[18*th April*, 1848.]

JOHN FLEMING and Co., Merchants in Glasgow, and others, owners of the ship "William Nicol," *Appellants.*

ARCHIBALD SMITH and Others, Underwriters, *Respondents.*

Insurance.—If the insured having received letters intimating damage to their vessel, and the measures taken to repair it keep those letters without communicating their contents to the insurers, and give directions for the reception of the vessel as their own property, they cannot afterwards, on the pretext that they were not fully informed of the nature of the damage sustained and of the extent of the repairs, abandon the vessel, and claim for a total loss.

Ibid.—Where a vessel sustains damage, but is capable of being repaired at a cost exceeding her value after the repair, the owners, in order to entitle themselves to claim as for a total loss, must give notice of abandonment within a reasonable time after receiving advice of the damage. *Semble.*

ON the 18th August, 1841, the Appellants effected a time policy of insurance upon the ship "William Nicol," for 6000*l.* for one year, in port and at sea, in all places, at the rate of 5*l.* per centum.

On the 4th of September the vessel sailed from Leith on a voyage for Port Philip and Port Adelaide. After discharging at these ports in the month of March 1842; she took in a cargo for Bombay early in the following April. On the 18th and 19th May she encountered a hurricane which did such damage to her masts and rigging, as induced the master, after consulting with his officers, to abandon the voyage to Bombay and steer for the Mauritius. The vessel again encountered severe weather

in the prosecution of the voyage to that island, and reached it in a very damaged state on the 31st May, 1842.

On the 5th of September the Appellants received a letter from Captain Elder, the master of the ship, dated 5th June, in which he described the events of the voyage, and the injury the vessel appeared to have received; and continued thus: "And if it "should be for your interest to condemn the ship, if the repair "should amount to so much as make your one-third part of the "insurance which you will have to pay very heavy, I shall cer- "tainly do so, as the 6000*l.* she is insured for I believe is more "than her value; but, before I can do this we must have ten- "ders in to see that the underwriters will save by selling the "ship as she is, than laying out so much money on her. I "have consigned the ship to Messrs. Hunter and Arbuthnot, "who are Lloyd's agents, and who are accustomed to all the "forms. There is one thing, however, I must also state,—The "rigging was entirely done, fore and aft, eight years was a long "time for it to be over the mastheads. I mentioned this to "you when I joined the 'William Nicol.' The masts were far "from sound, and the sails, from the heavy weather we ex- "perienced going out to Australia, entirely worn out, so that, "if we had gone to Bombay, we should have required to have "coppered her, a new suit of sails, and perhaps rigging, which "must have fallen very heavy on you alone. And I think, that "if you come on Scott and Sons for their share of the yellow "metal, having given way before the two years were expired, of "which I shall send you certificates; and upon the insurance "for the rest, you may by this save your expense of one-third; "and if the amount of repairs, by paying for your share of one- "third, being new for old, come to under a 1000*l.*, I think it "might be for your advantage to repair her, as the vessel will, "on leaving this, be as good as new. There is no yellow metal; "I am therefore obliged to copper her, which would last out "all her first letter. Whatever I may do, I shall act accord-

" ingly to the best for your interest. It was clearly an act of " Almighty God, which no human arm could help or avoid. " And if the ship is repaired, I would hope that we may get " a freight from here to anywhere that will pay. In about six " weeks, there is a regiment to leave here for Bombay or China, " and if so, I am sure we shall get it—Mr. Arbuthnot being " married to a daughter of the commander-in-chief. This would " pay your share of the loss. If, from late accounts from Bom- " bay, things are still so low, it would perhaps be better not to " go there, if freight can be obtained elsewhere. This must " all depend on circumstances, of which you will be duly " apprised."

On the same day, 5th September, the Appellants received another letter from the Captain, dated 9th June, thus expressed: " I have taken in estimates, and am going to heave the ship down " on Tuesday first, get new masts in her; for doing so, caulked " from copper to waterway seam, the use of the hulk with every " necessary faulds, &c., for 250 dollars—50*l.* sterling, which is ex- " tremely moderate, so that I shall be able to report to you every- " thing end of next week. I have been down to the wreck of the " 'Mary Thomson' to examine her spars, taking the carpenter " along with me. They are all new, with the iron-work on " them, and in fine condition; they are also the exact size of " my own, both yards and masts, so that I shall meet with " quick dispatch. This is very fortunate, and I should fain " hope that the evil anticipated may turn out for your benefit.

" We could not have made money at any rate, with the " present rate of freight from Bombay. I remain, &c."

On the 4th of July the ship was surveyed by proper persons, and the extent of repair necessary ascertained.

Some time in November the Appellants received a letter from the captain, dated 5th July, intimating the survey, and that he had taken tenders for the repairs, the lowest of which would make

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them about 3000*l.* The letter thus continued:—"Now, the "ship being insured for 6000*l.*, the loss to the insurers would "have been too great for abandonment, and on that account it "could not have been affected at any consideration.

"For your interest I must raise money on bottomry. If I "was to draw on your house for the repairs, and the documents "perhaps not have come to hand, or the time that elapses ere "the insurance makes up their part of the loss, it might not "perhaps be advantageous to do so. I have already advertised "for money, payable in England, on bottomry, in prosecution "of my voyage to Bombay, to be paid on my return home, but "have not succeeded as yet. The merchants here do not like "to take bottomry on a ship that has to go to another port "beside where the bottomry is payable, the risk being so great; "I would have no difficulty in getting it, were I to go home "direct, and I think it will be more advantageous to do so. "Messrs. Hunter and Co. say that they will send their sugars "by me at the rate of freights when the sugar season com-"mences, say in about six weeks. By that time I shall be all "ready for sea. The accounts from India are very disheartening; "freight is not to be had but at a very low figure, and which "would occasion a loss to the shipowner. If I can make from "here 2500*l.* to 3000*l.* freight direct home, it will, I think, be "certainly best for your interest. I wrote Messrs. William "Nicol and Co. on my arrival here, with instructions to write "me immediately on receipt, *via* Calcutta, an answer to which I "shall shortly expect, and which will guide me in my future "operations."

On the 28th November the Appellants received a letter from the captain, dated the 10th of July, in which he informed them that he had not been able to obtain any tenders of money for the repairs otherwise than by bottomry upon the vessel, which Messrs. Hunter, Arbuthnot, and Co., had agreed to enter into, upon condition that he gave an undertaking to load the vessel

for London direct, instead of going to Bombay, his original destination. After quoting Messrs. Hunter and Co.'s letter upon the subject, his letter continued thus: "Now, in reference to " this letter, it is clearly shown that money I cannot raise on " bottomry in order to go on my intended voyage to Bombay. " If I should lay the ship on here for England, and freights may " turn out low, which, from advice from India, I have reason to " expect it will be so, (the accounts coming to hand since I " wrote you last,) there is only one alternative left me, and that " is, to try and get money by bills drawn on you for the " repairs: if this cannot be done, then we have hold of the " underwriters to pay up part of any that may occur from my " laying on here, as it is certainly better for their interest than " yours, the ship should be saved. I hand you copy of the " letter I have wrote in answer to Messrs. Hunter, Arbuthnot, " and Co., which may be useful, as we are insured in Glasgow, " and which you can show them, so that no time may be lost " when the accounts do come in for a settlement.

" ' Messrs. Hunter, Arbuthnot, & Co.

" ' *Mauritius, 8th July*, 1842.

" ' GENTN.—I received your letter of this day's date, inform- " ' ing me that no offer has been made in answer to my call for " ' tenders for the loan of a sum of money sufficient to meet " ' the necessary repairs of the ' William Nicol,' under my com- " ' mand, to be secured by a bottomry bond upon the ship, " ' payable in England, the ship to proceed to Bombay in pro- " ' secution of her voyage home, and that it was necessary, " ' before entering upon the repairs of the vessel, that I should " ' give an engagement to the effect that, in the event of my being " ' unable to raise the money for the necessary repairs, proceed- " ' ing to Bombay, I will proceed to England with my ship, " ' after the necessary repairs shall have been effected.

" ' In reply, I beg to state there is only another way left me

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" ' now, in order to raise money, and that is by bills on my " ' owners; the reason I think so is, that, from the law of " ' insurance, I am bound to use every endeavour to obtain " ' money for repair,—first, on my owners; second, if this " ' should fail, by a bottomry bond on my ship. If this should " ' also fail, I have then no alternative left me than to lay the " ' ship on for England, and if this should be the case, I shall, in " ' first case, protest against such a measure, in order to take " ' the responsibility off my own shoulders; and, secondly, to " ' secure the interest of my owners.

" ' There is one question, however, I beg the favour of an " ' answer, which is this:—If the ship lay on for England, it is " ' for the benefit of the underwriters, certainly not for my " ' owners. Freight here just now is extremely low, and, to " ' look forward to the sugar season, by all accounts, and from " ' the quantity of shipping expected, I am afraid freights will " ' be low then also. Now the question I wish to ask,—If the " ' insurers are not entitled to bear part of the loss that may " ' accrue from the ship going home direct? 2d, If I cannot " ' abandon when I cannot get money, and lay the ship on for " ' behalf of the insurers? This I think is a very natural plan, " ' when it is for their interest alone that the ship goes home. " ' Waiting for your reply, I remain, &c.

(Signed) "'WILLIAM ELDER.'"

On the 15th November the Appellants received a letter from the captain, saying, "Since writing you last, per the " 'Culdee,' *we have finished all our repairs.* We have also " taken the masts out that I put in to heave the ship down, and " replaced them with two others. Our rigging is nearly fitted " for going over the mast-head, and our masts also and yards " are finished, so that we may expect to be ready soon.

" Accounts have reached here from Bombay and Calcutta up " to the 28th June. Freights are still worse, and I am still

" more inclined to wait the result of the sugar season here, in " the end of September or October, than run the risk of going " there seeking. Freights in Bombay are only 30*s.* per ton, " which must be a dead loss for the shipowner."

On the 25th November the Appellants received a letter from the captain, thus:—" I am surprised I have never received an " answer to my letter which I wrote William Nicol and Co. on " my arrival here. I am very sorry at it, as it might let me " know the particulars as regards freight, cargo, &c. The " latest accounts from Bombay that have reached here still " quote freights extremely low, 12*s.* per ton. This is indeed " sorrowful accounts, and I do think it will be better, when " fitted out, to lay the ship on for London from here; freights " just now are 3*l.* 10*s.* per ton, but none or very little of the " new sugar has come in. The season has been extremely " backward, and it will be six weeks yet before the sugar comes " in in any quantity. Freights then will depend on the quan- " tity of tonnage that will be in the harbour. At the present " moment it is very little, and I earnestly hope it will continue so.

" Messrs. Hunter and Arbuthnot say that they think they " will manage to load us with the aid of another house when the " sugar season arrives, which I hope will be the case. I do not " think it prudent to venture to Bombay in the present state of " affairs."

During this correspondence of the captain the Appellants were at the same time advised, from time to time, by Messrs. Hunter and Co., of what was going on. On the 3rd December they acknowledged the letters of that firm, thus:—" We observe " the general measures adopted for the refit of the ship 'Wil- " liam Nicol,' which we hope may turn out to have been the " best in the unfortunate circumstances in which she was " placed, but in the absence of any past experience on our part " of the usages of your port in such cases, we were rather " startled at the apparent necessity of a bottomry bond being

" had recourse to, and to so large an amount; but this may be " a misapprehension on our part, which the communication of " particulars hereafter may clear up.

" We notice the obstacle stated by you to the prosecution " of her voyage *viâ* India, and feel obliged by your offer to " Captain Elder of a cargo of sugar, at the first of the season, " for England direct; and should it have been decided upon to " follow this course, we hope the rate of freight will prove such " as to compensate in some measure for the loss which must " necessarily accrue from the heavy expense connected with her " repairs.

" We note your attention in the matter of insurance, which " we have duly provided for."

The last line of this letter had reference to a suggestion made by Hunter and Co., that the Appellants should insure the vessel. On the 18th of February, 1843, they accordingly effected insurance upon the homeward freight, to the amount of 1200*l.*

On the 11th of March the Appellants received a letter from Hunter and Co., saying, " We now beg to advise you that we " hope to be able to dispatch the 'William Nicol' from the " 20th to the 25th proximo, with a full cargo of sugar to Lon- " don. We offered Captain Elder half a cargo, either for " Liverpool or the Clyde, but we could not succeed in procur- " ing any other freight for these ports; we have therefore " determined, at some inconvenience to ourselves, to send our " sugar to London, as we shall be able to get the 'William " Nicol' filled up for that market, at a freight of 30*s.* per ton, " and 5%; we are aware that this is a very low figure, but it is " the rate which other first-class are receiving at present; and " from the short crop of sugar this season, and the number of " unemployed vessels now in harbour, we see no prospect of any " immediate alteration taking place.

" We suppose the bond will amount to from 4,500*l.* to " 5000*l.* We presume that the homeward freight will amount

" to about 1000*l.*—say 600 to 650 tons at 1*l.* 10*s.* and 5%; any " passage-money we may procure will be paid here."

On the 7th March the Appellants wrote Messrs. Henderson, of London, shipowners, intimating the expected arrival of the " William Nicol," and inclosing a letter for the master, " re- " questing him to follow your directions as to the dock of his " discharge;" and in the inclosed letter to the master, they wrote him, " We have to request you will be guided by the direction " of our agents, Messrs. Henderson, as to the dock to which " you are to proceed for your discharge." On the 24th of March, the Appellants again wrote the captain to London, in the following terms: " We observe the arrival of the ship in the " Thames, and although without any letter by her or from you, we " think it proper not to lose a post in addressing you, as, from " the extraordinary circumstances in which the ship is placed, it " will be necessary for us to be furnished with all the particulars " by which the claim of 4,500*l.* is made up before taking the " vessel off the hands of Messrs. Hunter, Arbuthnot, and Co., " and also, seeing that the amount claimed against the ship for " repairs is greatly above her present value in the market, to " consult counsel, whether we cannot yet abandon or refuse to " take the vessel. We have written to Mr. J. D. Nicol on this " subject, authorizing him to do so, and you will no doubt give " him all the information requisite to make out our case."

On the 27th of March the Appellants received another letter from Hunter and Co. informing them that the vessel was ready for sea, and that they had forwarded the bottomry bond, which amounted to 5,382*l.* 13*s.* 1*d.*, to London for payment. On the same day the vessel arrived in London.

On the 30th March the Appellants wrote the brokers, through whom the original policy of insurance had been effected, " We " beg to intimate to you that we abandon the ship 'William " Nicol" lately arrived in London, and have to request that the " underwriters will look after their interest;" which abandon-

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ment they on the 7th of April extended to the freight. And on the 17th of April they again wrote them:—"With reference to "our former communications on the subject of the ship 'Wil- "liam Nicol,' we beg to intimate, that, having abandoned that "vessel as at the time she entered the Mauritius, we do not "hold ourselves responsible for the premium of insurance "upon her, or for that upon her freight from that place to "London."

Upon the vessel's arrival it was taken possession of by the agents of Hunter and Co. for payment of their bottomry bond, and sold under proceedings in the Admiralty Court for 2,516*l.* 15*s.* 2*d.*, which, together with the freight from the Mauritius, likewise received by Messrs. Hunter and Co., did not discharge the bond. What part of the bond was strictly applicable to repairs did not appear. But the ship-market in London was at that time in a very depressed state.

The Respondents refused to accept the abandonment of the vessel by the Appellants, but expressed their willingness to settle as for a partial loss which had been estimated, by an average stater, at 2,469*l.* 10*s.* 8*d.*

In these circumstances the Appellants brought an action against the Respondents for payment of the full sum of 6000*l.* covered by the original policy. The Respondents consigned the 2,469*l.* 10*s.* 8*d.* in Court, and pleaded in defence the circumstances which have been stated, as showing that the loss was only a partial one; that the Appellants had elected to treat it as such, and were, at all events, barred by the delay which had occurred in treating it as a total loss.

The case was sent for trial upon the following issue:—"It "being admitted that, on the 25th day of August, 1841, the "defenders granted the policy No. 98 of process, whereby the "vessel 'William Nicol,' of Glasgow, the property of the pur- "suers, was insured by the defenders against the perils therein "stated, from the 18th of August, 1841, to the 18th of August,

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" 1842, to the amount of the sums attached to their names " respectively therein, amounting together to the sum 5,800*l*,—

" Whether, about the months of May and June, 1842, or " one or other of the said months, and within the said period " stated in the said policy, the said vessel was totally lost; and " whether the defenders are, under the said policy, indebted and " resting-owing to the pursuers in the foresaid sums attached to " their names in the said policy respectively, with interest " thereon as libelled, or any part thereof, under deduction of " the sum of 2,469*l*. 10*s*. 8*d*., with interest thereon ?"

On the 23rd of July, 1845, the jury returned a verdict in these terms : " Find for the pursuers, with leave to the defenders " to move the Court to enter a verdict for the defenders, if the " Court shall decide in their favour on the following points, viz.—

" Whether the pursuers are barred from recovering as for a " total loss, in consequence of abandonment having been neces- " sary, and not having been made in due time, or of the pur- " suers having elected to treat the case as one of partial loss : " Subject to which questions, as questions of law, arising on " the evidence, as appearing on the Judge's notes, this verdict " is returned."

On the 5th March, 1846, the Court pronounced this interlocutor, " Find that the pursuers are barred from recovering " as for a total loss, in respect they were bound, and failed to " abandon the vessel in due time to the defenders, and also that " they elected to treat the loss as partial : Therefore, appoint " the verdict to be entered up for the defenders, subject to " ascertainment of the amount due to the pursuers as for a " partial loss : Find the defenders entitled to the expenses " applicable to the discussion of the points now decided, and " remit to the Lord Ordinary to proceed with the case in terms " of the above finding ; reserving all other questions of ex- " penses."

The appeal was against this interlocutor.

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Mr. Attorney-General and *Sir F. Thesiger* for Appellants.—The question put by the issue was whether the vessel was totally lost, and the verdict finds for the pursuers. It therefore finds that there was a loss total in its nature, and that must be taken to be a fact not now to be controverted.

[*Lord Chancellor.*—The issue must be taken to assume the facts stated in the summons.

Lord Campbell.—And the verdict taking the whole together finds that there was a constructive total loss.]

We admit that. Then the verdict leaves for the consideration of the Court three questions: first, whether abandonment was necessary in order to entitle the Appellants to recover as for a total loss. Second, whether abandonment being necessary, it was made in due time; and third, whether the Appellants had in the circumstances elected to treat the loss, not as total, but as partial, and so barred themselves from a right to recover as for a total loss.

I. Loss in sea-insurance is of three kinds: total destruction of the thing insured in every sense, as where a ship founders at sea, and no part is ever seen again; second, where the thing insured is not destroyed in every sense, but only so far as to have lost the character in which it was insured, as where a ship is so damaged by storm, as, without repair, to be no longer capable of being used as a ship; when to use an expression of *Chief Justice Abbott*, it is "a mere congeries of planks;" and third, where the thing insured is withdrawn from the power of the owner as completely as if it were destroyed, as where a ship has been captured by an enemy, or been the subject of barratry by the master.

In the first of these cases there is obviously a total loss in fact, and therefore in law. In the second the loss is total or partial, according as the thing insured may or may not have received so much damage as to make it not worth while to attempt restoring to it the character in which it was insured, as

by restoring by repair the character of a ship to that which has become a congeries of planks. In the third the thing insured is not lost in one sense, it continues in existence retaining the character in which it was insured. In another sense it is lost, to the owner at least, for it is beyond his power.

In the two first of these cases no abandonment is necessary. In the first, for the obvious reason that there is nothing existing to abandon; and in the second, because the ship, so far as the owner is concerned, is as much lost as if she were at the bottom of the sea. It is in the third case only, that of loss by capture or barratry, that abandonment is necessary, in order to show the intention of the assured to treat that as a total loss which ultimately may prove to be no loss at all. To exclude any presumption from silence that the assured meant to adhere to the adventure as their own, and show that they meant to recur to the insurance, and give up to the insurers any chance of the vessel's recovery. The present case comes within the second class, and the Court below has only found abandonment to have been necessary by confounding two things entirely different "*relinquishment*" and "*abandonment*," where the thing insured is not destroyed in every sense, but only in that sense in which it ceases to have the character in which it was insured, such parts of it as retain existence in its altered character, the salvage, must be relinquished by the assured to the insurers when they come to claim upon the policy; because the contract of insurance is one of indemnity only.

Abandonment, on the other hand, is only an intimation of intention to renounce the particular adventure, and is only necessary where the matter insured exists in specie, and is available in specie; when it is totally destroyed, or so much destroyed as to be no longer practically useful, abandonment is not necessary. This was established in Cambridge *v.* Anderton 2 *Bar.* & *Cres.*, 691. In that case a vessel insured had received so much damage, that in the opinion of experienced persons,

her value after being repaired would not be equal to the expense of the repair, and the captain in consequence sold her as she was. There the insured were found entitled to claim as for a total loss, though they had not given any notice of abandonment, *Bayley J.* observing, that "if by means of any of the "perils insured against, the ship ceases to retain that character, "and becomes a wreck, that is, a total loss, the master may sell "her, and the assured may recover for a total loss, without giving "any notice of abandonment;" and *Holroyd J.* said as explicitly, "Where the damage sustained makes the loss a total loss, it is "unnecessary to give notice of abandonment." So in Roux *v.* Salvador, 3 *Bing., N. C.*, 266. There a vessel bound from Valparaiso to Bordeaux, with a cargo of hides, sprung a leak between Valparaiso and Rio Janeiro, and put into the latter port, where it was found that the hides were in an incipient state of putrefaction, from the access of the sea-water to them, and that if they should be carried on to Bordeaux, they would by the time of their arrival have ceased to exist as hides, and have become a mass of putridity. In these circumstances the captain sold the hides, and it was found by the Exchequer Chamber, correcting a previous judgment of the Court of Common Pleas, that the insured were entitled to recover as for a total loss, without the necessity of abandonment. *Lord Abinger* said the case "was not what has been called a *constructive* loss, but an absolute total loss," and referring to Mellish *v.* Andrews, 15 *East* 15., and Mullett *v.* Sheddan, 13 *East* 310, he continues "Both these cases are direct authorities that no "abandonment is necessary where there is a total loss of the "subject matter insured."

In Mellish *v.* Andrews, *Lord Ellenborough* said, "a party is "not in any case obliged to abandon, neither will the want "of abandonment oust him of his claim."

In the present case the verdict has ascertained the loss to have been a total one, so that upon the authority of these cases

there was no necessity for abandonment. At the moment the ship receives her death-blow the insured are entitled to claim the indemnity of the policy; and if the captain had sold the ship, it must be admitted, on the authority both of Cambridge *v.* Anderton, and Roux *v.* Salvador, that the Appellants would undoubtedly have been entitled to claim the sum insured. The circumstance of the captain having taken upon him to have the vessel repaired, instead of selling her, cannot alter the rights of the insured. In doing this the captain did not act as their servant or agent in particular. So soon as there was a total loss he became the agent of all concerned, to protect the property and dispose of it to greatest advantage. Whether the loss was to be considered total or partial depended not upon how the master chose to view it, nor on what he took upon him to do, but upon whether a prudent man would have expended money in the repairs, as was laid down by *Lord Tenderden* in Allen *v.* Sugrue, 8 *Bar. & Cres.*, 561. There can be no question that if there had not been any insurance here, and the owners had been at the Mauritius, they would not have ordered the repairs. No doubt, as was said by *Lord Abinger* in Roux *v.* Salvador, "the insured has always an option to claim under "the policy or not, but his abstaining from his right does not "alter the nature of it." If the loss is total in its nature, the insured may, if he choose, treat it as partial, but that is quite distinct from the necessity upon him to abandon, without which he cannot claim where the matter exists in specie, and is available or practically useful.

II. Assuming abandonment to have been necessary, notice of it did not require to be given until the party was cognisant of all the facts. When the letters intimating the loss were received by the owners the repairs had already been made, under the orders of the master, and it was beyond the power of the owners to controul them; the first letter was not received till the 5th of September, and the letter of 9th August shows that all the

repairs had then been completed. But the letters even did not disclose the true state of the facts, for they induced the Appellants to believe that after the repairs had been executed the vessel would be of greater value than when she was insured, whereas on her arrival in the Thames much more serious repair was found to be necessary. Then it was that the owners first became acquainted with the true state of the matter, and came under the necessity of taking to the ship or abandoning her.

III. The fact of the master having made the repairs did not preclude the Appellants from abandoning, or show any intention to elect. The verdict has ascertained that the loss was total; from that time the power of the master, as such, was determined. While the master's power, as such, continues, he is agent of the owners to effect repairs upon the vessel, but they must be such as are prudent and necessary, Webster *v.* Seekamp, 4 *B. & Ald.* 352. Here the master thought it prudent to lay out more money in repairs than the vessel's value. If, therefore, a question had arisen between the owners and the shipwright, the latter must have failed, because the *onus* would have been on him to show that the owners, if present, would, as prudent men, have sanctioned the repairs. But so soon as a vessel is totally lost, the power of the master to bind the owners in regard to her is at an end. With the ability of the master to prosecute the voyage ceases his power to bind her owners in regard to it. What he thenceforth does is as agent of all parties concerned. The Appellants were not, therefore, bound by any act of the master as evidence of intention to claim, as for a partial loss. These acts were unauthorized by the Appellants, who, so soon as they were aware of the real nature of the damage the vessel had received, which they were not till she arrived in London, abandoned her, and claimed for the total loss.

The Lord Advocate and *Mr. Adolphus* for the Respondents. —Where a vessel is not actually sunk, and has received only

such damage as occurred in the present case, whether she is totally lost must depend on a variety of circumstances; the nature of the port at which she has arrived, the possibility of repairing her, the expense of repairs, and the like; for if she can be repaired and made to continue her voyage there is no total loss; the loss is only a constructive total loss, and the necessity is laid upon the insured, if they mean to deal with it as such, of showing their intention by abandoning the vessel, so as to give the insurers an opportunity to profit by the means of repair, to reduce their loss and make the best of the matter. But the correspondence shows that the Appellants dealt with the master and considered him to be acting as their agent in the making of the repairs. For they did not, upon the receipt of the first letter, repudiate what he proposed to do, and at once communicate with the Respondents, but they kept to themselves the knowledge of the injury the vessel had received, and so far from abandoning the voyage, they reinsured the vessel from the Mauritius.

It would be monstrous then, that, after having acquiesced in the very heavy repair which was made, and taken the chance of earning a profit by them, they should be able, upon finding their mistake, to turn round upon the underwriters and say they will abandon. If this might be so there was nothing, as the policy was a time one, to have hindered them from going several voyages within the period, and to have deferred claiming until the vessel came into port.

In Cambridge *v.* Anderton the loss was treated as a total one, in which abandonment is not necessary, and it was so because the adventure was entirely at an end. Before the insured knew of the damage the vessel had been sold by the master, and the property transferred to third parties. And the same was the case in Roux *v.* Salvador, the hides were sold, and the adventure at an end before the insured knew of the damage. There was nothing in either of these cases, therefore,

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to admit of an exercise of intention by the insured; they were as much deprived of the possibility of this as if the vessel in either case had gone to the bottom of the sea. The only question that could be raised was, whether the master was justified in selling, and this he was held to be in both cases: in the first, because the vessel was unable to prosecute her voyage without repair, and the expense of that would have exceeded her value after it was made; and in the other because the hides, if they had been carried further, would not have reached their destination in a form in which they could have been of any value. But in delivering the judgment of the Court in Roux *v.* Salvador, *Lord Arbinger* put the very case which has occurred here. After speaking of a total loss where the thing insured is destroyed, his Lordship continues, "But there are intermediate "cases; there may be a capture, which, though *primâ facie* a "total loss, may be followed by a recapture, which would revest "the property in the assured. There may be a forcible deten-"tion, 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 these, or "any similar cases, if a prudent man, not insured, would decline "any further expense in prosecuting an adventure, the termina-"tion of which will probably never be successfully accom-"plished, a party insured may, for his own benefit, as well as "that of the underwriter, treat the case as one of a total loss, "and demand the full sum insured. But if he elects to do "this, as the thing insured, or a portion of it still exists, and is "vested in him, the very principle of the indemnity requires "that he should make a cession of all his right to the recovery "of it, and that, too, within a reasonable time after he receives

" the intelligence of the accident, that the underwriter may be " entitled to all the benefit of what may still be of any value; " and that he may, if he pleases, take measures at his own cost, " for realizing or increasing that value."

Both Cambridge *v.* Anderton and Roux *v.* Salvador are authorities to show that where the loss is not total, but only constructively total, the insured must abandon so as to give the insurers the benefit of working out their relief by turning to the best account, according to their judgment, whatever remains of the thing insured. In Mellish *v.* Andrews, the words of *Lord Ellenborough*, that a party was not obliged to abandon, had reference not to a *constructive* total loss, but to an *actual* total loss, which was the fact of that case, and as to which abandonment clearly is not necessary. And in Mullett *v.* Shedden, *Lord Ellenborough* said that if the saltpetre had not been unloaded and sold, but had remained in the ship and been delivered to the owner, he " should have thought there was much in the argument that in " order to make it a total loss there should have been notice of " abandonment." And in Benson *v.* Chapman, 6 *Man. & Gr.* 792, the right of the insured to recover upon an insurance of freight where the repairs of the vessel were so heavy as to exhaust her price and the freight she had earned upon the homeward voyage, was rested entirely upon his having abandoned immediately upon hearing of the disaster. That case, with the others, establishes that where the loss is a constructive total one, the insured may elect to treat it as total, but he must do so within reasonable time, and if not, then he must stand by the result.

II. and III. The time at which the insured should have abandoned, if they meant to do so, was when they first heard of the damage on the 5th September, or at all events in November, when they were informed what the probable cost of the repair would amount to. But in their letter of 3rd December they adopted what had been done, cherishing hope

of profit from the freight which had been promised, and gave no indication of any intention to abandon. It is no doubt true that at both of these periods the repairs had been already executed, but every warrantor, which an insurer is, is entitled to notice so soon as it can be given. The owners were entitled to know the state to which the vessel was reduced, but they were not entitled to speculate on which course it would be most profitable for them to follow, whether to adopt the repairs and claim for a partial loss, or to repudiate the repairs and claim for a total loss, and after having adopted the first of these courses, then to betake themselves to the other. All that they were entitled to was a reasonable time to make up their minds, 1 *Bell's Com.* 611; *Park*, 400. In Anderson *v.* Roy. Exch. Assurce. Co., 7 *East.* 38, notice of abandonment given twenty-one days after the vessel had struck on a rock and sunk with a cargo of wheat, and while it was yet doubtful whether she could be raised and the cargo saved, as was afterwards accomplished, was held to be too late to entitle the insured to claim for a total loss. And in Hunt *v.* Roy. Exch. Assur. Co., 5 *Man. & Sel.*, notice of abandonment given only six days after the insured were aware of the damage done to the vessel, was held to be too late to entitle them to claim as for a total loss.

With regard to the acts of the master, whether he acted as the agent of the insurers or insured, or of both, during the period before the arrival of his first letter intimating the loss to the insured is immaterial; because by not abandoning immediately they got that letter, they adopted his acts and made them their own. Assuredly he could not be the agent of the insurers until they had notice, and an opportunity given them to consider whether they would continue him or not; Mitchell *v.* Eadie, 1 *Durn. & Ea.*, 608.

If any doubt existed as to whether by the delay in abandoning the insured had elected to claim for a partial loss, it is removed by the terms of their own letters to the master and to

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Hunter and Co., and more especially by the fact of their having insured the homeward freight, on the 28th February, five months after they first had information of the damage sustained by the vessel; this could not have been done in any other character than as owners continuing to trade with the vessel for their own interest.

LORD CHANCELLOR.—My Lords, it appears to me, that in this case there are special grounds shown upon the correspondence, which are sufficient to dispose of the question without entering into any discussion as to many of the points which have been raised at the Bar, particularly as to that question which has arisen with respect to the formal abandonment, about which there is a confusion existing, arising, as I believe, more from the use of the term than from any real difference in the statements. But, at all events, in this case, it is admitted on all hands that, whether the parties were bound to give that formal notice of abandonment or not, when the facts came to their knowledge in this country, they were sufficiently informed of what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy which had been effected with the underwriters upon the vessel; and if they acted upon that election, they surely could not afterwards turn round, and go against the underwriters as for a total loss.

But that applies to the question of whether there was any necessity for a formal abandonment or not. If there was any necessity for a formal abandonment, and with a full knowledge of the facts they did not make that formal abandonment, but took the property instead, they could not afterwards take the benefit of the policy as if there had been a formal abandonment. But if, on the other hand, there was no necessity for a formal abandonment, still, if they choose to lie by, and allow things to

go on as they did, they could not afterwards upon a change of circumstances, or in consequence of a better calculation, turn round, and say to the underwriters, "Now we will give you up "this property because we find we cannot turn it to the advan- "tage which we expected." The question really turns upon what the information was which was sent to them, and what their conduct was upon that information coming to them of what had taken place?

Now the first communication they had may perhaps not have been sufficient to enable them to come to any conclusion; they knew that a misfortune had occurred to the vessel, and they knew that expenses had to be incurred in respect of repairing the vessel, but they did not know to what extent.

But there is a letter which they received afterwards, which seems to me to decide the question. That letter is written by Hunter Arbuthnot and Company, at the Mauritius, and it is dated the 16th of July, 1842, and was received in this country on the 13th of November. Now there they state that "Captain "Elder is naturally anxious to follow his instructions, and pro- "ceed, when required, to Bombay; for this purpose he has "advertised for the loan of about 20,000 dollars, to be secured "by a bottomry bond on the ship which would proceed to "Bombay, in the prosecution of her voyage. No offers, how- "ever, were made on these terms, but parties are ready to "advance the money required, provided the ship proceeds to "England direct from this. Captain Elder will therefore be "obliged to deviate from his instructions, and we have offered "him a cargo of sugar at the first season for England, at the "current rate of freight, which we think is better for all parties, "than to go on to Bombay at the miserably low rate of freight "ruling in India." That letter, therefore, shows that the parties were under the necessity of borrowing upon the ship a sum equal to 20,000 dollars; and that letter they received on the 13th of November.

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Then we have a letter of the assured, dated the 3rd of December, 1842. Having received information stating to what extent the expenses at the Mauritius would be carried, they write this letter: "We take advantage of the Overland Mail to "India, to acknowledge the receipt of your favours of the 10th "and 18th June, 16th July, and 10th August. We observe "the general measures adopted for the representatives of the "ship 'William Nicol,' which we hope may turn out to have "been the best, in the unfortunate circumstances in which she "was placed; but in the absence of any past experience on our "part of the usages of your port in such cases, we were rather "startled at the apparent necessity of a bottomry bond being "had recourse to; but this may be a misapprehension on our "part, which the communication of particulars hereafter may "clear up."

[*Lord Brougham.*—That is to show that they had received the letter. Now, look at the letter of the 16th of July, which says that they have advertized for the loan of 20,000 dollars.]

Lord Chancellor.—There is no doubt that they were in possession of the information. In point of fact, the answer to that particular letter shows that they were in possession of the information, stating that 20,000 dollars had been borrowed on a bottomry bond, for the expenses of the repairs of the vessel.

These parties, therefore, on the 13th of November had possession of this information, and we find them answering in those terms; and we find them afterwards, on the 7th of March, writing to Messrs. R. and J. Henderson, London, "From the "advices last received by us from the agents of the ship "'William Nicol,' at Mauritius, it was expected that she "would be ready to leave that place, with a cargo of sugar for "London, about the 20th December; and as she may therefore "be looked for shortly, we inclose a few lines for Captain Elder, "requesting him to follow your directions as to the dock of his

" discharge, to which please attend, after fixing with Mr. J. D. " Nicol what dock it will be most advisable to send him to for " that purpose. We are, dear Sirs, yours truly, John Fleming " and Co."

Now, my Lords, whether the fact of a total loss, as it is called, or such damage being incurred as would exceed the value of the ship to repair, whether that would make the captain the agent of the underwriters at all or not, or the agent for all the parties, is a matter which I do not think it necessary at present to advert to, because it is quite clear, even if it were so, that it was quite competent for the owners to continue the employment of the captain. If they thought proper to say, " We do not " treat this as a total loss, we do not treat you as our agent in " this matter of repairs, but we treat you as the person having " the authority over this property;" and if the facts had sufficiently come to their knowledge of what he was doing, and notwithstanding that, they think proper to take the property under their own direction, and to recognise his acts, can they afterwards, when a considerable time has elapsed, and the vessel has made a different voyage and obtained different freights from what they expected, turn round and say, " We no longer con- " sider this property as ours, but we will go against the under- " writers as for a total loss?" My Lords, it appears to me to be not only contrary to the common principles of justice, but contrary to all the authorities which have been referred to, And nothing has been cited at the Bar which can alter that view of the case; because, when it is said that they had not the necessary information to enable them to come to a conclusion as to whether they would treat it as a total loss or not, and when it is said that they were not aware of what species of vessel it would become, in consequence of the repairs to be done so as to enable them to elect, still if they thought proper to employ the captain as their agent in causing the repairs to be done, whether he acted judiciously or not, it is for them to suffer

the loss, and any want of judgment in their agent they must take the consequence of, and it is not to be visited upon the underwriters.

Upon these grounds, my Lords, it appears to me that the judgment of the Court below must be affirmed.

LORD BROUGHAM.—My Lords, I shall not occupy your time by saying more than that I entirely agree with the judgment of the Court below.

LORD CAMPBELL.—My Lords, I am likewise of opinion in this case, that the interlocutor ought to be affirmed upon both the grounds on which the Court proceeded. The Court proceeds by the interlocutor on two grounds, "The Lords having "heard counsel for the parties, find that the pursuers are "barred from recovering as for a total loss in respect that they "were bound and failed to abandon the vessel in due time to "the Defenders." That is the first ground; and then follows this, "and also that they elected to treat the loss as partial."

Now, my Lords, in this case the assured, according to the finding of the jury which I think is a very proper finding, were entitled, if they had thought fit, to treat this as a total loss, that is what we call a constructive total loss, which is as good a term as an actual total loss, and I do not see any reason why we should now alter that term. I admit that if persons uninsured under all the circumstances of the case, after the misfortune had befallen the ship, would not have repaired her, but, on the contrary, would have sold her to be broken up as useless, that is a total loss. But, my Lords, the question arises what the insured were bound to do to entitle themselves under this policy to claim as for a total loss. Now, my Lords, the ship was not submerged, she was not destroyed, she remained as a ship in specie capable of repairs, and it was for the captain to decide whether she ought to be repaired or ought not to be repaired.

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That depended upon the price of materials; upon the price of labour; upon the rate at which money could be borrowed; and, upon the probability of profitably employing the ship after she had been repaired.

Now, my Lords, under these circumstances the question arises whether, when the owners of a ship so insured receive intelligence that she has suffered such misfortune as to render it inexpedient that she should be repaired, but that she is capable of being repaired, and they are informed, not that she has been sold by the captain, but that she lies in port capable of being repaired, they can claim as for a total loss, without giving notice of abandonment? My Lords, in my humble opinion, they cannot. According to all the old authorities which have been referred to, where there has been what we call a constructive total loss, it can only be turned into a total loss by giving notice of abandonment, and that is most reasonable, because, although in the judgment of the assured it may be better not to repair the vessel, yet the underwriters with greater facilities and appliances, may give instructions whereby the ship may be repaired, and, at all events, if they decide that the ship is not to be repaired, they may give directions as to how the ship is to be disposed of, and it would be an extreme hardship upon the underwriters that they should be called upon for a total loss, without having the opportunity of making the most of the ship in her disabled state.

Well, then, my Lords, according to all the authorities under such circumstances, the law of Insurance requires that the notice of abandonment should be given. And we come now to the two cases that have been cited, in both of which I myself, when at the bar, happened to be counsel, namely, Cambridge *v.* Anderton, and Roux *v.* Salvador. The Court of Queen's Bench held in Cambridge *v.* Anderton, not overturning the old authorities, but as it seems to me in accordance with them, that under the peculiar circumstances of that case a notice of aban-

donment was unnecessary. Why was it unnecessary? Because, the ship coming down the river Saint Lawrence met with a serious misfortune, and the captain thought it was so serious that the ship was not capable of being repaired, and he, in the exercise of the authority that belonged to him as master of the ship, sold the ship, and conveyed a good title to the purchaser of that ship. The assured received the intelligence of this at the same time that they received intelligence of the misfortune that had happened to the ship, and the Court decided that under those circumstances there was no occasion for a notice of abandonment; that under the circumstances it would be wholly futile. There was nothing to abandon; the ship was gone; the underwriters could not have taken possession of the ship, because it had been lawfully transferred to and purchased by other parties. Therefore, the case of Cambridge *v.* Anderton did not break in upon the old authorities.

Then we come to the case of Roux *v.* Salvador, in which Lord Chief Justice Tindal, a very great authority, said that notice of abandonment was necessary. That case came before the Court of Exchequer Chamber, and I do not think the Judges were by any means disposed, or can be supposed, to have departed from the ancient rule, because in that case the hides were so much injured that they had ceased to exist as hides; there was no annihilation of matter, because the substance would continue, but it would not continue in the shape of hides. Therefore, it was considered there that the real substance which had been insured had been destroyed, and, therefore, no notice of abandonment was necessary.

But, my Lords, in this case, the ship existed, was capable of being repaired, was repaired, received her freight, and brought home that freight to England, her port of destination. Under these circumstances when the assured heard by the intelligence they received from the captain of the misfortune that had happened to the ship (of which they were informed at

all events in the month of November), at that time in my opinion, if they wished to turn that which was a partial loss into a total loss, it was then imperative upon them to give notice of abandonment—so that the underwriters might have the opportunity of making the most of the property which had been insured, and which was in a state that would enable them to exercise an option as to repairing the vessel, or selling it. But, my Lords, there was, in point of fact, at that time, no notice of abandonment. There was no notice of abandonment till the 30th of March, 1843. On the 17th of March, the ship had actually returned, and the assured were fully aware of all the circumstances of the case, and they allowed the period to expire from the 17th or 18th of March until the 30th before they gave any notice of abandonment at all.

Under all these circumstances I am of opinion that the first ground upon which the interlocutor is rested would have been sufficient.

But I am further of opinion that on the second ground the interlocutor is well founded, and that here the assured had elected to treat the property as their own—not only had they not given notice of abandonment, but they had actually taken steps whereby they chose to treat the property as still belonging to them, and they intimated their intention to come upon the underwriters for a partial loss, taking to themselves all the advantages that might arise from the repair of the ship, and from the adventure being complete.

Now, my Lords, it is not necessary to give any decided opinion as to the power of the master under such circumstances, but I must here again remark that I should be slow to come to the conclusion that under such circumstances when the master is acting *bonâ fide* for the benefit of his owners, he has not authority to act as their agent. Under these circumstances there can be no doubt that the master thought he was doing the best for those who had employed him. There is no

doubt that under many circumstances, the master is the agent of the assured, of the underwriters, and of all parties concerned, but here he stood pledged to act as the agent of the owners, doing the best he could for their advantage, and I think it would be therefore rather dangerous to say that his authority as their agent might be questioned, and might be contradicted by shewing that in the ultimate result, on account of events posterior to the repair of the vessel, it had turned out that he had formed a wrong conclusion, and that it would have been better if they had abandoned the vessel instead of repairing it. But, my Lords, in this case it is not necessary to give any decisive opinion upon the power of the master upon that subject, because it seems to me that the authority of the master was adopted and recognised by the owners in this country. At all events as early as November, 1842, they knew perfectly well that he was repairing the ship on their account, and they knew perfectly well that he was to freight her at the Mauritius for London, and that they were to have any profit that might arise from the adventure. What do they do? Do they repudiate his authority? Nothing of the sort. Having had this full information they acquiesce in all that he does, thereby reflecting an authority upon him if he was not previously in possession of that authority.

My Lords, it seems to me therefore that they have chosen to treat this as a partial loss down to the 20th of May, 1843, and having done so it is much too late now to turn round and say, "This is not a partial loss, but a total loss, and "we will come here as for the whole sum of 6000*l.*" for which the vessel was insured. Under these circumstances I entirely agree with the opinion of the learned Judges who decided this case in the Court below, and I also concur in the advice offered to your Lordships by my noble and learned friend, the Lord Chancellor, that this appeal should be dismissed, and with costs.

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Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed. And it is further Ordered, That the Appellants do pay or cause to be paid to the Respondents the costs incurred in respect of the said Appeal, the amount thereof to be certified by the Clerk Assistant, &c.