.* HINE AND OTHERS.

International Law—Maritime Lien—Lex Loci Contractus—Lex Fori—Disbursements on British Ship in Foreign Port—Judicial Sale of Ship in Scotland.

In an action of judicial sale of a ship registered in Scotland, and situated in Scotland at the date of the action, a party resident in New York lodged a claim for a preferential ranking in respect of certain disbursements made by him on the ship in New York, which he averred gave him a good lien on the ship, according to American law. *Held* that the question whether the party had a lien on the ship in respect of the disbursements made by him fell to be determined by Scots and not by American law.

Ship—Maritime Lien—Seamen's Wages—Payment by Third Party—Acquisition of Seamen's Lien without Assignation.

Held that no assignation of a seaman's lien on his ship for his wages is necessary to transfer the lien to a third party paying the wages.

Ship—Maritime Lien—Seamen's Wages—Payment by Third Party—Credit of Ship or Personal Credit of Owner.

Shipbrokers in New York, who were in communication with the owners of a British ship, and were requested by them to arrange for the execution of repairs on the vessel in New York, paid the sum due for repairs, and also paid wages due to the seamen. For the whole sums thus advanced the shipowners accepted a bill drawn on them by the brokers, and the bill was renewed at maturity, and the renewed bill dishonoured when it fell due. *Held*, in an action of judicial sale of the ship, that the brokers must, in the circumstances, be presumed to have advanced the sums due in respect of seamen's wages, in reliance on the personal credit of the owners, and not on the credit of the ship, and that they therefore acquired no maritime lien on the ship for the sum so advanced.

On 25th November 1907 an action of declarator and sale of the steamship "Abbey Holme," registered at Maryport, and then lying at Greenock, was raised by (1) Robert Clark, shipowner, Glasgow, a mandatory and attorney of William Brown, master of the ship, and assignee of certain members of the crew, and as an individual, with the consent and concurrence of William Brown, and (2) the said William Brown, against *inter alia*, (1) Wilfrid Hine, shipowner, Maryport, a partner of the firm of Hine Brothers, shipowners, and registered owner of the vessel, and the said Hine Brothers; (2) William Edward Mounsey, chartered accountant, Liverpool, trustee under an assignment granted by Wilfrid Hine and Hine Brothers for their creditors; (3) the Ardan Steamship Company, Limited, and the Scottish Investment Company, Limited, who held mortgages over the vessel; and (4) Messrs Bowring & Company, a corporation organised and existing under the laws of the State of New York, and having its principal office in the State of New York.

The pursuer Robert Clark averred that he had a maritime lien on the ship in respect of powers of attorney granted to him by the master, and of an assignation in his favour by certain members of the crew, which he received in consideration of various sums advanced by him to pay the wages of the crew, and certain liabilities or disbursements on the ship, made abroad by the master in the working of the ship, and for which the ship and owners thereof were liable.

Messrs Bowring & Company lodged defences, in which they averred, *inter alia*—"Explained that the said steamship arrived at New York in or about 5th December 1906 in a damaged and unseaworthy condition, making it absolutely necessary that she should go into dry dock for repairs. These defenders contracted with the owners on the credit of the ship to have it put into a seaworthy condition, and in connection with the requisite repairs, in the supply of necessaries to the ship, and in payment of wages then due to the crew amounting to 848 dollars, they expended a sum of 36,162 dollars. The supply of said repairs and necessaries was completed in or about the beginning of February 1907, and the sum due to the repairers and suppliers was paid by these defenders on 15th February 1907. The remainder of said sum of 36,162 dollars was expended by these defenders on or before said date. But for the supply of said repairs and necessaries by these defenders the ship would have been unfit to proceed. It was in reliance upon the credit of the ship that these defenders agreed to supply the funds for paying the crew and for furnishing the ship with necessaries and repairs, and in respect thereof they have a maritime lien upon the ship. Further, said agreement for supplying said funds was made in New York, and the rights incident to it fall to be determined according to the maritime law of the United States and the law of New York State. By these systems of law these defenders have a maritime lien upon the ship in respect of the sums expended by them in said repairs and necessaries, as

well as in paying the wages of the crew. Moreover, said agreement being made in the United States and subject to its laws, it was an implied term of it that these defenders should under any circumstances have the benefit of the lien recognised by American law."

For this sum of 36,162 dollars Hine Brothers accepted a bill of exchange drawn on them by Bowring & Company, which matured on 3rd May 1907. On that date Messrs C. T. Bowring & Company, Limited, 20 Castle Street, Liverpool—on behalf of Bowring & Company, New York—in lieu of the first bill, drew on Hine Brothers at sixty days for the said sum, and Hine Brothers accepted and paid the discount. The second bill fell due on 5th July 1907, and was dishonoured.

With regard to these bills Bowring & Company averred—"In drawing upon the owners of said ship for the amount expended by them these defenders did not relinquish any of their rights over the ship. At the time when the owners accepted said bill they were, as these defenders now know, insolvent. The drawing of the second bill in the name of C. T. Bowring & Company, Limited, was due to the fact that the arrangements with regard to it were made by them in this country and were carried through in their name. They were, however, acting on behalf of these defenders, who alone have any rights in said bill. The said sums were expended by these defenders prior to any of the obligations founded on by the pursuers being incurred, and the rights of these defenders in respect thereof are preferable to those of the pursuers or the mortgagees. A sale of the ship would injuriously affect the just rights of these defenders."

The pursuers pleaded — "(1) The pursuers, or one or other of them, in virtue of the writs libelled, having a maritime lien or hypothec over the said steamship, and being entitled to make their lien or hypothec effectual by a sale thereof, decree should be pronounced in terms of the conclusions of the summons. (3) The compearing defenders not having a maritime lien over the said steamship in respect of the disbursements made by them, the defences should be repelled, with expenses."

The compearing defenders (Bowring & Company) pleaded—"(1) In respect that the pursuer William Brown has been paid the sums alleged to be due to him, and in respect that his right of maritime lien is not transferable, or, at all events, has not been validly transferred to the other pursuer, neither of them has a title to sue the present action. (3) Neither of the pursuers having any valid lien over said vessel, the action ought to be dismissed. (4) These defenders having, on the credit of the ship, expended sums on repairs and necessaries for said ship, *et separatim* on payment of wages of the crew then due prior to 15th February 1907, they have a valid maritime lien over said vessel preferable to any alleged lien of the pursuers. (5) *Separatim* —these defenders having, according to the maritime law of the United States, and the law of New York State, by which the question falls to be determined, a maritime lien over the vessel in respect of said sums expended on necessaries for said vessel, *et separatim* on the wages of the crew then due, they have a claim prior in date and preferable to that of either of the pursuers. (6) In respect of these defenders' rights in said vessel, the pursuers are not entitled, in violation thereof, to have the vessel sold until the defenders' claims are discharged."

On 25th January 1907 the Lord Ordinary (SALVESEN) pronounced an interlocutor finding that the pursuers had a maritime lien on the vessel, and that they were entitled to have her sold, and granting warrant for and authorising the sale.

Opinion.—"This is an action for the judicial sale of a steamship called the 'Abbey Holme.' The vessel is lying at Greenock but hails from Maryport, and her registered owner Mr Hine has become bankrupt, and granted an assignment for behoof of his creditors in favour of the defender Mr W. E. Mounsey, chartered accountant, Liverpool. In such circumstances it is unusual to have an action of this kind defended, because whenever a sale has been carried through by order of the Court the sum realised is deposited with the Clerk of Court, and all creditors are given an opportunity of lodging their claims and competing *inter se* for preferential rankings should the fund prove inadequate to pay all. In short, the action is really converted into a multiplepoinding, and all the liens and preferences which existed over the ship are ranked upon the price in their order of priority. It is therefore very seldom where the owners have become bankrupt that any opposition is offered to a judicial sale.

"The compearing defenders are a corporation recognised and existing under the laws of the State of New York. They narrate that on 5th December 1906 the 'Abbey Holme' arrived at New York in a damaged and unseaworthy condition, which made it necessary that she should go into dry dock for repairs; that they contracted with the owners to have her put into a seaworthy condition, and paid the shipbuilder's account for repairs and made other disbursements on behalf of the steamer. For these disbursements they drew a bill of exchange on Hine brothers—the managing owners—dated 19th February 1907. This bill matured on 3rd May, and on that day Messrs C. T. Bowring & Company, Limited, arranged to give further delay, and in lieu of the bill which had matured they in their own name drew on Messrs Hine Brothers for the same amount. The bill was duly accepted but was dishonoured when it became due on 5th July 1907. The compearing defenders say that they relied upon the credit of the ship in making these advances, and that according to the maritime law of the United States, and of New York State in particular, they have a maritime lien upon the ship in respect of the sums expended by them on said repairs and necessaries. At the debate they did not maintain that according to the law of Scotland

or the general maritime law of Great Britain they could maintain the claim of lien, and as I can only apply our own law in determining the ranking of claims on a British ship locally situated in Scotland they must be treated as unsecured creditors of the bankrupt owner.

"These defenders have an obvious interest in resisting a judicial sale, for if the vessel were to go to an American port they would be able to enforce their alleged lien against her there, and that possibly notwithstanding that she might have changed hands under a private sale. If, on the other hand, the vessel is sold judicially, and declared by decree of this Court 'to pertain and belong to the purchaser free and disburdened of all bonds, mortgages, liens, rights of retention, and other encumbrances affecting the same,' in terms of the fifth conclusion of the summons, they are apprehensive—and I think with good reason—that the maritime lien which is said to exist in their favour in America might be completely destroyed. Hence their anxiety to prevent a judicial sale taking place.

"It is conceded by the pursuers that in order to give them a title to demand a judicial sale they must have a right and claim of maritime lien or hypothec and real burden over the 'Abbey Holme.' If they were merely unsecured creditors of the owner they would be bound to lodge their claims with the trustee in bankruptcy, to whom the ship itself would belong as part of the assets of the bankrupt estate. Accordingly Mr Clark, the leading pursuer, claims to have such a lien on three heads—(1) As having paid the wages due to the master, from whom he holds a power of attorney, and who is a concurring pursuer; (2) as assignee to the wages due to some members of the crew under an assignation; and (3) as having paid two drafts drawn by the master in favour of two companies who had supplied coals and necessaries to the vessel in foreign ports. In addition to the owner and his assignee in bankruptcy three defenders are called, who hold mortgages on account-current over the 'Abbey Holme.' None of these persons has lodged defences to the action, and it may be assumed therefore that they admit the maritime lien claimed, although in the case of the mortgagees at all events they have a strong interest to maintain the opposite.

"In my opinion the compearing defenders have no title to defend. On their own statement of the facts it is plain that they are merely unsecured creditors of Hine Brothers—or of the registered owner Mr Wilfrid Hine, for whom the firm acted as managers. As such they are represented by the trustee in bankruptcy Mr Mounsey. It is said that Mr Mounsey has no interest to object to a sale, because the prior mortgages are so large as to more than absorb the estimated value of the ship; and that the defenders have the interest which I have already adverted to. That, however, in my opinion, does not entitle them to take up a position which the trustee—who represents the interests of the general body of unsecured creditors—regards as untenable. They are no doubt called as defenders in the present action, but that is because they claimed at one time to have a maritime lien, and in that view had an obvious interest to oppose the claims of the pursuers to a lien which might take priority of theirs. It having now turned out that they cannot maintain any lien—according to the law which I am bound to administer—they are in no better position than any of the other creditors of Mr Hine, who must be taken to be fully represented by the assignee in bankruptcy. On that ground alone I would be prepared to repel their defences, and to proceed in this action thereafter as if it were undefended.

"The same result follows if I hold that the pursuers have in fact a maritime lien for all or any of the sums in respect to which the claim is made. The leading ground upon which their claim is contested is that a lien for wages or disbursements is a privilege personal to the master and crew, or to the master in respect of disbursements, and cannot be assigned. No Scotch authority was quoted in support of this proposition, but I was referred to a solitary passage in the latest edition of Abbott on Shipping, and to the following cases on which it is founded—*The* '*Lion*,' 6 Asp. M.C. 199; *Bridgewater*, 3 Asp. M.C. 506; '*Cornelia*,' L.R., 1 A. & E. 51, and *The* '*Fair Haven*,' p. 67. In my opinion these cases do not support the proposition that a maritime lien for wages cannot be assigned in favour of a third party who pays the wages. All the length they go is that the Admiralty Court will not, in the ordinary case, sanction the payment of money by way of wages to the crew by a third party without his first obtaining the consent of the Court. In all these cases an action had already been instituted for judicial sale of the vessel, and Dr Lushington seems to have desired that the Court should be consulted before wages were paid to seamen in order to get rid of the expense of keeping them if the person paying them was to be assigned into their place. That may be a useful enough rule of Court, the real application of which I rather think is confined to cases where no assignation has been obtained from the crew or when it is desired to stop their claims from running without their consent. But there is no case in which a person who paid the crew's wages, and obtained an assignation of their claim, was held to be in no better position than an unsecured creditor. On the contrary, I was referred to two cases—*The* '*William Stafford*,' Lush., p. 69, and *The* '*St Lawrence*,' 5 P.D. 250—in both of which persons who had advanced money to pay claims which conferred a maritime lien were ranked on the proceeds of the ship in the priority to which the cedents would have been entitled; and I cannot see any principle on which a claim for money against a shipowner, secured by a maritime lien, should not be capable of assignation like any other money claim with its relative securities. It is no doubt true that a maritime lien differs from many other forms of security in that it may

be insisted in to the prejudice of a purchaser of a ship who has no knowledge of its existence, but unless a maritime lien followed the ship after it had changed owners it would really be valueless, and the assumed hardship is not materially increased by holding that the assignee of such a right may enforce it equally with the original holder. The hardships the other way are much more conspicuous. The result of the Solicitor-General's argument would be that the representatives of a master or a seamen, who had a good maritime lien for wages, would not have the benefit of that lien to enforce payment of their author's claim. Besides, it would lead to great extra expense if such a doctrine were not to be recognised, as crews could not be paid off by a bondholder or other secured creditor, to whose claim the wages were preferable, until the sanction of the Court had been obtained to his doing so by some form of process which has yet to be invented.

"A further argument was offered on the footing that the pursuers' various claims were not sufficiently vouched. In my opinion, at all events so far as the master's claim and the claim for disbursements are concerned, there is no substance in this objection. The account for coals supplied at Las Palmas, to take only one instance, and the draft by the master in favour of the Coal Company, are both produced; and in the absence of any specific attack I think this must be treated as conclusive, at all events for the purpose of entitling the pursuers to have the vessel judicially sold. I shall, accordingly, grant a decree in terms of the 5th conclusion of the action—leaving to the pursuers to establish the specific amounts to which they are entitled to be ranked in the competition which will follow."

The vessel was thereafter sold, and the Lord Ordinary appointed all parties claiming an interest in the free balance of the price to lodge claims. Claims were lodged for (1) Messrs Clark & Service, shipowners, Glasgow (of which firm the said Robert Clark was a partner), who had incurred certain accounts relative to the disbursements and lien on which Robert Clark founded, and the said Robert Clark and William Brown, (2) The Ardan Steamship Company, Limited, (3) The Scottish Maritime Investment Company, Limited, and (4) Bowring & Company, New York.

The claimants Messrs Clark & Service and others founded on the maritime lien in respect of the power of attorney and assignation in favour of Robert Clark above mentioned, and claimed a preferential ranking to the extent of some £3200. With regard to the claim for Bowring & Company they averred—". . . Denied that the said claimants have or ever had a maritime or other lien over the said vessel or the proceeds of sale thereof either by the law of this country or by the maritime laws of the United States of America or the State of New York. . . . Explained that for the full sum claimed Messrs Hine Brothers accepted a bill of exchange drawn on them by Messrs Bowring & Company, which matured on 3rd May 1907. On that date Messrs C. T. Bowring & Company, Limited, having their registered office at 20 Castle Street, Liverpool, who were then holders of the said bill, arranged to give further delay, and in lieu of the said bill of exchange which had matured they in their own name drew on Messrs Hine Brothers at sixty days' date for the full amount, and Messrs Hine Brothers accepted a bill of exchange therefor and paid the discount. The last-mentioned bill fell due on 5th July 1907 and was dishonoured. Moreover, the cost of the repairs alleged to have been executed by the Newport News Shipbuilding and Dry Dock Company was covered by insurance, which Messrs Hine Brothers collected and retained. The sole claim of Messrs Bowring & Company, if any, is a personal one against Messrs Hine Brothers or Mr Wilfred Hine, the registered owners of the vessel, who have granted an assignment for behoof of creditors in favour of Mr William Edward Mounsey, chartered accountant, Liverpool. . . . The 'Abbey Holme' was a British vessel registered at Maryport, and the fund *in medio* is the price of the said vessel deposited in the name of the Accountant of Court after a sale conducted at Glasgow by order of the Court of Session pronounced while the 'Abbey Holme' was lying in the harbour at Greenock. The order of ranking of the claims upon the said vessel and all questions incident thereto accordingly fall to be decided by the maritime laws of Great Britain and the law of Scotland. . . ."

Bowring & Company averred—"1 . . . . In or about the end of September 1906 the claimants were notified by Hine Brothers, shipowners, Maryport, that a vessel belonging to the said Hine Brothers called the 'Abbey Holme' had been receiving temporary repairs in the Straits of Magellan, and that she was expected in a short period thereafter to arrive at New York. The claimants were not the regular agents of the said Hine Brothers nor of the said ship, but Hine Brothers requested the claimants to advise the master with regard to the noting of a protest and the signing of average bonds. They further informed the claimants at a later date that they had decided to send out their superintendent Captain George Brown to attend to the interests of the ship, and they requested the claimants to give him such assistance as they could in making any necessary arrangements for its survey. The said superintendent thereafter duly arrived. 2. The 'Abbey Holme' reached New York on 5th December 1906, when it was discovered that it would be necessary to put her into dry dock for the purpose of undergoing extensive repairs. The question of the necessary repairs was gone into and decided upon by the superintendent of Hine Brothers, and the ship was thereafter dry-docked, and the requisite repairs duly executed by the Newport News Shipbuilding and Dry Dock Company at a cost of 32,860 dollars. These claimants at the request of Messrs Hine Brothers made the contract with the Newport News Com-

pany for the said repairs, and when the sum fell due they on 15th February 1907 paid the amount of the said account to the Newport News Company. These claimants also prior to that date expended other sums on the supply of necessaries to the said ship, and they paid wages then due to the crew to an amount of 848 dollars or £176, 13s. 2d. In all they thus expended a sum of 36,162 dollars or £7537, 15s. 8d. 3. But for the supply of said repairs and necessaries the ship would have been unable to proceed on her voyage to England, as she was in an unseaworthy condition at the time when she arrived in New York. In expending said sums for said ship these claimants were acting according to the regular custom of shipping houses in the City of New York, and in doing so they were relying on the credit of the ship. In respect and to the amount of said disbursements and the amount paid for the wages of the crew they acquired a maritime lien upon the ship both according to the rule of English law and that of the maritime law of the United States of America. 4. Further, the agreement made by these claimants with Hine Brothers for the supply of said necessaries and said funds was made in New York, and the rights incident to it fall to be determined according to the maritime laws of the United States of America. According to that law it is presumed that a person making repairs and furnishing supplies to a foreign ship looks to the credit of the ship, and he obtains a maritime lien over the vessel for such supplies and repairs. By said law also a person who advances funds for the purpose of settling accounts for such repairs and supplies has the same right of lien that the repairer and supplier himself has, and is surrogated to all the rights and remedies of the person whose claim he has paid. Moreover, the fact that the person so advancing funds may have taken the bills of the shipowner for the amount does not, according to the American maritime law, in any way weaken the presumption that the credit of the ship was relied upon, nor does it in any degree affect the maritime lien thus created. The said lien as recognised by the Courts of the United States falls to be enforced by the British Courts according to the comity of nations. . . ."

They claimed a preferable ranking to the extent of £7537, 15s. 8d., or in any event to the extent of £176, 13s. 2d.

The other claimants claimed to rank, in respect of mortgages held by them, after satisfaction of the claim of Messrs Clark & Service, and they adopted their contentions with regard to the claim for Bowring & Company.

The claimants Clark & Service and others pleaded, *inter alia*—"(2) The claim of the claimants Bowring & Company should be repelled, in respect (*a*) that the sole claim of said claimants being a personal one against Messrs Hine Brothers or Mr Wilfrid Hine, whose estates are vested in an assignee for creditors, the said claimants have no title to insist in their claim; (*b*) That the claim for said claimants Bowring & Company is irrelevant and untenable in law; (*c*) That said claimants have no maritime or other lien or preferable right over the said steamship, or the proceeds of sale thereof in respect of the disbursements in question. . . ."

The claimants Bowring and Company pleaded, *inter alia*—"(1) These claimants having on the credit of the ship expended sums on repairs and necessaries for said ship, and on payment of wages to the crew then due prior to 15th February 1907, they have a valid maritime lien over said vessel, and are entitled to be ranked and preferred in terms of their claim. (2) *Separatim*—These claimants having, according to the maritime law of the United States of America, by which the question falls to be determined, a maritime lien over the said vessel in respect of sums expended on necessaries for said vessel and the wages of the crew then due, they are entitled to be ranked and preferred in terms of their claim. . . ."

On 13th June 1908 the Lord Ordinary pronounced an interlocutor finding the claim for Bowring & Company irrelevant, and repelling it and ranking the other claimants.

Bowring & Company reclaimed, and argued—(1) Even though the contract made regarded a ship registered in Britain, and situated there at the time of raising the action, the Court was bound to apply the *lex loci contractus*, *i.e*, American law by which the claimants had a good lien on the ship for the sums advanced by them. (2) In any event these claimants had a good lien, according to the law of Scotland, *quoad* the £176 expended in payment of the seamen's wages. The seaman had a good lien for his wages and might arrest the ship if they were unpaid. That lien passed to any third party, who advanced the money to enable wages to be paid, without any assignation—"*William F. Stafford*," 1860, Lush. 69; "*St Lawrence*," L.R., 1880, 5 P.D. 250; "*Tagus*," [1903] P. 44. There was nothing on record to negative the idea that these claimants, in paying the seamen's wages, relied on the credit of the ship, and the fact that they were in communication with the owners was not inconsistent with their looking to the credit of the ship, and so acquiring right to the seamen's lien when they paid their wages. The argument on the analogy of the bottomry bond had no application, because the bottomry bond was created by bargain between the parties, whereas the seamen's lien for wages arose *ex lege* independent of any contract. In any event, even the agent of the shipowner could advance money on the security of a bottomry bond—Abbott's Law of Merchant Ships and Seamen, 14th ed., p. 207.

Argued for the respondents—[The Court intimated that they desired no argument on the first point]—The lien which the seaman had for his wages did not pass to a third party who paid them without assignation. The cases cited by the reclaimers did not raise the question of the necessity for assignation, and were not inconsistent with this view. Compare "*Ripon City*," [1897]

P. 226. Where communication with the owners was possible, or at all events where there was actual communication as here, the master of a vessel could not grant a valid bottomry bond—Bell's Prin. 452-3; *Stainbank* v. *Fleming*, 1851, 11 C.B. 51; *Stainbank* v. *Shepard*, 1853, 13 C.B. 418; "*Hamburg*," 2 Moore, P.C. (N.S.) 289; Bell's Comm. (Lord M'Laren's ed.) i. 579. For the same reason a third party could not derive through the master a right of lien on the vessel—Brodie's Stair, Supl. 936, *per* Lord Ellenborough, there cited, in *Hassey* v. *Christie*, 1807, 9 East. 426, at p. 452-3, 13 Ves. Jr. 594. In any event it was essential to the creation of a lien on the vessel that the party making the disbursement for behoof of it, do so in reliance on the credit of the vessel. Here the reclaimers, *ex facie* of their own record, appeared to have relied not on the credit of the ship at all but on the personal credit of the owners. They were in communication with the owners at the time, they took a bill from them and subsequently renewed it.

LORD PRESIDENT—This is a competition upon the price of a ship that was sold at Greenock. The claimants who are preferred are claimants who have a maritime lien on the ship, and are also mortgagees. The competing claimants are an American firm who paid certain moneys in New York during the voyage of the ship, and who in respect of these payments allege that they have a maritime lien which entitles them to be ranked *pari passu* with the other claimants here. Now the position of these claimants in respect of their advances is different in respect of one portion of the money and of another. In respect of very much the largest sum they claim they aver and offer to prove that, by the law which would apply in the American Court in New York they have a good maritime lien. That is denied by the other claimants, but for the purposes of this argument we must hold that it could be proved as a matter of fact. But it is admitted by both sides of the bar that according to the maritime law applied in this country there is no maritime lien for these particular sums. That being so, I think the Lord Ordinary was perfectly right when he practically disposed of this matter in a sentence in his first judgment, where he said—"I can only apply our own law in determining the ranking of claimants on a British ship locally situated in Scotland, and they (that is, these claimants) must be treated as unsecured creditors of the bankrupt owner." I think that is really too clear for argument, and Mr Horne, I am afraid, could not produce any authority on the point, nor could he appeal to any principle. It seems to me perfectly clear that the question of whether there is a good lien upon a ship must be determined by the Court where the question arises, and must be determined according to the local law, having regard to the flag of the ship and also to the *forum* in which the question is being raised. I think that so much was determined in terms by Mr Justice Phillimore in the case of the "*Tagus*," which has been cited to us. It is impossible by contract to impose a local law of New York which *ex hypothesi* is different from the general maritime law of the world as applied in our Courts—it is impossible to impose that law in our Courts when the ship comes to our shores.

But the other advances are in a different position. They are advances of £176 odds, which were disbursed in payment of seamen's wages. Now there is no question that by the maritime law as applied in our Courts there is a good lien for seamen's wages. There is no question that that lien can be assigned. The question is whether these parties are in right of this lien? We had two questions argued to us. It was first argued by the competing claimants here at home that there could be no good lien without an actual written assignation. I am not inclined to assent to that doctrine. On the contrary, I think the contrary seems to be the case. It seems to me quite clear from the report in the case of the "*St Lawrence*" that there was no assignation in that case, and I think the judgment of Sir Robert Phillimore in a single sentence excludes the idea. He is talking of particular claims, and he says—"It is true that pilotage and towage claims are not mentioned by Dr Lushington in the case of the '*William F. Stafford*' as claims which, if paid by a third party, confer any priority on the party so paying them; but the reason of that decision applies to such claims, and indeed I do not understand it to be disputed that a person who discharges claims of that character has the same rights and remedies for their recovery as the person to whom the money has been paid." That, I think, would be a singularly inaccurate statement if it were true that an actual assignation was needed, and I think the same thing is said by Mr Justice Phillimore in the case of the *Tagus*, where he says—"If the whole disbursements are, as apparently they are, payments of wages to the crew, who might have seized the ship, then I think that the doctrine that the man who has paid the privileged claims stands in the shoes of the privileged claimant should be applied, and he has a lien for any disbursements made, although he was not master, in payment of the wages of the crew." Accordingly in that case, where there was obviously no assignation, the person claiming, who had been a mere supercargo at the time he paid the wages, but who had not taken any document of assignation from the sailors, was ranked and preferred for any sums which he had disbursed for the ship while he was supercargo, in payment of the crew's wages. But I entirely concur with what Mr Dickson said, that what is at the bottom of this doctrine is that you must show that the payment was made in reliance upon the credit of the ship. And no doubt in an ordinary case that would be shown by the mere fact of the payments having been made. It is, of course, a common case. The master arrives at a port without money to pay his seamen's wages,

and it being the fact that the seamen are then in a position to seize the ship, the master goes to a shipbroker or anyone else and gets him to pay the seamen's wages, and it is plain from the mere fact of payment that that person will rely upon the credit of the ship and not upon the credit of the master, who is probably a person whose credit is of very little worth. That always leaves behind the question of fact, and when you come to the facts of this case it seems clear that this payment of £176 was not made upon the reliance of the credit of the ship. The ship had been in difficulties in the Southern Seas before it got to New York, and the owners had written to these shipbrokers in New York saying that their ship had been in difficulties, and asking them to see to it on its arrival at New York. They undertook the agency, and that being so they paid the repairers' bills and also seamen's wages, and they massed the whole of the sums which they paid in one account, and for that account bills were granted, and these bills, when they came to maturity, were renewed, and we should never have heard anything about this question of lien had the shipowners not gone bankrupt, so that the renewal bills were not met at maturity. All that shows that these disbursements were not made in reliance upon any maritime lien at all, but in reliance on the owners, who had requested these claimants to make these advances. That being so, I think that the claim upon the £176 falls, and accordingly I think that the Lord Ordinary's judgment remains undisturbed, and that we should adhere to it.

LORD M'LAREN—I am of the same opinion. The first question appears to be really too clear to require argument in its support. The determination of how a security is to be constituted no doubt depends upon territorial law, and if this had been an immovable subject we should of course have gone to the sources of American law to ascertain whether the security required writing for its constitution, or whether it could subsist without as a lien. But then, in the case of a ship, a ship has no territory, or rather its territory is the whole world—any shore to which it is capable of being navigated; and therefore in order to constitute a security independent of written title it is necessary that the lien or right should be recognised by the general maritime law of the world. It may be that as regards coast traffic the United States of America would be able to enforce the law peculiar to their own country, because they have the ship subject to their jurisdiction. The same thing might happen if a foreign ship should arrive in America and be sold there. It would be for the courts to determine whether they would apply their own law or the general maritime law. I think that the present question must be ruled by the general maritime law, and consequently that the claim fails.

On the question of the seamen's wages I agree with your Lordship that there is no conclusive authority to the effect that a formal assignation is necessary where an advance of wages is made at the request of the captain or crew, and in reliance on the right of lien which they have under maritime law. In certain cases, no doubt, a person who advances money must be able to produce an assignation of the right, but even in such a case the rule has been much relaxed, because, for instance, in the case of cautionary obligations, if the cautioner pays the money he has a right under the principle *jus cedendarum actionum* to enforce his claim against any person who is in a greater degree of liability than himself. He is not required to produce an actual written assignation of the claim, but only to instruct that he has made a payment under his obligation. Unless the matter were concluded by authority I should not be in favour of applying a strict criterion to a case of this kind, because it is quite obvious that payments of this kind are generally made in an informal way, and naturally it would not occur to mercantile people to insist upon a legal assignation before witnesses, according to the forms of the country where the vessel might happen to be. But in the present case I agree that this cannot be treated as an advance made upon security of the lien, but is in reality an advance made upon the credit of the owners, or those who represent the owners. I think the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR—I agree with your Lordship in the chair on both points. As to the first, the law as laid down by the Lord Ordinary appears to me to be perfectly accurate, and no authority or principle of law was cited to the contrary, although if any authority or legal doctrine had been discoverable Mr Horne would not have failed to bring it to our notice. He did say that there was one doctrine of law upon which he founded. It was that according to our law contracts are to be construed according to the *lex loci contractus*. I am unable to admit that there is any general law to that effect. It has been said over and over again in this Court, and in a comparatively recent case in the House of Lords, that the question whether the meaning and effect of a contract is to be determined according to the law of the place where it is made or of the place where it is to be performed is, according to the law of Scotland, a question of intention to be determined on the construction of the particular contract and not by any absolute rule of law. In the present case I am not satisfied that the *lex loci contractus* ought to govern, even if the question depended solely on the construction of the contract. The true question is not what the contracting parties in New York intended, but whether the contract had the effect of creating a real security over a British ship, and consequently over the proceeds of the sale of that ship when it is sold in Scotland and the proceeds are put into the hands of the Court for distribution. I agree that that is a question for the *lex*

fori to determine. We are to consider whether there is a good preference over the money in the hands of the Court where the sale takes place, and that must be determined according to our own law.

On the second point I agree with the doctrine by which it it is held that when anyone in a foreign port is asked by the master of a ship to advance money for the payment of the wages of the crew, and agrees to do so, he is to be put into the shoes of the seamen whose wages he has paid so as to have the same rights and remedies against the ship as they would have had, because he is presumed to make advances upon the credit of the ship, which is the only fund of credit that *ex hypothesi* he knows anything about. He does not know the master nor the owners, and he makes the advances upon the credit of the ship. But it is consistent with that doctrine to hold that when a shipbroker is invited by the shipowners themselves to make advances, he may make what contract with them they choose to agree upon, and whatever his contract may be he must be supposed to rely upon their credit. If he desires to have a further security than their personal credit it is open for him to stipulate for it, but if he does not—and in this case there is nothing to show that the claimants did desire to make any stipulation—he is making a contract with the owners themselves to which the law does not attach as a consequence any right of lien over their property. I agree that the contract alleged is a contract by which the owners invited the claimants upon their credit to supply certain necessaries in order to enable their ship to proceed upon her voyage to England, and it appears to me that to say that they thereby acquired a right of lien over the ship is inconsistent with the agreement upon which they undertook to make the payment. On both points I agree with your Lordship in the chair.

LORD PEARSON was absent.

The Court adhered.

Counsel for Bowring & Company (Claimants and Reclaimers) — Solicitor-General (Ure, K.C.)—Horne. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Other Claimants (Respondents)—Dickson, K.C.—Clark, K.C.—Murray. Agents—Smith & Watt, W.S.

Thursday, July 16.

SECOND DIVISION.

[Sheriff Court at Glasgow.

H. M. ADVOCATE *v.* SUITS LIMITED.

(*See* also *H. M. Advocate* v. *Jacob*, 16th July 1908, *ante* p. 852).

Trade-Mark — Trade Description — Merchandise Marks Act 1887 (50 *and* 51 *Vict. cap.* 28), *sec.* 2, *sub-sec.* 2—*Master and Servant—Purchaser Writing for Patterns of "Scotch Tweed Waterproof All Wool" —Patterns "as Requested" Returned by Shop Assistant—Pattern not Answering Description.*

The Merchandise Marks Act 1887, sec. 2 (2), enacts—"Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves (*a*) that, having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description, and (*b*) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or (*c*) that otherwise he had acted innocently, shall be guilty of an offence against this Act."

A person with a view to obtaining evidence of an offence against the Merchandise Marks Acts wrote to a firm of clothiers stating he wanted a Scotch tweed waterproof, asking for patterns and saying—"What I want is a good serviceable coat, all wool." An assistant in the shop sent patterns "as requested." All of these did not answer the trade description "Scotch Tweed," and were not "all wool." One of the patterns not answering the description was chosen and a coat thereof supplied, but the clothiers when requested refused to give a receipt for the price as for a coat of "Scotch Tweed All Wool." The shop assistants had instructions not to give goods any other description than as invoiced; they had forms which required that the goods should be marked on the forms as in the stock books, which was as invoiced, and when a piece was taken it was ticketed with a form repeating this description. The pattern in question was of material invoiced merely as "overcoating."

A complaint having been brought charging an offence against the Merchandise Marks Act 1887, section 2 (2), against the clothiers, *held* that assum-