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

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

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

The Court adhered.

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

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

Tuesday, January 25.

FIRST DIVISION.

[Sheriff Court of Inverness.

MACGREGOR *v.* MACLENNAN'S TRUSTEES.

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

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

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

Question—Whether he was entitled to an ordinary ranking.

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

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

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

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

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

of £93, 6s. and of £45, 6s. 7d. to a preferable ranking, but admits them to an ordinary ranking, subject, however, to taxation of the accounts claimed by the Auditor of Court, and that on the grounds specified in the subjoined note."

Note.—"The claimant acted as agent to Mr Murdo Mackenzie, sometime residing at Ensign Cottage, Fairfield Road, Inverness, now at Hawthorn Lodge, there, who was sole accepting and surviving testamentary trustee of the deceased Duncan MacLennan, farmer, Achederson, in the county of Ross and Cromarty, whose estates form the subject of this sequestration, and the claimant's account has been incurred for work done for the said trustee, in connection with the said estate prior to the sequestration. It must, however, be kept in view that the whole estate was handed over by the said Murdo Mackenzie, with the consent, knowledge, and approval of the claimant to Mr Robert Munro, accountant, Alness, on behalf of the beneficiaries under the deceased's settlement, in or about May 1894, at least two years before the date of the sequestration, and which virtually necessitated sequestration. At the time the estate was so handed over the trustee divested himself of all interest he had as trustee, or as an individual in the estate, and accordingly then lost any lien, if any, he might ever have had over the said estate.

"In the claimant's affidavit there is no reason specified why his accounts should be preferably ranked; if any such reason exists it should have been specified in the affidavit, for all that appears the accounts are claims which the claimant alleges he had against the estate at the date of the sequestration, and being such the trustee can only give them an ordinary ranking.

"Further, it is doubtful indeed if the claimant is justified in doing this, as the present claim should have been made by the said Murdo Mackenzie, who is the party who incurred the expense, and the party against whom alone the claimant has any claim; as it is, however, alleged that the work was done prior to the sequestration, and that the claimant took a decree against the said Murdo Mackenzie, the trustee is willing to give an ordinary ranking. This ranking must, however, be subject to taxation by the Auditor of Court. It is a well-known principle that a trustee on a sequestrated estate can pay no law-agent's accounts until they have been taxed. It may be said that in this case the claimant holds a decree against the said Murdo Mackenzie for part of the amount claimed, but this decree was obtained of consent of the said Murdo Mackenzie, and without the amount being taxed. This consent is not binding on the trustee, and it is consequently submitted that the production of the decree in this process does not dispense with the necessity of taxation of the claimant's account against the estate of the bankrupt."

The claimant appealed to the Sheriff-Substitute (SCOTT MONCRIEFF) who on 29th November pronounced the following interlocutor—"The Sheriff-Substitute having made avizandum, refuses the appeal except to the extent of finding that the trustee is bound to admit the claim of the appellant of £93, 6s. to an ordinary ranking, without subjecting it to taxation; *quoad ultra* affirms the deliverance of the trustee appealed against, and decerns: Finds no expenses due to or by either party."

Note.—"The sequestration in this case is that of the estate of a deceased debtor. This estate was for some time prior to the date of sequestration under the charge of a testamentary trustee and executor who employed the appellant, a solicitor in Inverness, to act as agent in the management of the executry. Two accounts were incurred by the executor in that capacity to the appellant—one of these amounted to £93, 6s., the other to £45, 6s. 7d. For the former sum decree was obtained against the executor. The respondent admits that the appellant's accounts were incurred for work done in connection with the estate now sequestrated, and he is willing to admit them, subject to taxation, to an ordinary ranking. The appellant, however, claims a preferable ranking, and hence the present appeal. This claim appears to be based upon a dictum of Mr Erskine, iii., 9, 46, to the effect 'that the expense of confirmation and the other charges necessary for the common management come off the whole head of the executry funds, and are therefore, like the debts properly called privileged, preferable to every other creditor.' This opinion is, of course, entitled to very great weight, although apparently not supported by any judicial authority. It is also true that although it was expressed prior to the passing of any of the modern Bankruptcy Statutes, there appears to be nothing in them to deprive a debt of any privilege which it might have at common law. But I can find nothing in the authorities upon bankruptcy which would warrant me in holding that the present claim is entitled to a preferable ranking. The claims which are fall under well recognised heads, and certainly the presumption is against any addition being made to them unless there is clear authority for doing so. The executor does not make the claim. It is his law-agent, and I fail to see why the law-agent of the executor of a deceased debtor should be in a better position than the law-agent of the debtor himself. Whether or not the appellant can go against the executor is another matter, and not before me. I consider, however, that in so far as the appellant holds a decree for his account, this claim should be ranked without recourse to taxation. It is not a case for expenses. The trustee omitted at first to state his grounds for rejection as required by statute, and the appellant upon one small point has been successful."

The claimant appealed, and argued—This being a charge in connection with the management of the estate was entitled to preference—Ersk. iii. 9, 46; M'Laren's Wills and Succession, sec. 2296. Accordingly, the question of the trustee's lien did

not really arise here, since apart from it he had the equitable right to be reimbursed for any expenses incurred in the administration of the estate, and the appellant's account remained as a first charge on it—*Dall* v. *Drummond*, July 15, 1850, 8 Macph. 1006; *Thomson* v. *Tough's Trustee*, June 26, 1880, 7 R. 1035; *Drummond* v. *Carse's Executor*, January 27, 1881, 8 R. 449.

Argued for the respondent—The appellant had no direct claim against the trustee in sequestration. He should have made a claim against his employer, the testamentary trustee, who again would have had a right to reimburse himself by retaining the trust-estate. As, however, the testamentary trustee had parted with possession of the estate to the beneficiaries, he had lost his right of lien, which was only operative at the instance of the person in whose hands the property was. Accordingly, the appellant's employer was the only person against whom he had any claims—Bell's Com. ii. 392; *Gibson* v. *Macdonald*, December 7, 1824, 3 S. 374; *Anderson* v. *M'Dowal*, March 21, 1865, 3 Macph. 727.

At advising—

LORD PRESIDENT — If, as the parties desired, the papers before us, including the appellant's own affidavit, be taken as affording the materials of judgment, it seems to me much less clear that the appellant is entitled to a ranking at all than that he is not entitled to a preference.

This is a sequestration of the estates of the deceased Duncan MacLennan, and the appellant was not a creditor of the deceased. *Prima facie*, therefore, the appellant is not entitled to a ranking. The fact that he was employed by the testamentary trustee of the deceased to do work in connection with the management of the trust-estate does not of itself entitle him either to a ranking or to a preference on the estate of the deceased now that they have come to be sequestrated. I do not say that services rendered in the management of an estate which is afterwards sequestrated may not in some circumstances require to be paid by the trustee in the sequestration before he gets the estate handed over to him; and the same reasons might justify a preferential ranking if the estate, instead of being retained, were handed over. But this must depend on the circumstances, and so far from the information before us presenting a case of this kind, it points in the opposite direction. The testamentary trustee to whom the appellant rendered services, did not divest in favour of the trustee in the sequestration, but, on the contrary, in favour of the beneficiaries under the settlement, or (what is the same thing) their nominee, and it is from this latter that the estate has been recovered. The matter being thus remote, very special averments would have been required to establish a case for a preferential ranking of one who *prima facie* has for his debtor solely his employer, and no such averments are here.

In what has been said I do not wish to cast doubt on the propriety of the course taken by the trustee in admitting the appellant to an ordinary ranking, for this may, for anything I know, be quite according to the justice of the case. I speak merely of the inferences arising from the papers before us, and these do not profess to contain the whole information before the trustee.

The respondents' objection to the interlocutors on the matter of taxation was withdrawn.

I am for dismissing the appeal.

LORD M'LAREN—I do not wish to throw any doubt upon the proposition that a person who renders services to a private trust has a claim against the trust-estate which may be enforced in the appropriate way through the trustee who employs him. If the private trust be superseded by sequestration or by the appointment of a judicial factor, the private trustee does not lose his right of retention of the trust-estate for his necessary outlay in the fair administration of the trust; the official trustee takes the estate upon condition of satisfying the legal claims which adhere to it in the person of the private trustee.

But this principle appears to me to have no application to the facts of the present case, because this is not a claim by a testamentary trustee against the trustee in the sequestration, but is a direct claim by a law-agent who rendered services to the testamentary trustee, and I fail to see that he has any direct claim against the present administrator of the estate. His proper remedy would be to make a claim against his employer, who again would protect himself by putting forward his right of retention of the trust-estate. But that course is not now open, because the testamentary trustee made over the trust-estate, which consists chiefly of a farm and farm stock, to the beneficiaries, and having parted with the possession, which is the foundation of his right of retention, I am afraid he has lost the right and is no longer in a position to assert it against the trustee in the sequestration. However that may be, it is clear that the appellant has no direct claim against the defender, and the trustee has gone as far as he was able in recognising the claim as entitled to a ranking. His reason for doing so probably was, that if he did not recognise the claim directly, it might be raised indirectly through the testamentary trustee.

LORD ADAM and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellant — A. S. D. Thomson. Agents — W. & J. L. Officer, W.S.

Counsel for the Respondent—J. Wilson. Agent—R. Cunningham, S.S.C.