tion to provide elementary education for such pauper children. Both parties have asked us to indicate our opinion as to the proper course to be followed. We think that the agreement entered into by the kirk session and heritors with the School Board should be altered by retaining the nomination of children to the benefits of the endowment in the hands of the kirk session and heritors. If the parties put a minute in process to that effect, and also make it a condition that poor scholars are to have the benefit of the higher education, we shall be able to interpone our authority to the same, which will avoid the necessity of a procedure under the Trust Act.

The other Judges concurred.

The parties having put in a minute accordingly, the Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for John M'Culloch and others against Lord Shand's interlocutor of 16th February 1876, in respect of the joint minute No. 60 of process, Find that the heritors and kirk session of Dalry, acting as trustees under the will of Mr Johnston, are not entitled to delegate to the Parochial Board the right to nominate poor children who are to have the benefit of the endowment: Find that the nomination of such poor children must remain with the heritors and kirk session as trustees, and that on such nomination the School Board, while the agreement libelled on exists, are bound to have the poor children so nominated instructed in the higher as well as in the elementary branches of education, so as to fit them for one or other of the universities, and to that effect alter the interlocutor of the Lord Ordinary: *Quoad ultra* adhere thereto: Appoint the pursuers to lodge in process an account of the expenses incurred by them, and decern."

Counsel for Pursuers—Fraser—Rhind. Agents—Rhind & Lindsay, W.S.

Counsel for Defenders—Dean of Faculty (Watson)—M'Kie. Agents—J. & J. Milligan, W.S.

Counsel for School Board of Dalry—Burnet. Agent—W. Scott Stuart, S.S.C.

Saturday, July 8.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

STEELE & CO. *v.* BYRNE AND OTHERS.

Ship—Owner—Ship's Husband—Repairs—Liability.

When a vessel is in a home port, a managing part-owner may bind the other part-owners for ordinary repairs, but he is not entitled to bind them without specific authority for unusual and structural alterations, nor for work to fit the vessel for a new employment on which the part-owners have not resolved.

This was an action raised by Robert Steele & Co., shipbuilders in Greenock, against R. C. Byrne & Co., shipowners in Cardiff, Messrs Dixon of Liverpool, Lieut. Thomas P. Powell, 83d regiment, and Ambrose Parsons, solicitor, London—all registered owners of the ship "Brazilian;" and the summons concluded for payment by the defenders, conjunctly and severally, of (1) £5664, (2) £820, 1s. 2d., with interest from August 31, 1875. The action was raised to recover the first of these sums, as the value of certain repairs and alterations on the "Brazilian," executed by Steele & Co. under orders from R. Byrne & Co. in April 1875. The second sum, £820, 1s. 2d., was made up of five different accounts for repairs since April 1875. The facts of the case are given in the note to the Lord Ordinary's interlocutor given below.

After a proof the following interlocutor was pronounced by the Lord Ordinary:—

"*Edinburgh, 15th February* 1876.—The Lord Ordinary, &c., assoilzies the defenders Charles E. Dixon, Alfred Dixon, Thomas Pery Powell, and Ambrose Parsons from the whole conclusions of the action, and decerns: Finds the pursuers liable in expenses, &c.

"*Note.*—The pursuers Robert Steele & Company, shipbuilders in Greenock, have raised the present action against the registered owners of the iron steamship 'Brazilian,' lying in the Garvel Park Graving Dock at Greenock, and against the firm of R. Byrne & Company, merchants and shipowners in London and Cardiff, and the partners of that firm, for the purpose of recovering two sums, £5664 and £820, 1s. 2d. sterling, being the cost of certain repairs and furnishings executed by them upon said vessel, on the employment of R. Byrne & Company, who owned 31-64ths thereof, and were the managing owners of the vessel. The only defenders who have lodged defences are Charles E. Dixon and Alfred Dixon, who are the registered owners of 21-64ths, Thomas Pery Powell, who is registered owner of 2-64ths, and Ambrose Parsons, who is registered owner of 10-64ths. The main grounds of defence are that the repairs and furnishings in question were not necessary repairs, or such as a ship's husband or managing owner is entitled to order on the credit of his co-owners, and that even if necessary they were executed in a home port without the order or sanction of the present defenders.

"The facts of the case as disclosed in the proof appear to be as follows:—Prior to the end of March 1872 Messrs C. E. & A. Dixon were the registered owners of the whole vessel, apparently in trust for persons of the name of Fernie, carrying on business in Liverpool as 'The Merchants Trading Company,' who by a contract of sale, dated 3d December 1872, sold to Messrs R. Byrne & Company the 'Brazilian' as she then lay in Birkenhead Dock. One-third of the vessel was to be held by Messrs C. E. & A. Dixon, who were not to transfer the same without Messrs Byrne's consent; but in the event of Messrs Byrne & Company deciding to re-engine the vessel, they were to find the money to do so, all profits earned on the one-third interest to be retained by them until the amount advanced for the new engines should be repaid to them, with interest at five per cent. Th vessel was to be managed by Messrs R. Byrn

& Company on their usual terms as regards commission, &c. The price was fixed at £19,000 for the entire ship, two-thirds of which Messrs R. Byrne & Company were to pay in cash to Messrs C. E. & A. Dixon, on approval of ship, in exchange for bill of sale. In implement of this contract a bill of sale was executed on 31st January 1873 by C. E. Dixon and Alfred Dixon, and was registered on 6th February 1873 at Liverpool, the vessel's port of registry. By that transfer the Messrs Dixon formally transferred to Richard Clarke Byrne 43-64th shares of the said vessel. The Dixons thus retained, in terms of the original contract of sale, 21-64ths in their own names, although they appear to have held them for behoof of the Fernies or the Merchants Trading Company.

"Of the 43-64ths acquired by R. Byrne & Company, two shares were sometime in 1873 purchased by Admiral Powell, who without being registered sold them in the early part of 1874 to his nephew, the defender Lieutenant Thomas Pery Powell, who still holds the same, and is registered as owner thereof; of the remaining 41 shares, 10 were transferred about 21st September 1874 to the defender Ambrose Parsons, who although *ex facie* absolute owner, appears to have no beneficial interest therein, but to hold the shares merely as trustee for behoof of William Pustau, a German, who was incapable of being himself registered as owner, but who was a creditor of the Byrnes upon bills amounting to £5000, and who, it was arranged, should in this way have a security over the vessel, as the Byrnes declined to grant a mortgage. The bill of sale to Parsons, and a relative declaration of trust and agreement by Parsons and Byrne, setting forth the position of Parsons in the matter, were executed *unico contextu* on 21st September 1874. Such then was the ownership of the vessel at the time when the pursuers were employed by R. Byrne & Company to execute the repairs and the work, for the price of which this action has been raised. And the first point to be ascertained is, whether the present defenders authorised this employment?

"For this purpose it is necessary to trace the history of the vessel from the month of December 1872, when the contract of sale was entered into under which the Byrnes became the owners or ship's husbands. At that time the steamer was lying in the Birkenhead Dock. She had been previously classed in the Liverpool registry as for a period of eighteen years from the date of her launch in 1852, with a continuation of the class from year to year thereafter subject to an annual survey. The class was continued for only one year after the eighteen years expired, and it lapsed altogether in November 1872 in consequence of the annual survey not having been made. This happened before the Messrs Byrne made their purchase, and before they were appointed managing owners of the vessel. At that time, as appears from the contract of sale, the vessel stood in need of new engines and some other repairs, and the Messrs Byrne, who by the contract had full power to decide as to fitting up new engines, and were themselves to advance the whole cost thereof till repaid to the extent of a third out of Messrs Dixon's share of the profits of the vessel, took the vessel round to Greenock, where her decks were taken off by Messrs Scott & Co. and the foundations laid for the new engines, at a cost of about £2800, and new engines were contracted for at a cost of about £6000.

"After the vessel was taken to the Clyde, R. Byrne & Company had some correspondence with the Messrs Dixon, which appears to me to be of great importance in the present question, as it indicates very clearly the limited nature of the powers which all the parties then understood Byrne & Company to have in reference to ordering the execution of work upon the vessel. Byrne & Company having full power to re-engine the vessel on the terms set forth in the contract, they write thus to Messrs Dixon on 29th September 1873,—'As we are now about to make contracts for the other work, excluding engine work for the "Brazilian," thank you to ask Messrs Fernie if they have anything to suggest in the way [*Some parts of this letter illegible*] which will require to be done further than what we know of.' Now, in answer to that letter Messrs Dixon, on 30th September 1873, send to R. Byrne & Company a memorandum from the Merchants Trading Company making suggestions and giving directions as to the necessary work. These are arranged under four heads as follows:—(1) As to the arrangement of the space between engine-room and stoke-hole, and re-arrangement of the coal bunkers. (2) As to supplying new masts and rigging. (3) 'The additional power will cause extra strain, and one streak amidships, of course outside, should be doubled, so as to overlap the streaks above and below it. The streak that requires it can easily be seen. (4) The "Brazilian" being of great length and flat on the floor, has a tendency to be crank, and every alteration should be undertaken with this knowledge.' To that letter and memorandum Messrs R. Byrne & Company replied by writing to C. E. & A. Dixon on 2d October 1873—'The agreement for the third you hold does not say anything about reimbursing us for outlays, other than engines, &c. Will you advise what is proposed as to this, as we think we should receive cash for it at least.'

"No distinct answer to this request appears ever to have been obtained, but after some further correspondence Messrs Byrne & Company, in a letter to C. E. & A. Dixon, dated 25th October 1873, explain that what they meant by saying that they expected to be put in funds to the extent of one-third on all the extras to be done to the 'Brazilian' was, that outlays not connected with the engines, such as new stern-posts and other alterations, including, as I think, those mentioned in the Merchants Trading Company's memorandum of 30th September, were to be defrayed not wholly by Messrs Byrne & Company, as managing owners in the first instance, but by all the owners in proportion to their respective interests, that is, two-thirds by Byrne & Company themselves, and the remaining one-third by C. E. & A. Dixon. It does not very clearly appear to what extent the extra work here contemplated was executed; but it is plain that for the greater part of 1873 and 1874 the vessel lay in the Clyde, visiting different parts at distant intervals, and the work of taking off the deck and preparing the ship for the new engines went on very slowly. All this work was done by Messrs Scott & Company, shipbuilders, Greenock, and by engine makers in Glasgow, on the employment

of R. Byrne & Company. As to these furnishings, with which, however, the present action has no concern, I am inclined to think that Messrs Byrne & Company had authority under the contract of sale and the correspondence to give the order on the credit of their co-owners. On the other hand, I think it is plain from the correspondence that they had no power as managing owners or as ship's husbands to order any repairs or alterations without the express consent of Messrs C. E. & A. Dixon or the Merchants Trading Company, and that all the parties were acting upon that footing. Such, at least, was the position of matters in November 1874, up to which time there does not appear to have been any proposal made by R. Byrne & Company or any of the partners of that firm to any of their co-owners as to having the vessel repaired, so as to enable her to pass the survey required for her again obtaining a class on the registry, which she had lost in November 1872 in consequence of the annual survey having been omitted.

"It is here that the difficulty of the case begins. From the end of 1872 till September 1874 no anxiety seems to have been manifested by any of the owners to get the vessel ready for sea. It appears, however, from the declaration of trust and agreement between Parsons and Byrne, dated 21st September 1874, already mentioned, that it was then contemplated to employ the ship in the China trade, and that Byrne had agreed with Pustau (on whose behalf Parsons was acting) that the ship should be ready for loading for China, within six weeks from the said date, to the consignment of William Pustau & Company of China. The ship, however, was not ready for sailing within the specified time, and indeed is not yet ready. But it is quite plain that at this date, 21st September 1874, Byrne & Company were dealing with their co-owners and creditors on the footing that everything necessary to make the ship ready for a voyage could be done within a period of six weeks, and that no structural alterations or extensive repairs were necessary. Their views on the subject will be found very clearly stated in a letter, dated 15th September 1874, to Admiral Powell. By the month of November 1874, however, their views appear to have undergone a considerable change. The cause of this change does not appear from the evidence. None of the Byrnes were examined as witnesses, and the correspondence, so far as brought under my notice, is silent on the point. It is proved, however, that in November 1874 Byrne had employed Mr Laurence Hill, a civil engineer in Glasgow, to make arrangements for the restoration of the 'Brazilian' to her old class in the Liverpool registry, and for that purpose Mr Hill had caused the vessel to be surveyed by Mr Henry West, the chief surveyor of that registry in the Clyde district. From two letters written by Mr West to Mr Hill, both dated 24th November 1874, it appears that in order to fit the vessel for restoration to her former class, new plates and other structural repairs were necessary, and that these would entail very considerable expense. Indeed, Mr West and other witnesses examined at the proof estimated the expense at not less than £4000, and probably a good deal more. These letters were sent by R. Byrne & Company to C. E. & A. Dixon, in a letter dated 27th November 1874, in which they say—'We enclose you copies sent us of the returns or report of the Liverpool Book Inspector. We think it would be better to class her sixteen years or French veritas, or perhaps the London Book may take her third class, viz. 90A, sooner than go to the expense. Please telegraph if there be any suggestions to make. We are laying out a good deal of money, and we shall be wanting the proportion 21-64ths when we have our account made out.' So far as appears from the evidence, this is the first notice given to the Dixons of any proposal to have the vessel reclassed either in the Liverpool registry or in Lloyd's or elsewhere, and R. Byrne & Company ask for suggestions. They also ask for money, not however to make the alterations suggested by West, but plainly to pay for the new shaft and other operations which were then being made upon the vessel by Messrs Scott & Company of Greenock, to adapt the vessel for her new engines and machinery.

"Messrs Dixons reply to that letter on the following day, viz. 28th November 1874—'Yours of 27th, with inclosures duly to hand. Have sent them over to Messrs Fernie, who took copies of them, but as Mr Fernie is not in town to-day, no reply can be given. They want to know, however, what is the position of the ship? are the new engines going into her? and when do you expect her to be ready for sea?' R. Byrne and Company reply on 30th November—'The "Brazilian" is in the Garvel Dock, Greenock, and is preparing to get in new machinery, but cannot say when she will be ready for sea, as it somewhat depends with what Lloyd's recommend, and as to what may be decided, and what Mr West suggests in order to obtain the 18 years' class, if it be decided to continue her for such outlay, subject to yearly survey.' Now, it is plain that up to this time Byrne and his firm were dealing with Fernie, and taking directions from them as to alterations and outlay upon the vessel; and that this was the first communication which had been made of any proposal to change the class is, I think, made plain by the memorandum sent to C. E. & A. Dixon by the Merchants Trading Company (for which Fernie was acting), dated 30th November 1874, in which they say—'In reply to a letter, dated 27th instant, addressed to you by Messrs R. Byrne & Company, together with enclosures, we beg to say that we cannot consent to their proposal. The "Brazilian" was surveyed for the 18 years' class at the time that the arrangement was entered into, and we claim from them damages and loss for their action, and want of action since. With regard to the remark made by Messrs Byrne & Company as to requiring payment for the 21-64ths they are now incurring without our consent, we entirely decline any responsibility with regard to it.' Now, although the writers of this memorandum erroneously attribute to Byrne & Company the failure to continue the 'Brazilian's' class, which had expired before the Byrnes had anything to do with the vessel, the memorandum clearly shows that they declined to sanction any further outlay on the vessel, and, in particular, any such outlay as the alterations reported on by Mr West would have involved. This memorandum was at once communicated by the Dixons to R. Byrne & Company, as was also a later memorandum, dated 10th December 1874, in which the Merchant Trading Company say with reference to some

letters received from Byrne & Company in the interval—'In reply to your memorandum we return the letters referred to, and call your attention to our notice that we hold Messrs Byrne & Company liable for permitting the "Brazilian" to be in the position indicated in Mr West's letter without previously taking the necessary steps by survey, &c., to have had the class continued; also, that we cannot consent to any outlay to make good their fault.' All this shows that whether the real owners of the 21-64ths of the vessel were the Dixons or the Fernies, the correspondence took place upon the footing that whatever alterations or repairs might be necessary for the reclassification of the vessel, these would be made only with the consent of the owners of these shares; and the result was that such consent was withheld. Thereafter Messrs Byrne & Company, by their letters of 8th and 11th December 1874, proposed to have a meeting with the Dixons in Liverpool, in order to arrange about the vessel, but although it is probable that some such meeting did take place, there is no evidence that any arrangement was come to regarding the reclassification of the vessel, and there is no trace of any further communication on the subject, either verbal or written, until the summer of 1875.

"In the meantime, and after the positive refusal of the Merchants Trading Company to consent to any outlay for the reclassification of the vessel, Messrs Byrne & Company appear to have given up the notion of getting the vessel reclassed in the Liverpool registry, and to have instructed Mr Laurence Hill to endeavour to get her classed in Lloyd's registry, and with that view a report was obtained on 11th January 1875 by H. J. Boolds and James Molleson, the district Lloyd's surveyors, as to the condition of the vessel. These gentlemen reported that certain alterations which they suggested—consisting chiefly in the doubling of the inside streaks of the vessel from keel to gunwale—with some necessary repairs, would, if satisfactorily carried out, render the vessel eligible for classification as 95A, which is the highest class given to vessels which have not been originally built under special survey. Mr Hill advised Byrne to adopt Boold's report rather than Mr West's, because he considered that doubling the inside plates was preferable to renewing the outside plates, as recommended by Mr West, and also, because in order to carry out Mr West's plan to its full extent a much more extensive and expensive repair than West had contemplated would be necessary, in consequence of the corroded state in which certain parts of the vessel were found to be, but which could not have been seen by West at the time of his inspection.

"Byrne & Company then resolved to have the vessel doubled and repaired in terms of Mr Boold's report; and the pursuers at the request of Mr Hill made an offer for the work on 4th February, and afterwards more formally by an offer dated 18th February 1875, addressed to R. Byrne & Company, in which they offered to execute the doubling of the plates and all the necessary work attending the same, as explained by Mr Boolds, for the sum of £5750, and to execute certain other minor repairs and alterations at the rates therein mentioned. Some delay took place after receipt of the offer, but it was finally accepted by R. Byrne & Company by telegram and letter dated respectively 2d and 3d April 1875. While the vessel was lying alongside the wharf before being taken into the dry dock for the purpose of being altered and repaired by Messrs Steele, she sustained some damage which required to be repaired—all as reported upon by Mr Boolds and Mr Hill. The expense of these repairs, and of some other matters connected with the doubling of the plates, not included in the contract price, amounted to about £820. The whole of these operations were executed by the pursuers with the exception of fitting up some of the plates which were unfinished when the work was finally stopped. The value of these plates was £86, which being deducted from the contract price of £5750, leaves a balance of £5664, for which, and for the £820 of extra repairs, the present action has been raised.

"There is no doubt as to the liability of R. Byrne & Company and the partners of that firm for these sums, because they gave the order for the work. The question now to be considered is, whether the other defenders, viz., Messrs Dixon, Lieutenant Powell, and Mr Parsons, as registered part-owners of the vessel, are also liable therefor to the pursuers, as having expressly or by implication ordered or sanctioned the employment of the pursuers? Now, in the first place, it is quite certain that the pursuers had no communication on the subject of any of these operations with any of the owners of the vessel except Messrs Byrne & Company. They apparently did not know or inquire who the other owners were, and they seem to have taken it for granted that the owners of such a vessel as the 'Brazilian' would not only be liable for the repairs, but were in a position to meet their liability. In the second place, I think it must be held on the evidence that the present defenders did not authorise Messrs Byrne & Company to execute or order the repairs in question. I have already shown that up to the 10th December 1874 the Dixons and the Fernies had distinctly refused to give their consent to any such operations. The next communication which they received on the subject was a letter from R. Byrne & Company, dated 19th May 1875, long after the contract had been entered into by the pursuers, in which they say—'As we have explained to you a considerable time ago, when Mr T. R. Byrne was in Liverpool, that we should require some settlement of the "Brazilian" matter, ... we have since considered it would meet the difficulty by getting some one to buy out the Fernies.' But in this letter, which is of considerable length, it will be observed that while Byrne & Company distinctly recognise Fernie as the true owner of the 21-64th shares, there is not the slightest allusion to their intention to have the vessel classed at Lloyds', or to the contract which had been entered into with the pursuers. The next communication on the subject is a letter from Byrne to Charles Dixon, dated 5th July 1875, by which time one-third of the contract work had been executed by the pursuers. This letter, I think, bears internal evidence of being the first intimation of the proposed new classification of the vessel in Lloyds' as 95A. They say—'We think you had better have full particulars respecting this ship in order to facilitate matters, in case you can do business. . . . . The classification of the ship to 95A amounts to £5750 by contract, and we enclose a copy of it.' The letter is

acknowledged by Mr Dixon in a letter dated 7th July 1875, in which he says—'I have yours with particulars.' He does not refer to the contract, and he does not state any objections to it. A good deal of correspondence took place between Messrs Dixon and R. Byrne & Company and the Merchants Trading Company during the months of July, August, and September 1875, contained in the additional print of documents, all of which proceed upon the footing that Mr Fernie, *i.e.*, the Merchants Trading Company, and not the Dixons were the owners of the 21-64ths, and in which all liability for the work ordered by R. Byrne & Company is again and again repudiated. I think it must therefore be held that the pursuers have failed to prove that the defenders C. E. Dixon, A. Dixon, Parsons, and Powell, or any of them, authorised Byrne & Company to employ the pursuers to do the work in question, or to have any such work executed at all.

"Indeed, in the case of Parsons it is inconceivable that he should have given any authority, as it is clearly proved that he had no beneficial interest in the vessel, and that he held the 10-64ths of the vessel merely as a trustee for Byrne, the real owners of the shares, in order to secure Pustau, Byrne's creditor, for the advances which he had made. And in the case of Powell it is proved that he never knew or heard anything of the matter at all.

"This being so, the next question is, whether these repairs and alterations were necessary operations, and such as Messrs Byrne & Company in their character of ship's husbands or managing owners were entitled to order on the credit of their co-owners, the vessel being in a home port and not in the course of a voyage? I think this question must be answered in the negative. The law upon the point is, I think, nowhere better stated than in Parsons on Shipping, vol. i. p. 100—'In general the part-owners are liable *in solido* for the repairs of a ship or for necessaries actually supplied. This rests in part upon the general principle that one receiving and holding a benefit must pay for it, and in part upon the peculiar nature of this property, and the necessity there is, for the public good as well as for the advantage of each owner, that wherever the ship may be all who are interested in her should be regarded as authorising such expenditure for repairs or supplies as she may require. . . . If the things furnished are in any reasonable conformity with the character of the ship or the nature and purposes of the voyage, or if in fact they are such that any rational part-owner may be supposed to have desired them, it will be difficult for the absent part-owners to escape their liability. . . . It has been said that a part-owner of a vessel is not liable to another for repairs made at a home port without his consent. If made against his prohibition, he would not be liable, but we should suppose his consent would generally be inferred if the repairs were reasonable and proper and he made no objection. A considerable distinction exists in respect to all the powers of a part-owner or master or a ship's husband between the exercise of them abroad and in a home port. A ship far from its home might perish for want of aid which was delayed till all the owners could be consulted; but if at home, all who will have to pay have an unquestionable right to be consulted. It is not, however, quite certain whether the fact that the vessel is in a home port, which certainly limits these powers, goes so far as to destroy them; in other words, the question whether one part-owner can bind another in a home port without specific authority may be regarded as still open.' And the question was dealt with as open in the leading case in England, of *Mitchison* v. *Oliver*, 1855, 25 Ellis and B. 446.

"As regards the powers of a ship's husband, whether he be a part-owner or a stranger, to bind the owners for repairs and furnishings, the rule is, that being the general agent of all the owners, he binds his principals while acting within his authority. The powers and duties of the ship's husband are stated at some length by Mr Bell in his Comms., vol. i. pp. 552, 553, and they are more succinctly stated by Parsons, vol. i. p. 109, as follows:—'His duties are determined mainly by usage; they are, in general, to provide for the complete seaworthiness of the ship, to take care of her in port, to see that she has on board all necessary and proper papers, to make contracts for freight, and collect the freight and all returns. . . . . He cannot borrow money nor give up the lien for freight, nor insure, nor purchase a cargo for the owners without especial authority.' Questions of this kind have not arisen to any great extent in Scotland, but there are numerous decisions in England as to the powers of a ship's husband or managing owner, or a shipmaster, to bind the general body of owners *in solidum*. In the leading case of *Mitchison* v. *Oliver*, already referred to, Lord Campbell had told the jury at the trial that 'the defendant would not be liable to the plaintiff's demand merely as owner of the ship, or by reason of his being registered as such owner; nor would he be liable merely by the orders being given to the plaintiff by the defendant's master of the ship. And to that extent the direction was approved of by the Court of Exchequer's Chamber when the case was brought under review; but the Court went beyond this ruling, and held that the defendant would not be liable unless it were proved that the master acted as the defendant's master of the ship with his privity and consent, and the goods and work were supplied to and done upon the ship, not merely upon the credit of the owner by the *bona fide* order of the master given with the privity of the owner, but as in a contract with the owner on orders given by the master as for him. And in the later case of *Whitwell* v. *Perrin*, 1858, 4 C. B. (N. S.) p. 416, Byles, J., said—'Since the case of *Mitchison* v. *Oliver*, 5 Ellis and B. 419, the law is restored to what it formerly was, viz., that the mere fact of a man being owner or part-owner of a ship, or registered as owner, does not make him liable for work done or goods ordered for the ship. But as Jervis, C.-J., put it in *Brodie* v. *Howard*, 17 C. B. 109, 117, the question is, With whom was the contract? Was the party giving the orders the agent of the owners for that purpose? The mere fact of the goods being ordered by the captain or the ship's husband is no evidence to go to the jury; but here, not only was the defendant beneficially interested, but he knew that Whitwell the elder was acting as ship's husband, and he received a share of the profits. That clearly was evidence to go to the jury, that the ship's husband had authority to contract on behalf of the owners.' Now, I think that upon the

evidence in the present case it is quite impossible to hold that Byrne & Co. made the contract with the pursuers as for or on behalf of the present defenders, seeing that the latter had not only not authorised or sanctioned, but had declined to sanction, the repairs and alterations of the extent and character ordered by Byrne, And if I am right in this, there is an end of the case.

"But even if it should be held that notwithstanding the communications between Byrne & Co. and the defenders, the former, as managing owners or ship's husbands, had power to bind the latter, the question remains, Were the operations ordered of the nature of necessary repairs, and falling within the proper range of the ship's husband's duties and powers?

"In the case of *Chappel* v. *Bray*, 1860, 30 L. J., 24, it was decided that an express authority is necessary from a part-owner of a ship to the ship's husband to order work not necessary as repairs.' In that case the work ordered was the lengthening of a vessel, which was held to be unnecessary, and therefore not to fall within the powers of the ship's husband. On the other hand, in the case of *Barker* v. *Higgly*, 1863, 16 C. B., N. S. p. 27, it was held that 'the ship's husband or managing owner is an agent appointed to do what is necessary to enable the ship to prosecute her voyage and earn freight.' In that case money was borrowed to release the ship from Admiralty process, by which it had been arrested to meet claims arising out of a collision. And it was held that as the vessel was prevented from prosecuting her voyage by the arrest, the advance of money by the ship's husband was necessary, and formed a debt by the whole body of owners.

"The result of all the cases seems to be that the 'necessity of the repairs and furnishings is a question for a jury,' and that the urgency of the repairs, the stoppage of the vessel in the midst of a voyage or on the eve of her departure by repairs being suddenly found necessary, and the facts that the vessel is in a home port, and that the owners can be easily communicated with, are all jury elements in considering the question of necessity. It appears to me that the evidence in the present case negatives the necessity of the repairs. In the first place, the repairs were not rendered necessary by any sudden emergency. The vessel had been lying in the Clyde for nearly two years, and the fact that she had been there undergoing repairs and being fitted up with new engines was known to the pursuers. The vessel had not been chartered for a voyage, because the arrangement with Pustau that the vessel was to sail for China within six weeks from 21st September 1874 had come to an end, and no new charter had been obtained. It must therefore have been plain to the pursuers that the repairs which they were employed to make, and which were recommended by Boolds in consequence of the general rottenness of the vessel, were not matters of urgency requiring such immediate attention as to prevent the authority of the owners being previously asked for. Indeed, the fact that a period of two months elapsed between the pursuers' original offer for the work and Byrne & Company's acceptance gave the pursuers ample opportunity if they had chosen to consult the register and communicate with the persons there appearing as owners before entering into the contract. In the second place, I think that the repairs and alterations were of a nature and extent so material and extraordinary that they cannot be regarded as necessarily falling under the power of a ship's husband to order. Indeed, I think it is certain that the co-owners, had they been made aware of the circumstances before the contract was entered into, would have repudiated it, and at once have communicated with Messrs Steele to inform them of their repudiation, just as they did when they became aware of it for the first time in July 1875. It is said that without these repairs the vessel could not have been reclassed, and that it is difficult to insure an unclassed vessel. But where the operations required to secure this result were so extensive as in the present case, and so little urgent, the pursuers ought not in common prudence to have undertaken to execute them without ascertaining that the owners desired or sanctioned such extraordinary outlay. And on the whole matter I am of opinion that the defenders who have lodged defences are entitled to absolvitor; the pursuers being of course entitled to decree in absence against the defenders who have not lodged defences.

"It was specially pleaded in defence for Mr Parsons, that although he stands on the register as an *ex facie* absolute owner of ten shares of the vessel, yet, as he had no beneficial interest, and was merely a trustee holding the shares in security for a creditor of Byrne, and for reconveyance to Byrne on the payment of that creditor's debt, and as he never was in possession of any part of the vessel or its profits, he is not liable. And the following passage from Parsons on Shipping was cited in support of the defence:—'A mortgagee who does not have the possession and control of the ship does not authorise a furnisher to consider him the owner; and if credit be given him, it does not bind him unless given with his consent. . . . And even if a person takes a bill of sale of a vessel, absolute in its terms, and is registered as owner, and the person furnishing the supplies consulted the record of the custom-house and gave credit to him as owner, he is not liable for such if the bill of sale was intended as a collateral security, and he has never taken the vessel into his possession or control or exercised any acts of ownership.' This I assume to be a correct statement of the law as administered in America, and perhaps the proposition is a direct corollary from the law as laid down by the English courts in the cases of *Mitchison* v. *Oliver* and *Whitwell* v. *Perrin*. But in the view which I take of the present case generally, it is not necessary to say whether the doctrine is sound or not. There are sufficient materials disclosed in the evidence in this case to justify a verdict in favour of Parsons and his co-defenders.

"It is only necessary further to observe that I have not dealt with the pursuers' claim for the minor repairs, amounting to £820, as on a different footing from the repairs executed under the contract. These minor repairs were all more or less connected with the contract work, excepting those items which are for repairing damage done to the vessel while lying off the harbour before going into dock. But the whole of these repairs were executed along with and under the same

employment as those under the contract, and they must in my opinion all be dealt with on the same footing as regards the liability of the defenders."

Authorities—Bell's Prin. (M'Laren) vol. i. 552; Story on Agency, sec. 35; Abbott on Shipping, 11th ed.) p. 79; Parsons on Shipping, 100, 109, and 131. *Brodie* v. *Howard*, Nov. 1855, 25 L. J., C. P. 57, and 17 C. B. 109; *Chappel* v. *Bray*, 1860, 30 L. J., Exch. 24; *Hamilton* v. *Landale*, May 12, 1860, 22 D. 1059; *Barker* v. *Higgly*, 1863. 32 L. J., C. P. 270, and 15 C. B. (N. S.) 27; *Whitwell* v. *Perrin*, 1858, 4 C. B. (N. S.) 412; *Colehurst* v. *Leith*, 1866, 1 L. R., C. P. 649; *Trench* v. *Backhouse*, 5 Burrows 2078; *Arthur* v. *Barton*, 6 M. and W. 138; *Mitchison* v. *Oliver*, 1855, 25 Ellis and B. 446.

At advising—

Lord Justice-Clerk—[*After stating the facts*]—On the general law applicable to the present case I am of opinion that when a vessel is in a home port a managing part-owner may bind the other part-owners for ordinary repairs, but that he is not entitled to bind them without specific authority for unusual and structural alterations, nor for work to fit the vessel for a new employment on which the part-owners had not resolved. Something in such cases may depend on whether the other part-owners are easily accessible, and there will be a greater presumption in favour of the managing part-owner's authority should the others be beyond the reach of immediate communication. In the present case, as all the defenders were at hand, this element does not arise, and the first question is, Whether the contract with the pursuer, which was for structural and unusual alterations, was entered into by the direct authority of the defenders or any of them?

As regards the Messrs Dixon, they maintain that they are entitled to absolvitor on the ground that they not only never gave any authority to Byrne & Company to incur this amount, but, on the contrary, repudiated responsibility from first to last, and that on the ground that although their names stood on the register they were mere names for Fernie & Company. Without going into the evidence I am very clearly of opinion that their defence is entirely consistent with the facts. Messrs Byrne never treated the Dixons as principals, and never considered them as such, but dealt with them solely as interposed persons between them and the real part-owners, namely, Fernie & Company. For some reason which is not disclosed, Messrs Byrne made it a consideration of their purchase that Fernie & Company should not stand on the register as owners, but that the Messrs Dixons' name should be so entered, and that they should not re-transfer their apparent interest without the consent of Byrne & Co. There are some indications that at one time Messrs Dixon were the creditors of Fernie & Co., but they do not appear ever to have been mortgagees; and we have no evidence that at the date of the contract with the pursuers they were indebted to that firm. It has been long settled that the mere fact of a partner or partners of a firm being registered as owners does not of itself infer liability for furnishings by third parties on account of the ship. Even a mortgagee not in possession is not liable merely because his name appears on the register; and much less can a party be liable who merely lends his name for the benefit and to serve the purpose of another. Byrne & Company had no authority to bind Dixon & Company individually, and never supposed that they had.

How far Fernie & Company are liable to the shipbuilder is a question not raised in this action, and is one on which I desire for that reason to express no opinion. That they were part owners through the Dixons, then trustees, seems to be a fact, although even that fact in their absence it would be unjust to assume. There may also be a question how far—although as between Byrne & Company and Messrs Fernie the latter insisted that they should not be responsible—they may not be responsible to the shipbuilder for work done on their property of which they were cognisant, which they thought proper to be done and permitted to be done, and of which they received or may receive the benefit. These are questions which cannot be raised and decided here, because the Messrs Fernie are not parties to this suit.

As regards Mr Powell, who held a very small stake in the vessel, I am of opinion that he is not responsible as part-owner for the important alterations on the vessel, which were the main subject of this contract. A minor question has been raised in regard to the amount of expense incurred in repairing certain injuries incurred in removing the vessel from the docks at Greenock. The Lord Ordinary has not allowed this item, looking at the amount as one. I think it would be unfair to Mr Powell, in the absence of the other proprietors of one-third of the vessel, to treat this as an action for ordinary repairs. I propose to reserve this claim, to be made good, if the pursuers are so advised, in an action to which all the proper parties are called.

Lord Neaves concurred.

Lord Ormidale—I am of the same opinion. The result of the judgment in this case may be to impose on Messrs Steele considerable hardship, as no doubt they have done the work to this vessel, and no objection is taken to that work, which, indeed, has been completed as well as might have been expected. But the shipbuilders did this work on the personal credit of no one save of the Byrnes', the managing owners. What they relied upon, and what shipwrights in general do rely upon, is the lien over the ship, and here we are told that the ship is not in the pursuers' possession, and consequently they have not their lien. All that can be said is that they have the ordinary recourse against the Byrnes. The lien has been lost if ever they had it, but that is a question into which the Court cannot enter.

The case against the defender Parsons was abandoned. Indeed, obviously it could not be maintained; and the remaining defenders are firstly the Messrs Dixon, and secondly Mr Powell. The important matter then comes to be, whether the Messrs Dixon are liable as the true owners? for a great deal turns upon that in viewing the case as directed against Mr Powell. On the evidence I think the Dixons are not liable, and cannot be in any sense held to have been so. I feel quite satisfied that after the ultimate sale to Messrs Byrne took place the Messrs Dixon held no portion of the ship as true owners. They

merely allowed their names to be interposed between the Byrnes and the Fernies (the true owners) at the request of Byrne & Company, and to serve some purpose of their own, the reason of which does not appear. [His Lordship quoted here the letter of Sept. 29, 1873—Messrs Byrne to Messrs Dixon; the letter of Nov. 28, 1874—Dixons to Byrne & Company; and the memo. of Nov. 30, 1874, by the Merchants Trading Company in reply to it—all referred to and quoted by the Lord Ordinary.] That memorandum is very explicit. Messrs Fernie refuse to agree to the proposed alterations, and things stand upon this footing when in April 1875 Messrs Steele's tender is obtained and accepted by Byrne & Company without consulting anyone. Even Messrs Dixon did not know till July 1875, while the Fernies and Mr Powell were never consulted at all. I am clearly of opinion that not only was no consent of any kind got by Messrs Byrne from the interested parties to these extensive alterations on the ship, but that in the attempts made by the Byrnes to obtain such consent, these true owners took every opportunity of refusing to allow such alterations. It may be a misfortune for the Messrs Byrne, but they are not entitled, looking to the facts, to say that they as merely managing owners had power to bind the other owners for such extensive repairs. There is no such direct or express authority, and I cannot think that it is from the circumstances to be implied.

Now, if the Messrs Dixon are held not liable, what kind of a case is there against Mr Powell? It appears to me that there is none at all, if I am right in the general view that owners cannot be held bound by anything short of express consent in such large alterations on a ship. But apart from that, to hold Mr Powell liable would mean (now that the Messrs Fernie are clear) that the owner of two shares is to be made liable *in solidum*. I cannot take that view; he cannot be deemed to have given an implied consent, and he too must be assoilzied with the other defenders.

Lord Gifford—The Messrs Steele were in this case employed by the Byrnes. Mr Steele himself in his evidence says in reply to the question—"Did you understand that Byrne & Company were the owners of the 'Brazilian'?—We never made any inquiry or understood anything about it. We took it for granted that we were making an offer to the owners of the vessel, whoever the owners might be. I cannot say how long it was after the work was begun that Mr Hill mentioned the Messrs Dixon, but it was, I think, somewhere about the middle of the time. Many plates had not been put on by that time. I did not mark down what was done at particular dates; for having a ship of that kind, I took it for granted that the owners were responsible men. There had not, however, been a great deal incurred up to that time. We did not take any steps by way of communicating with the Messrs Dixon; we never do, as we always trust the owners." That shows how matters really stood; and I may, in passing, remark that if a shipbuilder trusts to a lien over a ship he is bound to see that the person giving the order has power also to give possession. If he trusts to the fact of ownership, he is leaning upon a broken reed, as the law is clear that the mere fact of a man's being a registered owner of a vessel is not in itself sufficient to render him liable. The real question is, whether he is or is not the person who by himself or by another gave the order? Now, in the present case it is maintained that either the Messrs Byrne were in the position of ship's husbands or that they had special authority. These two points are entirely separate and quite different. Suppose then, in the first place, that Messrs Byrne were actually ship's husbands, had they in that capacity power to bind the owners? for, be it observed, no distinction in reality exists between the position of a ship's husband and that of a managing owner—the power of an owner acting as ship's husband is not more than that of any outsider acting as ship's husband. Now, a ship's husband is a person who has power to manage and bind the owners of the ship in the course of trade in which that ship is engaged. I doubt if the duties of a ship's husband can really begin until the ship is ready for the trade in which it is to be employed. No doubt the mandate to a ship's husband may be made broad enough to cover this, but it is always then a question of circumstances. Now, here the bargain was that the vessel was to be managed by the Messrs Byrne on their "usual terms as regards commission." These, it appears, were five per cent. on the gross freight. All this work, forming the subject of the present action, was work on which the Messrs Byrne were not entitled to claim any commission. In a ship's husband's case there is not absolute delegation by the owners of their power—only a limited authority is granted. Many things which for owners might be very prudent are beyond the powers of a ship's husband. Looking, then, to the nature of these extensive repairs, I am of opinion that they were beyond the powers of a ship's husband.

Further, on the second point, as to whether Messrs Byrne had a special authority, I entirely agree with your Lordships that they not only were acting without the authority of their co-owners, but even more than that, they were acting against it. This appears to me conclusive of the whole case. I reserve all questions as to actions for compensation or for value given, as the whole question before us is, whether the Byrnes had authority? and I think they had not.

The Court pronounced the following interlocutor:—

> "Adhere to the said interlocutor, but reserve to the pursuers the right to insist against the defender Thomas Pery Powell for payment of the sum of £271, 15s. 5d., being the amount of the two accounts Nos. 13 and 14 of process, in any action they may be advised to raise against all the parties interested, and to them their defences thereto as accords, and decern; find the pursuers liable in additional expenses," &c.

Counsel for Pursuers — Burnet — Trayner. Agents—Mason & Smith, S.S.C.

Counsel for Dixons—Dean of Faculty (Watson) —Maclean. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for Powell—Mackintosh—Robertson. Agents—Mackenzie & Black, W.S.

Counsel for Parsons—Dean of Faculty (Watson) —Black. Agents—Wilson & Dunlop, W.S.