to make such an addition, it is clearly in our power to authorise the judicial factor to do what they might have done." To the same effect is his Lordship's opinion given effect to in a matter involving the exercise of a discretion in the case of *Jamieson* v. *Allardice* (10 Macph. 755). There his Lordship says—"The trustees have power given them by the trust-deed to sell, and there is nothing which tends in an opposite direction except the wish expressed by the testator that they shall, if possible, make over the landed property to his son Robert. If the sale is allowed, the estate will obviously remain in a better form for whoever may get it than it is now." Lord Kinloch concurs, and says—"The trustees could have sold without applying to the Court at all, and it is only because Mr Jamieson is a judicial factor that he has thought it necessary to apply to the Court." These cases seem to me authority for the course to be adopted, but even without this authority I should have had no difficulty in granting the power now asked.

LORD MURE was absent on Circuit.

The Court recalled the interlocutor of the Lord Ordinary and granted the special powers craved.

Counsel for Petitioners—Urquhart. Agent—J. H. S. Graham, W.S.

Tuesday, January 30.

OUTER HOUSE.

[Lord Kinnear, Lord Ordinary on the Bills.

LESLIE *v.* THE ORKNEY COMMISSIONERS OF SUPPLY.

JOHNSTON *v.* THE ORKNEY COMMISSIONERS OF SUPPLY.

Parish Minister—Glebe—Commissioners of Supply—Lands Valuation (Scotland) Act (17 *and* 18 *Vict. cap.* 91), *sec.* 19—*Proprietor* ex officio.

Parish ministers having in virtue of their offices glebes above £100 of yearly value *held* not to have the statutory qualification under the Lands Valuation (Scotland) Act 1854 to be enrolled as Commissioners of Supply.

These appeals were brought (under section 6 of the Commissioners of Supply (Scotland) Act 1856, which provides for a summary appeal to the Lord Ordinary on the Bills from the determination of the Commissioners of Supply on Claims and Objections) by the Reverend Alexander Leslie of Lesliedale, minister of the united parishes of Evie and Rendall, and by the Rev. David Johnston, minister of the united parishes of Harray and Birsay, both in the county of Orkney, against the judgment of the Committee on Claims and Objections of the Commissioners of Supply for that county, refusing to sustain their claims, under sec. 19 of the Lands Valuation (Scotland) Act 1854, to be enrolled as Commissioners of Supply for the county. Each of the appellants had glebe lands of a yearly value exceeding £100 within their respective parishes. Mr Johnston claimed to be enrolled on the ground that he was, "in right of his office, proprietor of lands" (not burdened with any liferent) in the county of the yearly rent or value of £100 and upwards, exclusive of the yearly rent or value of houses and other buildings, not being farmhouses or offices or other agricultural buildings. Mr Leslie, who besides having his glebe lands, was also proprietor in his own right of land in the county to the value of £60 per annum, and founding on that fact in his claim, claimed as being, "as minister" of his parish, "proprietor in liferent" of lands exceeding £100 in yearly value.

Section 19 of the Act 17 and 18 Vict. cap. 91, is as follows:—"From and after the passing of this Act the qualification for a commissioner of supply in any county shall be . . . the being proprietor, or the husband of any proprietor, infeft in liferent or in fee not burdened with a liferent in lands and heritages within such county of the yearly rent or value, in terms of this Act, of at least £100, or the being eldest son and heir-apparent of a proprietor infeft in fee not burdened with a liferent in lands and heritages within such county of the yearly rent or value, in terms of this Act, of £400, and the factor of any proprietor or proprietors infeft either in liferent or in fee, unburdened as aforesaid, in lands and heritages within such county of the yearly rent or value, in terms of this Act, of £800, shall be qualified to act as a commissioner of supply in the absence of such proprietor or proprietors: Provided always, that with reference only to the qualification of commissioners of supply under this Act the yearly rent or value of houses and other buildings or offices or other agricultural buildings shall be estimated at only one-half of their actual yearly rent or value in terms of this Act."

The Committee on Claims and Objections having, as above stated, refused to sustain the claim, the claimants appealed to the Lord Ordinary on the Bills.

The Lord Ordinary pronounced this interlocutor in each case:—"Having heard counsel for the petitioner, and considered the petition and productions, dismisses the same.

"*Opinion.*—I have considered these appeals, and am of opinion that they cannot be sustained. The statutory qualification is quite clear, and the appellants do not possess it, not being infeft either in liferent or in fee in property of the statutory value.

Counsel for Appellants—Pearson. Agent—J. B. M'Intosh, S.S.C.

Friday, February 2.

SECOND DIVISION.

[Lord Adam, Ordinary.

KENNETH & COMPANY *v.* MOORE AND ANOTHER.

Marine Insurance—Time Policy—Constructive Total Loss—Perils of Sea—Seaworthiness—Inherent Defects.

In an action on a time policy of insurance for an alleged constructive total loss of a vessel by perils of the sea, the underwriters denied liability on the ground that, assuming

the vessel to be a constructive total loss, the proximate cause was her own defective condition, and not the perils insured against. It appeared from the proof that the vessel, not being a new and strong ship, had been rendered a constructive total loss by a storm which might not have injured it so seriously had it been newer and stronger. *Held* that in a case of constructive equally as in a case of actual total loss, there is no warranty of seaworthiness in a time policy, and the underwriters were therefore liable.

This was an action on a policy of insurance on the ship "City of Manchester," at the instance of William Kenneth & Company, merchants in Glasgow, owners of that ship, against Henry Moore and another, two of the underwriters with whom the ship had been insured, in respect of the alleged constructive total loss of the ship. The policy of insurance was a time policy for the space of 12 calendar months, commencing on the 2d December 1880, as employment might offer, in port and at sea, by docks and in ways, at all times and in all places, and in all lawful trades and services whatsoever, for the sum of £4500 sterling, the ship being valued in the policy at that amount.

The vessel sailed from Glasgow to Rio de Janeiro with a cargo of coals on 3d December 1880, Captain Beith being the master.

The vessel had been built in 1854. She had been surveyed by Lloyds' surveyors in 1876, and was then classed A1 for seven years. Immediately before sailing for Rio she underwent her half-time survey. All repairs considered necessary were executed, and she was found to be eligible to remain as classed, the usual certificate to that effect being issued.

The vessel arrived at Rio on the 9th February 1881 after a voyage of ordinary duration and character, and there discharged her cargo and sailed from Rio on 15th March in ballast to go round Cape Horn to Astoria, there to ship a cargo of grain for the United Kingdom or France. She proceeded on her voyage until Saturday the 26th of March, when after encountering stormy weather she was turned back and made for Barbadoes, where she was pronounced unfit to proceed again to sea, as hereafter narrated.

The pursuers averred that the vessel was seaworthy when she sailed from Rio, and could have made the voyage to Astoria in perfect safety but for the heavy gales and seas which she encountered, but that the labouring and straining caused by the heavy sea had so greatly aggravated any defects which existed, and so seriously injured the vessel, that the cost of repairing the vessel and making her seaworthy would greatly exceed her value when repaired.

They pleaded—"The pursuers having sustained a constructive total loss of the foresaid vessel through the perils of the sea insured against, and within the period insured against by said policy, are entitled to decree against the defenders severally for the respective amounts underwritten by them, with interest and expenses, as concluded for."

The defenders averred that the surveys disclosed that the ship was capable of repair at a moderate cost, so as to be equally seaworthy as when insured, and was not a constructive total loss; that any defects were not due to perils insured against, but to the age of the ship; and that assuming her to be in the condition alleged, her being in that condition was not due to the perils insured against.

After a proof, the import of which appears from the Lord Ordinary's note, the Lord Ordinary (ADAM) decerned against the defenders in terms of the conclusions of the libel.

"*Note.—[After a narrative of the facts from which the narrative given above is taken]*—The vessel proceeded on her voyage without anything calling for remark until Saturday the 26th of March, when a strong breeze with heavy squalls and a rising sea were encountered. The wind and sea continued to increase, and the ship was pitching and tossing and labouring heavily. On Monday the 28th the attention of the captain and his officers was called to the state of the ship, and after fully examining her they came to the conclusion, from the way in which she was working, and the amount of water she was making, that she was very much strained, and could not with safety proceed on her voyage. Captain Beith thereupon resolved to abandon the voyage, and the ship was turned back.

"The Lord Ordinary does not doubt the *bona fides* of Captain Beith in coming to this resolution. It appears to him that the account given of the working and straining of the vessel at the time by the captain, and by Roberts, his first mate, and the steward Adams, is true, and that it is confirmed by the condition the vessel is proved to have been in when she reached Barbadoes. It appears to the Lord Ordinary that Captain Beith was right in turning back, and that to have persevered in the voyage would probably have led to the loss of the vessel and of the lives of those on board.

"A good deal of criticism was expended on the language used in the log-book, with the view of showing that the entries therein did not show that the ship had met with such heavy weather as is now represented by Captain Beith, but that criticism had very little effect on the mind of the Lord Ordinary.

"Captain Beith, after turning back for the benefit of all concerned, resolved to go to Barbadoes. Barbadoes was not the nearest British port in point of distance, but it was the most available, and there seems to be no ground for complaint with regard to the course he followed in that respect.

"The ship arrived at Barbadoes on Saturday the 30th April. Captain Beith immediately put himself into the hands of agents there, who advised him to hold a survey on the ship.

"The ship was accordingly surveyed on the 2d May. The result of the survey was that the surveyors reported that they found the vessel in a very bad condition and thoroughly unseaworthy; that in the condition in which she then was she was unfit to proceed on any voyage; that they could not recommend that the necessary repairs should be entered into, as what would be required would, they believed, cost more than the ship was worth; and they recommended that the captain should communicate the particulars to his owners and await their decision.

"The owners were accordingly communicated with by telegram, and in consequence a second survey was held on the 10th of May by the same gentlemen, with the addition of Captain Kirk-

ham, assistant harbour-master. The surveyors were able on this occasion to see somewhat more of the inside of the ship than they had been on the previous occasion. The result of the survey was that the surveyors confirmed the previous survey, and found that the ship was even in a worse condition than previously reported; and they agreed that the ship was completely unseaworthy and unfit to be repaired; and they gave it as their opinion that the wisest course to be pursued in the interests of all concerned was to abandon the ship altogether as unfit to go to sea, and they recommended that she should be at once dismasted and sold by public auction, or in any other convenient manner as found most advantageous for the interest of all concerned. Captain Beith, under advice, acted on this report, and had the vessel brought into the careenage, dismantled, and advertised for sale.

"The result of these surveys had been communicated to the owners in Glasgow, and by them to the underwriters. The underwriters, however, did not agree to act on the recommendation contained in the reports, but sent out Captain Barr to Barbadoes to see the ship. In the meantime the sale was postponed.

"Captain Barr arrived at Barbadoes on the 20th of June, and at his instance a survey of the ship was held by other surveyors on the 22d June. They did not agree with the previous surveyors, but recommended that the vessel's rigging and spars should be put back, the vessel hove down, stripped of her metal, and caulked from garboard streak up, to enable the vessel to take ballast and proceed to the port of Glasgow.

"Captain Barr wrote to Captain Beith, forwarding this report, and called upon him to comply with the recommendation therein contained. Captain Beith, however, refused to do so, and gave notice of the abandonment of the ship as a constructive total loss. Captain Barr refused to accept the abandonment.

"Several other surveys of the vessel were subsequently held, some at the instance of the owners and others at the instance of the underwriters. The vessel having been for the purpose of these surveys opened up to a much larger extent than she had formerly been, the fact then came to light, which had not been previously known, that the timbers of the vessel were rotten to a very considerable extent.

"The Lord Ordinary understood that the underwriters now admit—but whether they do so or not it is the fact—that the vessel could not have been repaired except at a cost greater than her value after the repairs had been executed. But they maintain that the material injuries which the vessel received, and which rendered her not worth repairing, were not the result of the perils of the sea, against which she was insured, but were due to her own defective condition and the wear and tear of ordinary weather in an ordinary voyage.

"If this were a correct representation of the facts of the case, it would probably be a good defence to the action, because in that case the vessel would not have perished from any external cause, but solely from the results of age and internal decay—she would have died, so to speak, a natural death. But the facts of the case are quite different. The vessel had just completed her voyage from Glasgow to Rio in perfect safety, and without showing any signs of weakness; and I see no reason to suppose that if she had not met with the heavy weather which she did meet after leaving Rio she would not have completed her voyage to Astoria in safety. It is no answer to say that if she had been a new vessel the weather was not such as to cause her to work and strain as she did, or to have prevented her from completing her voyage. She was not a new vessel, and no doubt a higher premium was paid to the underwriters on that account. It appears to the Lord Ordinary that the vessel was reduced to the condition in which she was when she reached Barbadoes by the heavy weather acting in combination with the rotten and defective state of the vessel. If that be so, then, even assuming that the unseaworthiness of the vessel was a *sine qua non* without which the vessel would not have been reduced to a condition in which she was not worth repairing, still the heavy weather was the proximate cause of the vessel having been reduced to that condition. If the captain, in place of abandoning the voyage and arriving in safety at Barbadoes, had persevered in the voyage, and the ship had been lost at sea, the Lord Ordinary does not see how it could have been maintained that she had not been lost by the perils of the sea; in which case the underwriters would have been liable, seeing that there is no guarantee of seaworthiness in the case of a time policy. But does it make any difference in the liability of the underwriters that the vessel was not lost at sea, but succeeded in reaching a port in safety, although in such a condition as not to be worth repairing, and therefore constructively a total loss? The underwriters maintain that it does. They say that although a considerable portion of the injuries to the vessel may have been caused by the perils of the sea, still that these of themselves would not have caused a total loss; and that therefore the constructive total loss is not due to the perils of the sea but to the rottenness of the ship. The owners, on the other hand, say that the injuries caused by the perils of the sea would alone have been sufficient to cause a constructive total loss.

"It appears to the Lord Ordinary to be quite impossible to say how much of the injuries to the ship were due to the one cause and how much to the other. Both causes worked together to produce the result that the vessel could not be repaired except at a cost greater than she would have been worth when repaired. The heavy weather which she encountered brought into play the inherent defects of the vessel, and was the proximate cause of her being reduced to that state and condition. But that was one of the perils of the sea against which the owners were insured. The Lord Ordinary is therefore of opinion that the owners are entitled to recover as for a constructive total loss. . . .

"The Lord Ordinary was referred to the cases of *Dudgeon* v. *Pembroke*, L.R., 9 Q.B. 594—L.R., 2 Ap. Ca. 284; *West Indian Telegraph Company* v. *Home and Colonial Insurance Company*, 6 Q.B.D. 51; *Fawcus* v. *Sarsfield*, 25 L. J., Q.B. 249, 6 El. and Bl. 192; and Arnold, i. 13."

The defenders reclaimed, and argued—The constructive total loss on which the present action was raised was not due to the perils of the sea insured against in the policy of insurance. The

causa proxima of the loss was old age. The vessel's inherent defects were brought out by shaking received during a voyage, which in point of fact was nothing more than mere wear and tear of ordinary weather.—*Fawcus* v. *Sarsfield*, Feb. 23, 1856, 6 Ellis & Bl. Rep. 192; *Merchants Trading Co.* v. *Universal Marine Co.*, not reported, but referred to on p. 196 of report of above case. The doctrine that there was no warranty of seaworthiness in time policies was only applicable to the case of actual total loss. It did not extend to a constructive total loss.

The pursuer replied—The *causa proxima* of loss was perils of sea, and not inherent defects in the vessel, therefore the underwriters are liable.—*Dudgeon and Others* v. *Pembroke*, July 6, 1874, 9 Q.B., L.R. 581. The Courts in England do not admit anything beyond the proximate and actual cause. Thus in the case of *Cory & Sons* v. *Burr*, Dec. 9, 1881, 8 Q.B. Div., L.R. 313, a vessel was insured in a time policy against the ordinary perils (including barratry of the master), the subject-matter being warranted "free from capture and seizure." In consequence of the barratrous act of the master the ship was seized and detained for smuggling. The Court held that the loss must be imputed to the excepted perils of capture and seizure, which directly caused it, and not to the barratry of the master, and therefore that the underwriter was not liable. There was no warranty of seaworthiness in a time policy.

At advising—

LORD YOUNG—This is a case of some interest, and not without difficulty. The question is whether the underwriters are liable as for a constructive total loss under this policy of insurance on the "City of Manchester" for a year from December 1880 to December 1881. There is no doubt about the insurance, and the parties are agreed that in May 1880, within the period of the policy, the ship was found to be in a condition not worthy of being repaired—that is to say, that she could not be repaired, if repairable at all, at a cost which made it worth while; the cost of repair in short, would be more than the value of the ship when repaired. Parties are agreed upon that. And the Lord Ordinary, before whom to a great extent, and under whose direction, a tremendous mass of evidence has been taken, has returned this verdict upon it—"It appears to the Lord Ordinary that the vessel was reduced to the condition in which she was when she reached Barbadoes by the heavy weather acting in combination with the rotten and defective state of the vessel." In short, the vessel insured during the currency of the policy is reduced to the condition of being in the estimation of law a constructive total loss by heavy weather acting in combination with the rotten and defective state of the vessel itself. Now, I do not think we need perplex ourselves with the case of very little being attributable to the perils of the sea—something very inconsiderable and insignificant. The Lord Ordinary, it appears from his note, is of opinion that the damage done to the ship by the weather—that is, by the perils of the sea—was not slight, but was considerable, and I see no reason for disagreeing with that. She was seriously injured by the perils of the sea insured against, although it does not appear that but for her rotten condition otherwise these perils would have been sufficient to reduce her to the condition of being a constructive total loss. The question, then, upon that state of the facts—for I am not at all prepared to differ from the Lord Ordinary in his conclusions from the facts—is, What is the law?

Now, it seems to be quite settled—and Mr Mackintosh did not dispute it—that unseaworthiness is no defence to the underwriters against liability in the case of an actual loss. If an unseaworthy ship, there being no warranty of seaworthiness, is insured without any fraud on the part of the owner—and no fraud or blame is suggested or attributed to the owners here—if an unseaworthy ship is insured and encounters perils of the sea and is lost, the underwriters are responsible notwithstanding the unseaworthiness. The conclusion may be drawn distinctly in point of fact that those perils of the sea would not have destroyed a sound ship, and the ship is lost; but there is no fault on the part of the owner, for there is no warranty of seaworthiness. The short and the long of it is, the ship is unseaworthy; she encounters perils of the sea and is lost; the consequence is the underwriters are responsible notwithstanding the unseaworthiness. The counsel for the underwriters endeavoured to make the distinction between an actual total loss and a constructive total loss. I am not able to see the distinction. I could understand this case—and indeed upon that my opinion would have inclined to be favourable to the underwriters. A vessel does receive some damage from perils of the sea, and upon measures being taken to ascertain the extent of them the true state of the vessel is discovered, and then she is pronounced to be not worth repairing, because the cost of renewing her constitution, which is gone from the decay of long life, *plus* the cost of repairing the damage, inconsiderable though it might be, done by the sea, would probably amount to more than her value when repaired. I say upon such a state of facts I should be inclined to favour the case of the underwriters, and indeed that appears to me to be the opinion of the Lord Ordinary, for he says—"The Lord Ordinary understood that the underwriters now admit—but whether they do so or not it is the fact—that the vessel could not have been repaired except at a cost greater than her value after the repairs had been executed. But they maintain that the material injuries which the vessel received, and which rendered her not worth repairing, were not the result of the perils of the sea against which she was insured, but were due to her own defective condition, and the wear and tear of ordinary weather in an ordinary voyage. If this were a correct representation of the facts of the case, it would probably be a good defence to the action, because in that case the vessel would not have perished from any external cause, but solely from the results of age and internal decay—she would have died, so to speak, a natural death. But the facts of the case are quite different." And he is of opinion that she did encounter very bad weather, and that the damage done to her by that very bad weather which she encountered was very considerable, although probably that bad weather would not have reduced a younger or stronger ship to the condition of being a constructive total loss. And then, applying the doctrine that the unseaworthiness of the vessel is no answer on the part of the underwriters to

the claim, I think the judgment of the Lord Ordinary is right. I think that doctrine is applicable to the case of constructive total loss, as well as to an actual loss in such circumstances as we have here, and with such weather and such damage caused by that weather as we have here. In short, it is all one to the shipowner whether there is an actual total loss or a constructive total loss—I mean the damage to him is the same, except only the case of the price which may be got for the wreck, which, of course, is deducted from the claim against the underwriters.

With that exception the owners are in the same position with respect to this insured vessel as if she had gone down. They get the value and give the underwriters credit for the value of the materials, which in this case are not worth repairing. If she had gone down, it might have been said that in all human probability, and with something approaching to certainty, she would not have gone down if she had not been unseaworthy, the weather, although bad, being such as would not in all likelihood have wrecked a sound ship.

Therefore, upon the whole matter, my opinion coincides with that of the Lord Ordinary, that a case for liability as for constructive total loss is here established.

Lord Craighill—The ship "City of Manchester" was insured by a time policy to endure from December 1880 to December 1881, by the defenders. She left Glasgow soon after the policy was effected, on a voyage to Rio Janeiro with a cargo of coals. The voyage was successfully made, the coals were delivered, and thereupon the vessel left that port in ballast for Astoria, in Oregon, for a grain cargo to be shipped for Great Britain. The voyage from Rio was successful until the Falkland Islands were reached, but there, as the pursuers allege, storms were encountered by which the ship was so seriously injured as to render it necessary that in place of prosecuting her voyage she should return to a port where her injuries might be repaired. Accordingly she was taken back to Barbadoes, and it was discovered upon a survey that the repair of the ship would cost more than the ship would be worth after she was repaired. This was the report of surveyors made before it had been discovered that the beams of the ship were rotten, and that money expended upon her would be money thrown away. All parties are now agreed that when the ship reached Barbadoes she was constructively a total loss. This action has been raised for £4500, the sum insured under the policy, and what is to be determined is whether the pursuers are entitled to recover that sum. The Lord Ordinary, for the reasons explained in his note, answers affirmatively, and I concur in his judgment. The thing insured against was a peril of the sea, and I am of opinion that the proof shows that the ship was reduced to the condition in which she reached Barbadoes through stress of weather, or, in other words, through a peril of the sea. No doubt, had she been a stronger ship she might have survived the injury, but seaworthiness is not warranted in a time policy, and the pursuers being entitled to recover for a constructive total loss as they would be entitled to recover for an actual loss, they must here prevail, because the thing which led to the loss has been shown to be a peril of the sea, against which the pursuers were insured.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I also concur in the result, and much on the grounds explained by the Lord Ordinary in his note. There are some somewhat subtle questions that might arise under the category to which this case belongs, but I do not think this is a case of any difficulty at all. It is quite plain that this vessel was probably, when she started from Glasgow—perhaps not certainly—in a condition that was not seaworthy; but it has been decided—and it is too late to go back on the principle—that unseaworthiness is no defence against an action on a time policy. Consequently the question is, How did it happen? In the first place, this vessel instead of proceeding on her voyage was obliged to put back to Barbadoes, and I have no doubt whatever that that was occasioned by the perils of the sea which she encountered on her way from Rio to the Cape. In the second place, it is clear that repairs were rendered necessary by these very perils of the sea. That she was driven out of her course by those perils of the sea, and that the necessity for those repairs arose from the perils of the sea, cannot be doubted. And then when the repairs came to be considered, it was found that from the condition of the vessel she could not be repaired except at a cost greater than her value would be—that she was, in short, a constructive total loss. As that was caused entirely by the perils of the sea, I think her loss is embraced by this policy.

The Court adhered.

Counsel for Reclaimers—Mackintosh—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Trayner—Guthrie. Agents—J. & J. Ross, W.S.

Wednesday, February 7.

FIRST DIVISION

TURNBULL *v.* LIQUIDATORS OF BENHAR COAL COMPANY (LIMITED).

Public Company—Winding-up—Arrestments on Dependence, Withdrawal of—Preference—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 108—*Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 133, 163.

A creditor used arrestments on the dependence of an action against a public company. Ten days thereafter the company went into voluntary liquidation, which was subsequently placed under supervision of the Court. The liquidators admitted that the debt sued for was due. In a question as to the value of the arresting creditor's diligence, *held* that he was entitled to be ranked preferably on the assets of the company in respect of his arrestments.

George Vair Turnbull, shipbroker and merchant in Leith, was sole surviving trustee under (1) the settlement of the late Robert Park, merchant, Leith, dated 21st April 1860; (2) the trust-dis-