would be equally appropriate in designating the terms of payment throughout the course of years which was to follow the vesting period if it had been expressly enacted in another clause that the North British Company was not to be liable except for one-half of the dividends, rents, and interest accruing after the vesting period. In that case they would aptly express the rule that one-half of such of the yearly dividends as had accrued after the vesting period and previously to one or other of those terms should be paid at such term by the North British Company. And they must, in my opinion, receive that interpretation, if it be a matter of fair implication from the other enactments of the statute that the North British Company was merely to bear its just share as joint-owner of dividends accruing after vesting, and was not to pay by way of premium to the Caledonian Company half of a six months' dividend which accrued whilst that company had still the sole and exclusive possession of the joint railways.

The controversy between the parties appears to me to turn upon this—whether the words "the following half-yearly payments," &c., are to be held as referring to payments "accruing" after the vesting period, or to payments which have accrued before but are not exigible until after that period? I prefer the first of these alternatives, because section 6, sub-section 1, was necessary in order to give effect to that which the Act did certainly contemplate, viz., that after the railways became joint property the North British Company should bear an equal share of the termly payments falling to be made to the original owners and creditors of the railways held by them and the Caledonian Company as a condition of their joint-occupancy and use of these railways, and because I cannot decern within the four corners of the Act any indication of an intention to give the appellants a premium in the shape of a moiety of sums which they were bound to pay for their own use of the joint railways.

I therefore agree with your Lordships in thinking that the judgment appealed against ought to be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants — Benjamin, Q.C. — Chitty, Q.C. Agents—Grahames, Wardlaw, & Currey—Hope, Mann, & Kirk, W.S.

Counsel for Respondents — Solicitor-General (Balfour, Q.C.)—Asher. Agents—W. A. Loch, —Adam Johnstone, Solicitor.

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# COURT OF SESSION.

*Friday, February* 25.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

### SHEPHERD *v.* HENDERSON.

*Ship—Insurance — Abandonment — Constructive Total Loss — Date at which Validity of an Abandonment is to be Determined.*

A ship plying on the coast of India was run on shore during a violent storm in the end of May. The monsoon winds begin to blow early in June and continue till October, and during that period it was impossible to get the ship off. Before the monsoon began the ship was not got off, but after it was past the insurer floated her and returned her to the owners completely repaired. The owners had in June intimated to the insurers that they had abandoned the ship, and claimed as for a total loss, and in October, before the ship was got off, raised an action for recovery of the sum insured, the abandonment not having been accepted. *Held* on a proof that at the date of the intimation there was no constructive total loss—the test being whether a prudent man uninsured would in the circumstances have abandoned the ship.

*Question*—Whether the state of matters at the date of the intimation or at the date of raising the action, as in the law of England, was to determine whether there was a constructive total loss or not?

In 1878 there was built for Joseph Augustus Shepherd, merchant in London, an iron screw-steamer called the "Krishna." Her net register tonnage was 198·65 tons, and she was taken to Bombay to ply the passage between Goa and Bombay. On the 23d September 1878 Messrs Gray, Dawes, & Co., the owner's agents, effected an insurance in Glasgow on his behalf through William Euing & Co., insurance brokers there, over the hull and machinery of the vessel for £8000, "for and during the space of twelve calendar months, commencing with the 23d day of September 1878, and ending with the 22d day of September 1879, both days inclusive, as employment may offer at port and at sea, in docks and on ways, at all times and in all places, and on all services whatsoever and wheresoever, under steam or sail." Early on the morning of 23d May 1879 the "Krishna" started from Goa for Bombay properly manned and found, but she had not been long at sea when she was overtaken by a storm, which increased so much in violence that the master, not knowing at what time the ship might founder, and for the safety of the lives of all on board, ran her on a small sandy bank to the northward of Raree Fort, on the west coast of India. On this beach the surf broke heavily, the south-west monsoon having now begun to blow. For a week no attempt was made in consequence of the state of the weather to extricate the ship, but during the succeeding fortnight all was done that could be done, by the use of chains, hawsers, and anchors on board, aided by the steamer's engine, to get her afloat. All attempts however failed, and on the 5th June the master intimated to the owner by telegram, and afterwards by letter, in the following words:—"Though I have virtually given up the ship as lost, I think the crew had better remain until I hear from you about the stores. In the meanwhile I have given the engineers orders to carefully coat with white lead and tallow all bright portions of machinery, and cover the cylinders over with the remnants of old awnings. The funnel will also be covered over to protect the tubes from rain water. All portable gear about the decks, such as binnacle-tops, lamps, boats, oars, masts, sails, buckets, cooking-house, doors, &c., will be put below, and all the ventilating cowls taken off and put below, and the wood plugs placed in

and secured from below. When all the work is finished the crew, I suppose, had better go to Vingorla, there to await shipment to Bombay, as you may advise me hereafter." At this time the "Krishna" had been forced up the beach, through the soft sand, and a bank of sand had formed between her and the sea. The hull also, as far as could be ascertained, was entire, and the precautions which had been taken to protect the machinery and the portions of the ship's furniture which could be stored below suggested that no further disaster was anticipated. On the 7th June the owner, on receipt of the master's telegram, gave notice to the underwriters of abandonment and claim for total loss, which, however, was not accepted by the latter. The parties corresponded for four months with a view to compromise, but on the 1st of October the owner raised this action in the Sheriff Court of Lanarkshire against John Henderson, one of the underwriters, suing him (1) for the sum of £50, the sum underwritten by the defender, with interest; (2) the sum of £6, 5s. with interest, said to be the proportion of the charges and disbursements incurred under the suing and labouring clause of the policy after the shipwreck. About the middle of October, and after the south-west monsoon had come to an end, and as soon as the weather permitted, the underwriters, in the character of salvors, employed Captain Burns, who set to work and ultimately succeeded in extricating and floating the vessel. She was then taken to Bombay and docked there for purposes of survey and repair, and early in December she was taken into the harbour of Bombay, where she remained.

The pursuer pleaded—"(1) The said vessel having become a total loss by the perils insured against, and having been timeously abandoned by the pursuer, he is entitled to decree against the defender, as one of the underwriters on the said policy of insurance, for the sum underwritten by him, and for his proportion of the charges incurred under the 'sue and labour clause' therein. (2) The underwriters upon the said policy having accepted the pursuer's abandonment, decree should be granted as craved."

The defender, on the other hand, averred that when Captain Burns was engaged in extricating the vessel from the beach he was acting on behalf of the underwriters as a salvor, and in accordance with the usual practice under all policies of this kind. The pursuer was aware of all that was being done, and he never suggested that he would in consequence hold them as accepting abandonment. The ship was anchored at Bombay about 13th December 1879, and it was again intimated to the pursuer that she was lying there at his risk. The defender further averred that he and the underwriters had suffered loss by the pursuer's failure to raise this plea of acceptance of abandonment now as the ship had deteriorated in value and had not been used since December.

He pleaded—"(2) The pursuer's statements, so far as material, being unfounded in fact, the pursuer is not entitled to decree as concluded for. (3) The defender having always been and being willing to settle with the pursuer, so far as he has any claim under the policy founded on, the present action is unnecessary, and ought to be dismissed, with expenses." Additional plea—"(3) The defender has not accepted abandonment in respect of Captain Burns' actings in salving the ship, because—1st, He acted in conjunction with underwriters who had special powers so to act; 2d, he acted only as a salvor, and the pursuer knew this; 3d, he acted in accordance with the usual practice in such cases."

The Sheriff-Substitute (GUTHRIE) found . . . "that in August and September, and at the date when this action was raised, the 'Krishna' was not in any risk of sustaining further injury where she lay, and that regard being had to the usual course of the monsoon, there was then a reasonable prospect of her being got off the sandy shore where she lay without greater expense than a prudent uninsured owner would reasonably incur: Finds, therefore, that there was not at that date a constructive total loss of the ship such as to entitle the pursuer to abandon her to the underwriters: Therefore assoilzies the defender from the first craving of the petition, and decerns: Finds with regard to the claim made under the suing and labouring clause of the policy by the pursuer for disbursements made in regard to the 'Krishna,' that the charge for the employment of the 'Gunga' is excessive, and that the pursuer is entitled to be paid therefor at the rate only of 500 rupees per day: Finds that the other charges have been duly incurred, and ought to be allowed; and therefore decerns against the defender for £4, 6s. 5d., being his proportion of the said charges: Finds the defender entitled to expenses, including a debate fee of £5."

He appended the following note:—"The pursuer's steamer was driven ashore while on a voyage from Panjim to Bombay on the 23d May 1879, and after some attempts by the master and crew to get her afloat, the pursuer on 7th June, acting on the information he then had, gave notice of abandonment to the underwriters. The south-west monsoon was beginning, and the knowledge that all efforts to get the vessel afloat must consequently cease for some months, during which, moreover, the vessel, if exposed to the action of the sea, must run a great risk of being further damaged and possibly broken up, was doubtless one of the principal elements in determining the pursuer to take this course. If the legal effect of the abandonment were to be judged of according to the facts as they stood at the 7th of June, when notice was given, it would be difficult to say that the vessel, though then existing in fact, was not lost so far as any beneficial use to the owner was concerned. The validity of abandonment as at the date of notice is not, however, a point which must be decided here; because I think that by the law of this country it is necessary to the pursuer's success that the circumstances should have continued to be such as to involve a constructive total loss down till the raising of the action. There was an attempt by the pursuer to show that it is an open point in the law of Scotland whether the validity of an abandonment is to be determined by the state of matters existing at the date of the notice, or by that existing at the time when action is brought; and the doubts expressed by Lord Eldon in the Scotch case of *Robertson* v. *Stewart and Smith*, 10th Feb. 1809, F.C., *rev.* 2 Dow 474, were referred to in support of this view. But there is no authority in our law except the doubts of Lord Eldon, and the judgment of the Court of Session

in that case, in support of the American and French doctrine on this subject as distinguished from the English; and there is no sufficient ground for holding that our law and practice is not, as Professor Bell indicates in his Commentaries, vol. i., p. 655, the same as that which obtains in England, and which has been settled by a series of English cases subsequent to *Robertson* v. *Stewart and Smith*, and all confirming the rule of *Bainbridge* v. *Nelson*, which Lord Eldon doubted. The principle to be extracted from the decisions is that abandonment is a *quasi* offer which grows into a contract or transaction fixing the rights of parties only (1) by the insurer's acceptance, or (2) by a judicial determination of its validity, which, like other judicial decisions, deals with the state of facts at the inception of the action in which it is given. 'Notice of abandonment,' says Bayley, J., in *Brotherston* v. *Barbour*, 5 M. and S. 418, 'is no more than a proposal on the part of the assured which the underwriters may accept, and then there will be a new agreement binding on both parties. But while the transaction rests on abandonment only on one side the underwriter's responsibility may vary, and cannot amount to a total loss, if by subsequent events it has become otherwise at the time of action brought.'

"This point being fixed, the determination of the principal question of fact under adjudication becomes comparatively simple, for it seems to me that however hopeless the recovery of the 'Krishna' may have been at the beginning of June 1879, the prospect was very different at 1st October. The monsoon was then over, the ship was uninjured, or at least as little injured as it was possible for her to be after lying for four months on the beach, and there was no reasonable doubt to those acquainted with the position of the vessel, as indeed the event proved, that she could be got off without undue expense. The vessel was got off and repaired for a total cost of about £1400, and the pursuer's own witness Captain Cooper places her value when offered to the owner at £6000, or about two-thirds of her original cost. We have not in this country adopted the American rule that a loss is total wherever the insured subject is deteriorated to the extent of half its value, or the cost of its restoration would exceed half its value. But even if that were our law the evidence does not lead to such a result. It would be useless to analyse the evidence on the subject, the mass of which irresistibly leads to the conclusion that at the 1st of October, when the claim for indemnity was judicially made, and the right to indemnity under the contract of insurance falls to be ascertained, there was no constructive total loss upon which the pursuer could rest his demand.

"But even if there were not a constructive total loss, it might be that a notice of abandonment having been given at an earlier date, the insurers had so acted as to be barred from repudiating that abandonment, and the pursuer, somewhat late in the day, was allowed to add to the record a plea to this effect. It does not appear to me that there is even a plausible ground for this contention. The insurers at once declined to accept the abandonment when it was made; a distinct notification to the same effect was made on their behalf early in August; and it is impossible to refer to any words or acts of theirs suggesting that they proceeded to float the 'Krishna' on any other footing than as salvors. I find nothing in the authorities to suggest that where insurers salve an abandoned vessel, all the time protesting that they do not accept the abandonment, they are to be taken as accepting the abandonment. The judgment in *Provincial Assurance Company of Canada* v. *Leduc* (43 L.J., P.C. 49, L.R. 6 P.C. 224) certainly does not support any such view, which would simply mean that where an owner abandons, and the insurers repudiate the abandonment, the subject insured must be left to perish utterly, because neither party can interfere for its protection or recovery without forfeiting his legal rights.

"If we look only to the established principles which for nearly two generations have governed British mercantile practice under insurance contracts, and disregard speculative views borrowed from alien systems of jurisprudence, which in this department widely deviate from our own, it can only be a subject of regret that the pursuer should have expended so much pains and expense in a litigation which might possibly have had a different result if it had been begun four months earlier. This last remark may suggest a rational ground for giving a different judgment; but the rule referred to is so firmly fixed in the maritime law of Great Britain that even if it be objectionable in principle or in its practical results, I think it cannot be unsettled by anything short of a judgment of the House of Lords.

"With regard to the claim under the suing and labouring clause there is not very ample proof of the disbursements of which repayment is claimed. But the claim was not strongly disputed, except in the charge for the employment of the 'Gunga.' It may be a question whether the despatch of that vessel at the beginning of the monsoon was a reasonable step for which the shipowners are entitled to charge. But I am inclined to think that they were bound, or at least fairly entitled, to try if by any chance the 'Gunga' could get near enough to aid the 'Krishna.' They cannot, however, make a profit out of the voyage, and I think only half their claim for this ought to be allowed. Giving effect to this deduction, the claim falls to be reduced to 7906 rupees, which at 1s. 9d. the rupee amounts to £691, 15s. 5d., the defender's proportion thereof being the amount decerned for."

The pursuer reclaimed, and argued—On the 7th of June, when notice of abandonment was given, there was constructive total loss, and in point of law the rights and obligations of parties fell to be considered with reference to the circumstances existing at this date. The law was to this effect in France, Germany, and America—*vide* cases of *Copelin* v. *The Phœnix Insurance Co.*, 2 Grant Thomson, 504; *Snow* v. *Union Mutual Marine Insurance Co.*, 20 Grant Thomson, 349; *Bradlie* v. *The Maryland Insurance Co.*, 12 Curtis' U.S. 745; *Marshall* v. *The Delaware Insurance Co.*, Hare and Wallace's Leading Cases, vol. ii. 665; *Peele* v. *The Merchants Insurance Co.*, Hare and Wallace's Leading Cases, vol. ii. 676–701;—and in Scotland—*vide* case of *Robertson* v. *Stewart & Smith*, 10th Feb. 1809, F.C., *rev.* 2 Dow's App. 474; Buchanan's Remarkable Cases, 73. The law of England, which looks to the circumstances existing at the date of

raising the action, did not apply, and the English cases cited were all cases of capture.

Argued for defender—(1) In point of fact the state of matters existing at 7th June, when notice of abandonment was given, was not such as would have justified a prudent man uninsured for declining any further expense or effort to float the vessel—*vide* cases of *Roux* v. *Salvador*, 3 Bingham's New Cases, 266, Tudor's Mercantile Cases, 139; *Kemp* v. *Halliday*, 10th May 1866, 6 Best and Smith's Reps. 723; *Rankin* v. *Potter*, 6 L.R., Eng. and Irish Apps. 83—and therefore *a fortiori*, in accordance with these cases, there could be no constructive total loss at that date as far as concerned the pursuer, who was insured. Moreover, the notice of abandonment had not been accepted, and the underwriters merely floated the vessel as salvors. (2) But assuming that there was, as the Sheriff found, such constructive total loss at 7th June, in point of law the rights and obligations of parties are to be considered with reference to the circumstances existing at the date of raising the action, at which time unquestionably there was no such loss as is contended, there being every prospect of the vessel being floated off eventually, as indeed the event proved. The solitary Scotch case of *Robertson* v. *Stewart & Smith* had been followed by many English cases—*Brotherston* v. *Barber*, 5 Maul and Selwyn, 418; *Bainbridge* v. *Neilson*, 10 East. 329; *Patterson* v. *Ritchie*, 4 Maul and Selwyn, 393; *Hamilton* v. *Mendes*, 2 Burro's Reps. 310; *Naylor* v. *Taylor*, 9 Barnewall and Cresswell, 718; 1 Bell's Com. 654; Arnold's Mercantile Insurance, 14-15; Crump on General Average, 22; *Kaltenbach* v. *Mackenzie*, June 4, 1878, L.R., 3 C.P.D. 467.

At advising—

Lord Craighill—[*After stating the facts of the case*]—The first question to be considered and decided is, Whether there was on 7th June, the date of the notice of abandonment, a constructive total loss? The Sheriff does not answer this question directly, but in his interlocutor he finds that shortly after the stranding of the "Krishna" the south-west monsoon began to beat upon the coast of India, and continued until the end of September or beginning of October, and that during its continuance it was impossible to get the "Krishna" afloat. In his note he adds—"The pursuer on the 7th June, acting on the information he then had, gave notice of abandonment to the underwriters. The south-west monsoon was beginning, and the knowledge that all efforts to get the vessel afloat must consequently cease for some months, during which, moreover, the vessel if exposed to the action of the sea must run a great risk of being further damaged and possibly broken up, was doubtless one of the principal elements in determining the pursuer to abandon. If the legal effect of the abandonment were to be judged of according to the facts as they stood at the 7th of June, when notice was given, it would be difficult to say that the vessel though then existing in fact was not lost so far as any beneficial use to the owner was concerned."

Limiting this conclusion to the time when the notice of abandonment was given, and to the next three and it may be four months, its soundness can hardly be impeached; the weather was and would be an obstacle to the floating of the vessel, even if she did not break up, which could not be overcome. But the bad weather would, according to all experience, come to an end in October, if not sooner, and unless broken up in the interval, which, as a bank of sand had been formed between her and the sea, was unlikely, there was ground for a reasonable expectation that the "Krishna" might then be removed. This was not doubted at the time, and the result proved its accuracy.

There were thus only two elements by which a constructive total loss as on 7th June could be said to be established. One was the contingency that the vessel before she could be removed from the strand might in fact become a total wreck, or be so much injured that the cost of removal and repairs together would be more than her value when released and repaired; and the other was the length of time that must elapse before she could be removed.

With reference to the second element, that certainly was not such as of itself would warrant abandonment. Detention or loss of the beneficial use of a vessel for such a period as the interval in question will not convert what is in its own nature only a partial into a constructive total loss.

The first element, however, is more material. There was risk that the vessel while exposed on the strand might become a wreck—that is to say, only a congeries of planks, which, though it might still bear the semblance of a vessel, would not be worth more than the value of the materials; or if not reduced to this condition, that she might be so much injured that the cost of her removal and of the necessary repairs would exceed what would be her value when released and repaired.

What right did these contingencies confer on the insured? The law upon this subject is not doubtful, and may be presented in the words used by Lord Abinger in *Roux* v. *Salvador* (3 Bingham, N.S. 266, Tudor's Marine Cases, 140)—"There are intermediate cases—there may be a capture which, though *prima facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost or so damaged that they are not worth the expense of bringing them or what remains of them to their destination. In all those or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of total loss, and demand the full sum insured." Would, then, a prudent man not insured have dealt on 7th June with the "Krishna" as a wreck?—that is to say, as a congeries of planks, or as a vessel the release and repair of which would exceed her value when removed and repaired? I think he would not. He would have waited. And why? Because even if the worst were to happen he could not be worse than he would be were he immediately to act on the

assumption that the vessel in the end would become a wreck. He might gain by holding on, but he could not lose, whereas by disposing at once of the property as a wreck he might lose and could not gain. The position of matters appears to have been this:—It was not improbable that, stranded as she was, and exposed to the south-west monsoon, the "Krishna" might become a wreck; but it was possible, to say the least, that she might remain unbroken, that she might be got off when the south-west monsoon came to an end, and that she might be repaired at an expense far within her value. No prudent uninsured owner would in the circumstances, as I think, have abandoned either hope or his ship. He could act otherwise only by sacrificing a possible advantage without any corresponding consideration, because his vessel at the beginning was not in fact a wreck, and this at the worst would only be its character when it came to be disposed of at the end.

These considerations have brought me to the conclusion that there was not as on the 7th of June, when notice of abandonment was given, any more than at any subsequent period, a constructive total loss, and this of itself would be a ground, though a different ground from that on which the Sheriff proceeded, for giving judgment for the defender.

(2) But it may be that the notice of abandonment given to the insured was accepted by the underwriters, and if so, the latter of course will be bound by the agreement thus concluded. And this the appellant says is what happened; but in this part of the case I agree with the judgment of the Sheriff. There appears to me to be no reasonable ground for such a contention. Upon receipt of the notice intimation was made on the part of the underwriters that "they, as is usual, declined to accept it." And to this, so far at least as protestation went, they uniformly adhered. But having in the month of August learned from persons sent to inspect the "Krishna" that when the south-west monsoon ceased she might be got off, they sent in the following October the men and the materials thought to be necessary for this undertaking, with the result that after four weeks' labour she was released. This was done by the underwriters, as they say, simply in the character of salvors, and such I think is the fact. The underwriters, it may be, as they had rejected notice of abandonment, had not a legal title to do what they did, and certainly they might have been prevented by the appellant had he chosen to resume his right in the "Krishna," which had been abandoned; but this does not bring with it as a corollary the conclusion that their conduct was equivalent to acceptance of the notice of abandonment. No doubt, if in acting without title they injured the owner, they must make reparation; but all idea of injury is excluded on the present occasion, for onthe one hand, if there was as on the 7th June a constructive total loss, and if that is the date with reference to which the rights and obligations of the parties are to be determined, the appellant will, notwithstanding the subsequent salving of the ship, recover the full sum insured; while if, on the other hand, the loss is to be held as having been only a partial loss, the release of the ship could not be an injury, but rather would be a benefit to the owner. If, indeed, the "Krishna" had been left uncared for on the shore where she was stranded, the result, sooner or later, would necessarily have been not a constructive but an actual total loss, but on the assumption that doing nothing himself the owner prevented others from doing what was necessary for her release, it is hardly conceivable that upon such a claim as for a total loss the appellant could have recovered.

(3) On the view that on the 7th June the circumstances were such as to entitle the insured to give notice of abandonment, and that this notice was not accepted by the underwriters, which is the view upon which the Sheriff has proceeded, the question whether the date of the notice or the date of the action is the point of time with reference to which the rights and obligations of parties are to be determined is next presented for consideration. This, in truth, had all through been dealt with as the great question in the cause. Being purely a question of law, and therefore of general application, it is one of interest and importance—not, however, because it need have much influence upon insurers and insured in time to come, for once the point is fixed parties may so contract that the effect of the decision may be almost neutralised. If action should be raised simultaneously, or nearly simultaneously, with the giving of notice, the importance of a question like the one now awaiting decision is plainly diminished. That question, nevertheless, is one which has long been debated, and it is one upon which not only jurists but legal systems have differed. England, although the rule has not been applied, so far as appears, to a case like the present, or to other cases than loss from capture or restraint—if the *dicta* of judges and the statements of institutional writers should be taken as conclusive—has chosen the date of action, while France and America have chosen the date of the notice of abandonment. In Scotland the question has only once been before the Court, and the decision both of the Judge of the Admiralty Court and of the Judges in the Court of Session was in favour of the view adopted in France and America—*Robertson, Forsyth, & Co.* v. *Stewart, Smith, and Others*, Buchanan's Reps. 73, 2 Dow (H. of L.) 474. Judgment, however, was given on a different ground in the House of Lords, and the case is almost more memorable for the protest entered by the Lord Chancellor (Eldon) against being thought to concur in or to differ from the previous decisions in England which had been cited as authorities, than for what was decided either in the Court of Session or in the House of Lords. The same question has not, until the present action was raised, been again submitted for the consideration of the Courts in Scotland. Professor Bell, however, in treating of the subject, has brought into prominence what since the days of Lord Mansfield has been decided in England, and almost suggests that the English rule may be taken to be the rule in Scotland. But in so doing he is influenced, not by any favour for the English rule, but by the consideration that it is not likely, and certainly would not be desirable, that what has long been taken for law on a mercantile question in England should be found not to be the rule recognised in Scotland.

Dealing with the point as one of principle, more, I think, may be said for the French and

American than for the English rule. The assumption is that at the date of the notice of abandonment there was a constructive total loss, in consequence of which the insured were entitled to give notice of abandonment, and claim for the sum set forth in the policy as by agreement the value of the vessel. Then why are the rights and obligations of the parties thenceforward to remain uncertain? It is said that contingencies may occur by which what at the time was constructively a total loss will be reduced to a partial loss. This reason, however, operates as much against the selection of the date of action as for selection of the date of notice. Things relative to the condition of the vessel may change as well after the one as after the other, and therefore there is, so far as I can see, no consideration of principle which affects the first more than the last. But of the converse this cannot be predicated. Once notice is given the ship is ceded by the insured, though the exact connection between her and the insurers consequently established has never been clearly, or, I may say, satisfactorily defined. The insured thenceforward cannot meddle; his power as owner is surrendered; and whatever may be apprehended, he has no title upon which he can interfere and endeavour to guide the course of events. This being so, there would appear to me to be expediency in dealing with the contract in such a way that things as they were when notice was given should determine the measure of the rights of the insured and of the liabilities of the insurer. The truth is, that in any case, except the first to which the rule is applied, there can be no pretext for a complaint of hardship, whatever may be the rule which is the subject of application, because both parties when they contract know, or at least may know, what as regards constructive total loss is involved in their contract, and must therefore be held to have realised their respective positions.

These being my views, I should be disposed to hold, if there was no countervailing consideration, that the date of the notice of abandonment was the date with reference to which the question whether a constructive total loss had occurred was to be determined. But there is, in my opinion, such a consideration, and that is the opposite rule which has been recognised in England for more than a century. We are not bound by decisions which have been pronounced in another country, but in a mercantile question it would be unfortunate were we called upon to give a judgment by which a different rule would be recognised and be set up here from that which has been established in England. But on this reason we are not pressed by any such necessity, because if there was a constructive total loss as at 7th June 1879, the date of the notice of abandonment, the right to recover for the full value of the ship was not extinguished by anything which occurred previous to the 1st of October, when the action was instituted. At the later date, just as much as at the earlier, the "Krishna" was a wreck, assuming that at any time she could be so regarded. She still lay on the strand upon which she had been cast on the 23d of May, and whether she could be released, and what if released would be her condition, were matters merely of opinion or of speculation. But the underwriters when sued as for a constructive total loss, could not satisfy the owners demand by presenting them with a contingency, even had that been one more hopeful than formerly could have been offered. Satisfaction of the owners' claim, if not by payment of the value of the ship, at least by the delivery of the ship herself, was what was required. This is the rule in England. The decisions of the Courts of that country established the principle, that if once there has been a total loss, this is construed to be a permanent total loss, unless something shall afterwards occur by which the assured either has the possession restored or has the means of restoring such possession—*vide M'Iver* v. *Henderson*, 5 M. & S. 447; *Deans* v. *Hornsby*, 3 E. & B. 187. Nor will the restoration of the hull be enough, for it has also been held that the insured were not bound to be satisfied by the mere restitution of the ship's hull under conditions which make it doubtful whether they would not have to pay more than it was worth. As the rule was expressed by Mr Justice Bayley in *Houldsworth* v. *Wyse* (7 B. & C. 794)—"To reduce the loss once total to a particular loss, the subject of the insurance must be in existence under such conditions that the insured may, if they please, have possession," —for they may reasonably be expected to take possession of it. The strength of the principle in question is even more fully exhibited in the language used by Lord Ellenborough in deciding *Paterson* v. *Ritchie* (4 M. & S. 393). The principle of the decision in *Bainbridge* v. *Neilson* (10 East. 329) he said is a general one, and is this—"I have a right of action for the non-payment of money; the party pays me before action brought; that takes away my right of action." Thus what is offered or given is the ship in such a condition that she is counted as money for the value insured, which necessarily excludes the idea of contingency in the matter either of restitution or of the ship's value when restored. But here there was at the raising of the action contingency as to both particulars, and therefore I think that assuming there was a constructive total loss at the date of the abandonment, the liability of the underwriters, who did not accept of the notice when given, was not extinguished as at the 1st of October by any supervening change in the condition of the ship.

Upon this view of the case the interlocutor of the Sheriff must be altered, and decree for the full sum covered by the policy pronounced.

Lord Young—The Sheriff was of opinion that on the 7th of June, when the notice of abandonment was given, there was constructive total loss, but that on 1st October, when the action was raised, the circumstances did not involve such loss—that is to say, that between those two periods the circumstances had materially changed; and being of opinion, in point of law, that the case was to be determined according to the circumstances existing at the time of raising the action, he found that there was no total loss. I think that the question is one of fact, and really it partakes of a jury question as to whether the circumstances involved at the 7th of June a constructive total loss, and it is a question of fact undoubtedly attended with some difficulty, and the Sheriff thinks with some hesitation that the circumstances did involve such a conclusion. I

am myself inclined to agree with Lord Craighill that the better view is that they do not. In point of fact the ship was stranded on the west coast of India, and at the beginning of the monsoon, which blows steadily from the end of May till the beginning of October, she was driven on soft sandy beach, and did not suffer much injury. The question then was about getting her off. There was quite a good chance of doing this, for the monsoon was not yet due. However, she was not got off, the monsoon began blowing, and then it was needless to try again till the wind had subsided at the beginning of October. Accordingly, when the underwriters were informed, by notice of abandonment, of total loss, they said "The notice is premature, and there is still a good chance of the vessel being got off." I think this was a very reasonable answer for them to make. The result might quite justify such a view, and in point of fact it did, and the balance of evidence is to the effect that these expectations, which were ultimately justified by the event, were quite reasonable, and there is no doubt that the owners should have waited and renewed their efforts. Therefore, though not without some difficulty, I agree with Lord Craighill's view of this part of the case, and I further think that that disposes of the case, for, as I have said, the ship was got off, and by the 15th of December. She was presented to the owners completely repaired at a cost of £1400. The Sheriff in his note says—"The vessel was got off and repaired for a total cost of about £1400, and pursuer's own witness Captain Cooper places her value when offered to the owner at £6000, or about two-thirds of her original cost." Then that being so, the insured are entitled to partial loss only. But along with the many perplexing things in this, I may call it, multitudinous case, no attention whatever has been paid to it in all these processes as a case of partial loss, and I suppose further litigation will result. The underwriter must pay, and the question is whether on total or partial loss, and I should have thought that the case might in a less bulky form have been prosecuted to ascertain this, but the action being raised for total loss the other matter is not entered on.

Now, if the conclusion arrived at by Lord Craighill—and in which I concur—be right, viz., that there has been no constructive total loss, of course the question does not arise as to whether such loss is to arise at the time of notice of abandonment or at the time of raising the action, but I may say on this matter, which I repeat does not arise on the verdict of the facts which we have returned, hypothetically my opinion inclines to that expressed by Lord Craighill, and I think that there may be found to be grounds for distinguishing between the cases of capture, which is specially insured against in every policy of insurance, and damage to a ship, which latter is the case we are considering here. However, while expressing the inclination of my opinion on this point, I reserve my definite opinion, as according to the verdict which we have returned on the facts in the present case the question does not arise.

Lord Justice-Clerk — I concur with your Lordships, and have really nothing to add. But on this last point I think that if we were called on to give any decision a great deal would have to be considered. However, I think that specific restitution must always exclude, and this principle may distinguish the cases of capture and a case like the present where restitution is impossible.

The Court found that there had been no constructive total loss, and affirmed the Sheriff's interlocutor.

Counsel for Appellant — Asher — Guthrie. Agents—Maconochie & Hare, W.S.

Counsel for Respondent—Dean of Faculty (Kinnear)—Jameson. Agents—J. & J. Ross, W.S.

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*Wednesday, January* 26.

## SECOND DIVISION.

[Lord Lee, Ordinary.

### SMITH *v.* SCOTT & BEST.

*Implied Contract—Sub-Contract—Conduct which Induces Third Parties to Believe that there is an Implied Authority to Pledge another's Credit.*

A contractor employed a person in insolvent circumstances to execute a portion of the work contracted for, and supplied him with some of the materials for doing so. He took no steps to prevent this person from being considered his foreman, with power to order materials, and a belief to that effect became current in the district. The person thus employed having absconded without paying for certain furnishings made for the work at which he was engaged, the person who had made them sued the contractor for his account. He defended himself on the ground that the work had been done under a sub-contract, and that the person who had ordered the materials had no power to pledge his credit. *Held* on a proof that there had been no sub-contract, and that the defender had so acted as to incur liability for the pursuer's account—Lord Young *diss.* on the ground that there had been a sub-contract to do the work, and that therefore the defender was not liable.

Messrs Scott & Best, contractors, Leith, were contractors for the formation of certain waterworks for the Forfar Water Commissioners. In August 1879, while these works were in progress, a man named Alexander Cameron came to Mr Best, one of the partners of the firm of Scott & Best, and asked him to give him work. Best said he had no work at Leith then, but mentioned the work at Forfar, and offered him work there. He was aware that Cameron was then without funds, but Cameron told him that he expected shortly to be in possession of several hundred pounds. What passed between Best and Cameron at this interview, as related by the former and Mr Gray, inspector of works, Leith, who was present, was as follows:—Best showed Cameron the schedule of work at the Forfar water-works, which included the construction of a bridge over the Esk at Justinhaugh at a cost of £213, 8s. Cameron after becoming acquainted with the measurements and nature of the work at this bridge said, "I will give you £40 for your contract." Best told him to take care and think again, and he then repeated that he would give £40 for the