is an insufficient and imperfect mode of imposing those fetters—he has not imposed the fetters according to the act of parliament. What equity is there? There never was a greater mistake than supposing, that what we call election here, which is called by the name of approbate and reprobate in Scotland, touches a case of this sort. In the case where there were three estates in a settlement, and it turned out that one of the estates belonged to the person, but the other two came under the settlement, it was held in Scotland, as held here, that the party taking under the deed could not take against him;—if you take the two estates which belonged to the settler, you must bring into the settlement the third estate which belongs to yourself. There is no difficulty about that. But what has that to do with the case in which he is to take under a deed? Observe, that in that case you attempt to take under and in opposition to the deed at the same time. You cannot be permitted to do that in a Court of Justice; but it is a totally different question here, because here the party does take strictly under, and only under, and not in opposition to, the instrument. The instrument has all the binding force and operation which the law gives to it, and to that he submits. What can be done more? There is no such law in England as would enable you to confirm an imperfect settlement of this sort without something more than we have here. If you do not effectually make your settlement, the party taking under it may be unable to maintain it; but there is no equity, because the thing might have been done—there is no equity which can compel the party to do it. It stands simply upon its own force, and if it can be executed by its own force, that is valid, otherwise it must fall to the ground. That is all the former decisions do.

Now, my Lords, there is no authority whatever in the law of Scotland to do that which is contended for here—and there is no such authority in the law of England. Your Lordships are aware, as I am, having had the honour of appearing in these Scotch appeals, that I have done as my predecessors always have done—strictly confined myself to the Scotch law, and have not attempted, and never shall attempt, to import into the doctrines of Scotch law the doctrines of the English law;—but taking the Scotch law as I find it, there is no such doctrine as is contended for. In the *Abertarff case*, it was introduced necessarily and inevitably, because there was a settlement executed, and it extended the fetters to the second instrument, because it evidently was considered to have been a part of the original instrument, and to indicate that the two together formed one instrument.

Therefore I recommend to your Lordships to affirm the interlocutor of the Court below, and to dismiss the appeal.

My Lords, though I think that nothing can be more wise than that the costs should follow and abide the event, yet in this case it is impossible not to see that the authorities have left the question in a state of great uncertainty and confusion; and I think this would be a very proper case to depart from the general rule of compelling the appellants to pay the costs, having failed in the appeal. I shall therefore move your Lordships to affirm the interlocutor complained of, but without costs.

Interlocutor affirmed without costs.

First Division.—Richardson, Loch, and Maclaurin, *Appellant's Solicitors.*—Williamson, Hill, and Williamson, *Respondent's Solicitors.*

MARCH 2, 1853.

THE SCOTTISH MARINE INSURANCE COMPANY, *Appellants*, *v.* JAMES TURNER and ALEXANDER RANKINE JOHNSTONE, *Respondents.*

Maritime—Ship—Insurance—Freight—Total Loss—Expenses—*The owners of a ship effected an insurance with an insurance company on freight, and with the same and other companies on the vessel itself. In the course of the homeward voyage, and before entering the dock, the vessel suffered great damage, but discharged her cargo and earned freight, which was paid to the owners. Thereafter the owners having abandoned the ship, the company, which had also insured on freight, accepted the abandonment, but the others having refused to do so, an action was raised as for total loss, in which a verdict was returned finding that the vessel was properly abandoned, and not worth repairing, and that she was a total loss. Under this verdict, it was held that the insurers on the ship were entitled, in settling as for a total loss, to have placed to their credit their due proportion of the freight, subject to such deduction as might be found properly to affect their interest therein. Thereafter the owners having raised an action against the company who had insured both on vessel and freight, for payment of the sum insured on the freight,*

HELD (reversing judgment), *that the company were not liable in payment, in respect that the*

freight insured was actually earned and received by the owners, and that, but for their act in electing to abandon the ship after such earning and receipt, they might have retained the freight for their own use.[1]

The appellants appealed against the judgments reported as above, maintaining in their *printed case* that they ought to be reversed for the following reasons:—1. Because the voyage insured having been performed, the cargo delivered, and the freight earned and paid, no loss of freight arose to found a claim against them under the policy on freight; and that none of the circumstances relied on by the respondents, as to the damage to the ship, or as to the effects of abandonment under a separate insurance, could authorize a demand against the appellants on the freight policy. 2. Because, at all events, the respondents could not recover from the appellants more, or at a higher rate, than according to the amount carried off by the underwriters on the ship under the abandonment of that subject; and as the respondents were allowed to retain £457 12*s*., 1*d*. from the freight earned and paid, allowance should be made for that sum in considering their claim under the action.

The respondents in their *printed case* supported the judgment on the following grounds:—1. Because the ship having been destroyed by perils of the seas before completion of the voyage on which the insurance was effected, and being thus unable to earn any freight on the voyage, there was, by reason of such total loss, a total loss of the freight, in respect of which the assured were entitled to recover the full sum insured. 2. Because such freight was wholly lost to the assured, not by reason of any abandonment or transfer by them of the right to and benefit of what might be saved from the wreck, and of any remuneration, in the nature of freight, which might, by means of acts subsequently done, be received from the consignees of cargo, but by reason of the perils of the seas which occasioned the loss. The respondents also pleaded, that the interlocutor of 23d May 1851 should be affirmed—1. Because the matters brought before the Court in the minute or note had been already adjudicated upon, and that the motion made was an attempt to reopen the judgment. 2. Because, upon the merits, there was no foundation for the claim of deductions or apportionment so made, such deductions being in respect of salvage expenses, which were properly deducted, and the policy on freight being a valid policy.

Sir F. Thesiger and *Willes* for appellants.—The respondents are here attempting to recover in the teeth of their own summons, which puts them out of Court, for the summons expressly sets forth, that the freight was in fact earned, and not only so, but that it was even paid to the owners. If, then, the freight has been paid, what are the respondents suing for? Nothing is clearer than that we must look to the contract of insurance on freight considered by itself. That contract amounts merely to this, that if the cargo is not delivered owing to some peril of the sea which prevents freight being earned, then the insurers will pay the sum which the freight would have amounted to. But they do not undertake that the freight shall be received by the owners—for this reason, that there might be an assignment during the voyage of the ship, in which event the freight would pass to the assignee. They merely insure, therefore, that the cargo shall be delivered —*Everth* v. *Smith*, 2 M. & S. 278. But an abandonee is in the same position as a purchaser—*Case* v. *Davidson*, 5 M. & S. 79; *Idle* v. *Roy. Exch. Co.*, 3 Moore, 116; 8 Taunt. 755; and abandonment is a voluntary act—*M'Carthy* v. *Abel*, 5 East, 388; *Idle* v. *Roy. Exch. Co.*, 3 Moore, 151; *Read* v. *Bonham*, 3 Brod. & Bingh. 151. If an owner, therefore, abandon his ship, he thereby assigns the freight, and cannot recover for a total loss of freight as against the insurer of freight—*Morrison* v. *Parsons*, 2 Taunt. 407. Hence it was the voluntary act of the assured in abandoning the ship, that caused the loss of the freight, and the insurer of freight cannot be liable. But whether it was owing to their voluntary act or not, it is at least certain that the cargo was delivered, and the freight earned; and Baron Alderson said in *Benson* v. *Chapman*, 2 H. L. C. 721, that there has never been a case where freight had been actually earned, and yet an action for a total loss of freight was maintainable. Neither can it be said that this was a loss caused by the perils insured against. It is true the policy adds, "and all other perils and misfortunes," &c.; but this is a mere form of expression, and goes for nothing unless the peril alleged to come within this general description is analogous to, or of the same kind as, those particularly specified in the foregoing clause. That there was no loss by a peril of the sea, is clear from this, that if there had been no insurance of the ship, there could have been no loss of the freight. Hence the loss must have been caused by the fact, of there being another contract with the insurers of the ship. Moreover, even if it could be said that the loss flowed originally from a peril of the sea, yet the cause was too remote to be a ground of action, according to the maxim, *non remota sed proxima causa spectatur*, as to the application of which, see *De Vaux* v. *Salvador*, 4 Ad. & Ellis, 431; *Powell* v. *Gudgeon*, 5 M. & S. 431. But it is not even a necessary consequence of the total loss of the ship, that the ship is given up to the abandonee; for if the freight was of great relative value, no prudent owner would scruple to prefer retaining it for the

[1] See previous reports 13 D. 652; 23 Sc. Jur. 290, 455. S. C. 1 Macq. Ap. 334; 25 Sc. Jur. 274.

sake of the freight. If, then, the loss of freight merely depends on the accident of the owner putting in force his legal remedy (*i. e.* his right of abandonment) against the underwriter of the ship, how can it be said to be a loss by perils of the sea?—which, in other words, brings us back again to the proposition, that the loss was caused by his own voluntary act, in electing to abandon. The difficulty of the case no doubt arises from the accessorial nature of freight, which has been long settled to go with the ship—*Case* v. *Davidson*, *supra*.

[LORD TRURO.—What is the ground on which it is held that the freight passes to the underwriters? Was there ever a case where it did so, and where the owner of the ship had not abandoned?]

No; we can find no such case. Abandonment seems the only ground of the freight's passing to the underwriters. Though, therefore, in one sense, freight is merely a quality of the ship, yet, for the purposes of insurance, the ship and the freight are two distinct and independent subject matters. Such, then, being the state of the law, the parties must be understood to have contracted in contemplation of that known law. The owner must have known that, in the event of his abandoning the ship, he would render the underwriter on the ship a *quasi* owner; and this being a voluntary act on his part, he stands in the same position as if he had actually assigned or sold the ship.

[LORD TRURO.—Yes; you say, if the owner thought fit, he might have recovered the freight; but he chose to put himself in a position where he could not recover it. He ought to have proceeded against the insurers of the ship, not for total loss, but for the actual damage he had sustained, and thus he might have kept the freight.]

Yes; or the policy of insurance on the ship might have expressly provided, that in the event of the ship becoming so damaged as to make abandonment a justifiable step, the remedy against the freight insurer was not to be lost in consequence. Emerigo on Bottomry, by Hall, 36-41, seems to say this might be done. But it was not done here. Yet it is sought to influence the liabilities and rights attaching to the insurance of freight, by mixing it up with the consequences arising out of the separate contract of insurance of the ship. The Judges below seem to have assumed that an insurance of the ship was so customary, that it must be taken here that there was an insurance of the ship. But it often happens there is no insurance of the ship, or it is only partly insured, and such insurance of the ship may or may not be executed after the freight has been insured. How, then, can you incorporate into our contract, conditions flowing out of another future and contingent policy, which may or may not ever be in existence? It is clearly *res inter alios acta*. Then it is said, that what was earned here, was not freight, but salvage. But this is a mere play on words.

[LORD CHANCELLOR.—If it was not freight, how could the underwriters on ship bring an action, as the decision implied they could, for money had and received as such? But, indeed, it was sued for here *eo nomine*.]

The name is not worth disputing about. The money had all the qualities of freight, and could have been enforced and recovered under that name. Freight at least is the name given to the remuneration for carriage of goods, not only by one ship, but also in cases of transhipment—See Jacobsen's Laws of the Sea. The respondents, then, must be reduced to say, either that this is not freight, or that, it being freight, it became lost to them by other circumstances. If this is not freight, in what other way could freight have been paid, supposing no accident had ever befallen the ship? As to its being salvage, it is enough to ask, Who, then, are the salvors?

[LORD TRURO.—Suppose the owners had insured only half or part of the ship, being their own insurers as to the rest?]

That is this very case; and we have here, therefore, the owners pocketing part of the freight, and then turning round and suing us on the ground that that very freight was totally lost. The following cases were also incidentally cited:—*Roux* v. *Salvador*, 3 Bingh. N. R. 266; *Cambridge* v. *Anderton*, Ry. & Moody, 60; 2 B. & Cr. 691; *Mellish* v. *Andrews*, 15 East. 13; *Thompson* v. *Rowcroft*, 4 East. 34; *Sharp* v. *Gladstone*, 7 East. 24; *Leatham* v. *Terry*, 3 Bos. & Pull. 479; *Holdsworth* v. *Wise*, 7 B. & Cr. 794; *Samuel* v. *Royal Exchange Co.*, 8 B. & Cr. 119; *Moss* v. *Smith*, 9 C. B. 94; Arnould on Insurance; Benecke Pr. of Indemnity.

Sir F. Kelly, *Serj. Byles*, (with them *Burnie*,) for respondents.—The ship was totally lost on 11th August, and that total loss existed, in point of law and in fact, independent of any notice of abandonment. Whatever rights, therefore, a total loss could confer, became vested in the owners on that day. The right then accrued, to sue both sets of underwriters on their respective policies, and could not be defeated by subsequent events. It is true the owners received the freight in the first instance; but they did so merely as agents for the underwriters on ship, and cannot be prejudiced by that circumstance. On the 11th August, then, the owner might have left the ship to perish, for by the mere fact of the accident on that day, the wreck passed out of his hands. Lord Cottenham in *Stewart* v. *Greenock Insurance Co.*, 2 H. L. Cas. 159, says as much.

[LORD TRURO.—Suppose the owner, on 11th August, had assigned or sold the ship, could the assignee have recovered freight before the delivery of the goods?]

Of course an assignee has a right to the freight, because the voyage was not completed. If

a ship is sold on the last day of the voyage, the vendee gets the freight, for there is no such thing as freight *pro rata itineris*. But here the whole mischief was done on the 11th August at latest, and before the ship entered the dock.

[LORD TRURO.—Suppose she had been brought into dock, and had delivered her cargo, and immediately received some fatal accident, yet before the period of the policy on the ship had expired, who then would be entitled to freight?]

We admit the owner, and not the underwriter on ship, would be entitled in that case. But here the total loss occurred before the delivery, and therefore the right of action against both the ship and the freight insurers accrued on the same day. In England, abandonment causes the total loss to relate back to the date of the accident, while, in France, it relates back to the commencement of the voyage—Emerigon, c. 17, § 9; Code de Commerce, § 386; 2 Phillips' Ins. (ed. 1840) 417.

[LORD TRURO.—But suppose the underwriter on the freight sets up as a defence, that the goods had subsequently been delivered, or that the time had not arrived for the delivery?]

But if a total loss occurred on a certain day, is the owner to wait till some subsequent date to see whether the cargo may be delivered? In that case he might wait for ever; for if the ship existed at all, it might not be physically impossible for it to be refitted and brought home. Here it was no doubt possible for the owner to have had the goods brought home, but at an expenditure such as no reasonable man would incur. Assuming, therefore, as we are entitled from the verdict in the former case to do, that a total loss occurred on the 11th August, it necessarily follows that the owner had no longer the power to earn freight after that date. The wreck had passed out of his hands, and what signified it to him whether any third party might have speculated on the wreck, spent large sums upon her, and ultimately brought her home; his rights could not thereby be altered. It was the underwriters of the ship, then, who, in the contemplation of the law, here brought home the ship, and delivered the cargo. Freight in one sense may be earned, and yet be totally lost, as is shewn in *Idle* v. *Royal Exchange Co.*, 3 Moore, 115; 8 Taunt. 755, which clearly supports our case—See also *Read* v. *Bonham*, 3 Brod. & B. 154. But freight has never been earned here in the sense of the contract of the freight insurer. What was got was money, which the underwriter on ship was entitled to by choosing to bring the goods from that part of the sea (where the total loss occurred) to harbour. Suppose a case where a ship strikes a rock, and the peril is so great, that the crew leave her to perish, the sole question would then be, whether the crew were justified in so leaving her, and if they were so, the right of the owner to recover on freight would be clear, and would be unaffected by the circumstances which might subsequently have happened—such as, whether the ship was ultimately got off and brought home.

[LORD TRURO.—I know there are what may be called contingent total losses. Thus a capture is a total loss, while the ship is in the enemies' hands; but, then, if she be recaptured, the total loss is rescinded. Hence, in such a case, unless the owner brought his action for the freight before the ship was restored from capture, he could not recover.]

There may be cases where the owner is justified or not justified in abandoning, but that cannot alter his right of action, if such right has attached at a particular point of time. We say here the owner's right accrued on 11th August. In cases of capture, or sudden abandonment in the hour of danger, we admit, that if the owner was in a position to recapture or repossess, he would be unable to recover in an action for freight. Then it is said it was our own voluntary act in abandoning the ship, that caused our loss of freight. But when a ship is insured for £6500, and becomes so damaged that it is not worth £470, it is absurd to say that he elects the former sum; it is an abuse of language to call it a voluntary act. It is like A refusing to deliver up B's goods, unless B pay him £1000, and B pays that sum; in one sense, it is B's voluntary act, yet he can nevertheless, on getting back his goods, recover back the £1000 which he had been improperly coerced to pay—*Ashmole* v. *Wainright*, 2 Q. B. 837. So, in jettison, though the owner with his own hand throw goods overboard, that is held not to be a voluntary act—*Powell* v. *Gudgeon*, 5 M. & S. 431.

[LORD TRURO.—What was to prevent you claiming an average loss? You might have said, "I'll keep the ship, and I'll take average damage," which, in many cases, may be as much as 99 per cent.]

We found it would be practically more advantageous to recover for a total loss. Lastly, it is said, that if the ship had not been insured, we could not have had any pretence for the present claim. But it is enough to say, that in that event the present case could not have arisen, and our rights cannot be affected by what might have happened in such a contingency. If it be held that we are not entitled to recover, then the practical effect will be, that in future it will be impossible for an owner to insure both his ship and the freight at the same time, which hitherto he has always been protected in doing. The following cases were also cited:—*Fleming* v. *Smith*, 1 H. L. C. 513; *Everth* v. *Smith*, 2 M. & S. 278; *Knight* v. *Faith*, 15 Q. B. 649; *Benson* v. *Chapman*, 6 M. & Gr. 792.

Willes replied.—No doubt there have been difficulties introduced into the subject, owing to

freight being held an accident of the ownership, and it may be regretted that the law took such a turn as it did in *Case* v. *Davidson;* but it is too late now to alter the principle then established.

LORD CHANCELLOR CRANWORTH.—(After reading part of the summons)—Now, for a moment, we will pause there. The first observation which occurs in this summons is, that, *primâ facie*, it discloses no case of freight lost at all. The cargo arrived safely in the ship, and was delivered by the owners to the consignees, by whom the freight was duly paid. Then, how is it that the respondents, the pursuers, say the freight has been lost? It is thus. They say the ship had been insured in several offices on policies to the extent of £6500. The ship, when in dock, was examined, and found so much damaged that it was impossible to repair her. The expense of doing so would have been too great; the value of the ship when repaired, would not have been as much as the cost of repairing her, and therefore the owners claimed against the insurers of the ship as for a total loss of the ship; and, on the 1st of September 1842, they gave notice to the underwriters, and abandoned the ship to them. The question was raised between the owners and the insurers of the ship, whether there had been a total loss. The Greenock Marine Insurance Company, who had insured the ship, resisted the claim, and the owners raised an action, and obtained a decree establishing that there had been a total loss. The proceedings in that action are thus stated—(reads from summons, and states proceedings in the action against the ship insurers, and then in the present action.)

The Court of Session, in the present case, decided in favour of the claim of the owners, and against the appellants, the underwriters of the freight. The underwriters, being dissatisfied, have appealed. There is a very elaborate judgment given below, which deserves, and has received, I have no doubt, the serious attention of your Lordships. Three of the learned Judges below—the Lord Justice Clerk, Lord Medwyn, and Lord Cockburn, sustained the claim of the pursuers, the owners. One Judge—Lord Moncreiff—took a different view of the case, and considered that the claim of the owners was not made out.

My Lords, I have given very anxious attention to these able and well reasoned judgments, which fully disclose the grounds upon which the Court, that is, the majority of the Judges, proceeded. Those grounds were these:—*First*, They considered that there was a total and actual loss of the ship before she was brought into dock. *Secondly*, That being so, and the ship having been abandoned to the underwriters, or, at all events, notice of the loss having been duly given to them, the damaged vessel became their property as from the time of the fatal injury, say on the 11th of August. It is immaterial whether it was the 11th of August or the 17th of July before she got into dock. *Thirdly*, The Court considered the legal consequence of such a state of facts (as established by *Case* v. *Davidson*, *supra*, and a case in your Lordships' House arising out of this very transaction, *Stewart* v. *Greenock Marine Insurance Company*, *supra*) to be, that freight accruing due after the 11th of August, (which includes all the freight of the ship,) belonged, not to the owners, but to the insurers of the ship, and so was lost to the owners. *Fourthly*, The Court held, that the cause of this loss of freight to the owners was the loss of the ship by perils of the sea, and so the freight was lost by one of the perils insured against.

These are the grounds on which the Court of Session proceeded. But, with all respect to the distinguished persons by whom these judgments were pronounced, I think they rest on an unsound foundation. I do not think that, as between the parties in this cause, it can be said that the ship was totally lost during her voyage. That she was not in fact lost, is certain, for she arrived at Liverpool, was there brought into dock, her cargo was safely delivered to the consignees, and the freight was paid to the owners. But how then, it may be said, is this consistent with the verdict of the jury in the action against the underwriters of the ship, which finds expressly that the vessel was a total loss, irrespective of the decayed timbers and deficient sails? To this I answer, that the verdict was altogether *res inter alios acta*. As between the underwriters on the ship and the assured, it might be proper to treat the damage as a total loss. But it does not therefore follow, that it can be so treated as between the owners and other persons—as between the owners, for example, and the underwriters of the freight. When it is said, that as between the owners and the underwriters of the ship, there had been a total loss, all that is meant is, that the circumstances of the case were such as gave to the owners the same rights against the insurers of the ship as if there had actually been a total loss. It does not by any means follow, that the same circumstances will give to the owners similar rights against other persons. When the cargo was delivered to the consignees, and the freight paid, the owners might, if they had thought it for their interest, have retained the damaged vessel, and come on the insurers for the cost of repairing her, or for a due proportion of that cost. In such a case, there could have been no possible claim on the appellants, the underwriters of the freight; their contract would have been performed. How can the right of the owners to enforce against third persons, claims resting on what is in truth a fiction, (namely, the assumption that the ship did not perform her voyage,) give them any right against those whose contract was actually performed?

The learned Judges in the Court of Session seem to doubt whether the contract of the underwriters on the freight was performed—whether the sum paid to the owners by the consignees, on

delivery of the cargo at Liverpool, could be treated as freight—whether it was not rather to be regarded as in the nature of salvage, paid indeed to the owners, but paid to them only as agents of the underwriters on the ship. With all respect, I do not think there is any ground for such a doubt. The sum paid to the owners by the consignees was due for freight, and for nothing else; and if payment had been withheld, there can be no doubt but that an action could have been maintained by the owners for freight immediately on delivery of the cargo. None but the owners could have maintained such an action, and they could maintain it only by virtue of their original contract of affreightment. What the underwriters on the freight undertook was, that the voyage should be so performed, as that the owners should be able to deliver the cargo, and so be in a condition to assert their title to freight—and this state of things actually occurred.

It is true that the Court of Session first—and afterwards this House, in the action by the underwriters on the ship against the owners—decided, that the sums paid for freight were paid to the owners, not for their own benefit, but for the use and behoof of the insurers; and it was strongly contended at your Lordships' bar, that the contract into which the appellants, the underwriters on freight, entered with the owners, was, that the voyage should be so performed as to entitle the owners to recover the freight for their own use, and not merely as agents or trustees for others. The decision in the action by the owners against the insurers of the ship, has been, that, under the circumstances, the freight was due, not to the former, but to the latter, and so, it was said, the contract of the underwriters on the freight was not performed. But this reasoning rests on a fallacy. The underwriters on the freight engaged that the ship should not be prevented by perils of the sea from enabling the owners to earn her freight. Nor was she so prevented, for, in spite of those perils, she arrived in port under the conduct of the owners, and obtained payment of her freight. The right of the underwriters to claim that freight against the owners, arose not from perils of the sea, but from the election made by the owners, after the freight had been earned and paid to them, to treat the ship as wholly lost on or before the 11th of August.

Where a ship has received such an injury as entitles the owner to treat it as totally lost, and the owner consequently abandons it to the underwriters, they, if they repair and navigate her, come in as assignees, and so are entitled to all freight afterwards earned. In such a case, the owner has been compelled by perils of the sea to abandon the ship, and so he loses, not only the ship, but all possibility of earning freight.

It was to this state of circumstances that Chief Justice Tindal refers in *Chapman* v. *Benson*, 6 M. & Gr. 792, where he says—"The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing; for, after such abandonment, he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." But there the very learned Chief Justice was referring to what was then treated as a total loss, and abandonment to the underwriters before the freight was earned. The distinction between the cases of *Benson* v. *Chapman*, according to what were supposed in the Court of Common Pleas to be the facts, and the present case, is, that there, before any freight had been earned, there had been a damage so serious as to justify the owner in treating it as a total loss, and abandoning the ship to the underwriters; whereas here the owner remained in actual possession till after the freight had been earned, and earned by reason of the ship having actually performed the voyage in question.

I do not apprehend that there is any doubt as to the soundness of the doctrine laid down by Chief Justice Tindal, though the judgment of the Court of Common Pleas was reversed by the Exchequer Chamber, and that reversal was afterwards sustained by this House. That reversal proceeded on the ground, not that the views of the Chief Justice were erroneous, if the facts had been such as they were supposed to be in the Court below before the facts had been put on the record in the form of a special verdict, viz. that there had been a total loss and abandonment,—but because it was considered, that the facts found in the special verdict did not shew that there had been a total loss and abandonment, so that the principles laid down by the Chief Justice were inapplicable. But then it was argued at your Lordships' bar, that here the circumstances are precisely those to which the Chief Justice referred, and on which he relied, namely, an abandonment to the underwriters on the ship, in consequence of an injury so serious as to have justified such an abandonment. This, it was said, was a total loss, and so the doctrine of the Chief Justice, that there was a total loss of freight as well as of ship, is strictly applicable. There is, however, a manifest and most important difference between the case on which Chief Justice Tindal was reasoning, and the present. The Chief Justice was referring to a case of loss and abandonment during the course of the voyage, and before the freight had been earned. Here, though, according to the verdict, the ship was totally lost, yet there was no abandonment till after she had arrived in port, and till the owners were in a condition to insist on payment of the freight, and until that freight had been paid to them. In such a state of things, I concur in what was said by Mr. Baron Alderson when he delivered in this House the opinion of the Judges in *Benson* v. *Chapman*, 2 H. L. C. 721. His words are—"Nor, indeed, is there any instance to be found in which an action for a total loss of freight has been held to be main-

tainable, where the freight has been actually earned." The Court below appears to me to have fallen into an error by overlooking this distinction. Whatever might be the rights of the owners as between themselves and the insurers of the ship, it could not possibly be competent to them, after the freight had been earned, to make an election which should affect the interests of third parties.

I am not aware, indeed, of any previous case in which, after a ship had actually performed her voyage, the owners have been permitted, even between themselves and the underwriters on the ship, to treat an injury sustained on the voyage, as a total loss, abandoning the ship to the underwriters after her arrival in port; and I observe that the Lord Chancellor, in moving the judgment of this House in *Stewart* v. *The Greenock Marine Insurance Company*—where the question was, who, as between the owners and the underwriters on the ship, were entitled to the freight earned—cautiously abstains from giving any opinion on the point, whether there had been what could justly be treated as a total loss. His Lordship's judgment, indeed, proceeds on the assumption that such was the case; but then he says expressly, "The facts as found by the verdict, must be the ground on which the consideration of the question must proceed;" and again, "The verdict finds, first, that there was a total loss of the Laurel;" and then, proceeding on the ground, that, as between the then parties, namely, the owners and the insurers on the ship, there had been what the verdict had conclusively established to be a total loss, he considers what, as between those parties, were the rights in respect of the freight. That was the sole question then before your Lordships, and the decision then come to does not govern a case where the parties are different, and where it is open to the party sought to be charged, to contend that, as against him, there cannot be said to have been that total loss, the existence of which was the foundation of the former decision.

On the ground, therefore, that here the freight insured was actually earned and received by the owners, and that, but for their act after such earning and receipt, they might have retained it for their own use—so that the contract into which the appellants entered was strictly performed—I have come to the conclusion, that the judgment below was erroneous, and I therefore move your Lordships that it be reversed.

LORD TRURO.—My Lords, I concur in the conclusions to which my noble and learned friend has arrived, that the judgment which was pronounced in the Court below is erroneous, and ought to be reversed. And in stating my reasons for coming to that conclusion, I shall be under the necessity, I fear, of repeating much which the Lord Chancellor has just addressed to your Lordships. The opinion which he has delivered to your Lordships appears to me to have contained all that is essentially material to the case; and, except that the case is one of considerable importance, I should have been well content to have rested entirely upon the reasons which the noble Lord has given. I think they are perfectly sound. I am satisfied that they are consistent with every previous decision, except that which is now the subject of appeal, and that they furnish abundant ground for your Lordships to reverse the judgment according to the prayer of the appellants. But, my Lords, I pray your Lordships' indulgence while I state, or rather to some extent repeat, the reasons which have induced me to form the opinion I am now expressing.

Your Lordships are rightly told, that in this case the assured upon a policy for freight claims to recover the total loss upon that policy, not by reason that the freight has been actually lost, but by reason that the assured, who has received the freight, is not entitled to retain it for his own use. The case of the respondents, as appears upon the record, is, that the freight has been earned, has been received, and the assured, by reason of certain circumstances, has been compelled to allow the underwriters upon the ship the freight so earned and so received, in an account by way of set off against the subscription, the amount of which he claims to be entitled to receive.

It appears, as your Lordships have heard, that this ship sailed from Quebec on the 14th of July. She arrived in the river Mersey, and at the entrance of the Liverpool docks, on the 11th of August. She had been materially damaged on the 27th of July, soon after she sailed from Quebec, by coming in contact with an iceberg, and again sustained considerable damage on the 11th of August, at the entrance into the Liverpool docks. It also appears by the respondents' case, that she was afterwards floated into the basin, and, on the 12th or 13th of August, was floated into the dock, where she was moored, and remained until the next day, when she was put into a graving dock, where she delivered her cargo, and the owner afterwards received freight. Some days after the delivery of the cargo, it appears that the ship was surveyed, and found to be damaged to such an extent as to render her not worth repairing; whereupon the present respondent, the assured, abandoned the ship to the underwriters, and sued them for a total loss, and recovered; but the Court, in determining the amount which the pursuer was entitled to recover, decided that the underwriters were entitled to credit for the amount of the freight which the pursuer had received, against the amount of their subscriptions. And the assured, being thus compelled to allow, in an account with the underwriters in the settlement of the loss, the amount of freight, instituted the present suit against the underwriters upon the

freight, insisting, that because he was so compelled to allow the freight actually received, to the underwriters of the ship, there had been, within the meaning of the policy, a total loss of freight. And the question now before your Lordships is, whether, because the underwriters upon the ship were so entitled, which this House has decided they were, to the amount of freight, that, in point of law, constitutes a total loss of freight within the meaning of the policy.

My Lords, I own it appears to me that the assured's right of abandonment and recovery of a total loss against the underwriters upon the ship, has been determined under circumstances somewhat peculiar. The ship, as my noble and learned friend has stated to your Lordships, actually performed the voyage—a circumstance which, as far as I am aware, has never occurred where the owner has been held entitled to abandon the ship, and claim for a total loss, however extensive the damage may have been which was incurred during the voyage. In the cases in which abandonment has hitherto been allowed, the voyage has either been actually lost, or the ship has been placed in circumstances, by the perils insured against, in which no prudent owner, uninsured, would do that which has become necessary to enable the ship to perform the voyage. In some of the cases, ships have been under capture or detention by hostile powers, or stranded, attended with uncertainty whether the ship could ever be got off in a situation able to prosecute the voyage, or so damaged at an intermediate port, as to be either irreparable altogether by reason of her own condition, or for want of the necessary means of repair, or requiring an outlay to enable her to pursue her voyage, such as no prudent owner uninsured would incur. In all these cases, at the time of the abandonment, either the voyage was lost, or in imminent peril of being so. But, as before stated, in this case, though the damage was incurred during the voyage —that is, before she had delivered her cargo in the Liverpool dock—yet that damage did not prevent her from completing her voyage by delivering her cargo and earning the freight. That the underwriters of the ship were liable to indemnify the owner for the pecuniary damage which he would sustain by the outlay necessary to repair the injuries which the ship had received, is quite clear; but the decision by which the right to abandon and recover a total loss was established, appears to me to be somewhat in advance of the previous decisions.

The case, the nearest in point of circumstances, and which was referred to by my Lord Cottenham in moving the judgment of the House, is that of *Samuel* v. *Royal Exchange Assurance Company*, *supra*. That ship was insured to the port of London, and was ultimately destined to deliver her cargo in the King's Dock at Deptford. She arrived at the dock gates, but, before entering the dock, was there totally lost, and, of course thereby prevented from completing her voyage, which she never did complete. The plaintiff was held entitled to recover for a total loss, but only upon the ground that she was lost during her voyage,—that is, before she was moored at the place of her ultimate destination, and her voyage thereby completed. But, as before stated, in the present case, though the damage was during the voyage, the ship was not thereby prevented from completing her voyage. It does not appear to me that, provided the loss occurs during the voyage, it is at all material whether that loss happens a short time after the inception of the risk, or a short time before the voyage is completed. From the commencement to the termination of the risk, the effect of the loss is the same, inasmuch as the loss during any portion of that interval, is equally a loss at whatever time it may occur during the voyage.

In the action against the underwriters on this ship, the jury found facts, which must be coupled with facts admitted upon the record. This, I think, has been much overlooked—it being a clear principle of law, that that which the parties admit upon the face of the record, the jury even cannot gainsay. It is not within the issue left to them. Their verdict, therefore, must always be construed with reference to the facts admitted upon the face of the record. The verdict in this case, taking it in its terms, coupled with the facts admitted upon the record, shews that the ship, although so damaged as not to be worth repairing, had yet performed her voyage. The verdict is certainly not quite so distinct upon some of the material facts, as we are accustomed to see verdicts in the English Courts. But the terms of that verdict, being taken in connection with the facts admitted upon the record to which that verdict would be appended, and upon which the interlocutor or judgment was pronounced—the facts distinctly appear, that the damage sustained by the ship, either by coming in contact with the iceberg, or at the pier-head, did not prevent her afterwards being floated into the basin, and subsequently into the dock where she was moored, and from which, on the following day, she was taken into the graving dock, and there discharged her cargo. It further appears, that some days after this the ship was surveyed. It was at first reported, that the cost of repairing her would be £3000; it was afterwards estimated that it would exceed £4000,—the ship having been valued in the policy at £7500. Further, it appears that the freight, as before stated, actually earned and paid to the owners, amounted to £1402 2*s*. 2*d*., which is the amount sought to be recovered on the policies on freight. So that the verdict, properly construed with reference to the other facts admitted upon the record, and by which the parties are conclusively bound, shews that the damage sustained by the ship did not prevent her from completing her voyage, and earning her freight.

These are facts necessary to be attended to in proceeding with the inquiry as to the rights of the parties in the present case. In order to determine whether those facts constitute a loss of

freight within the meaning of the policy on freight, it is necessary to consider what are the obligations which the underwriter takes upon himself by that policy. My noble and learned friend, I think, has stated them most correctly. I conceive that the underwriter upon the freight binds himself to indemnify the assured against any loss of freight occasioned by the ship being prevented from performing the voyage insured, by any of the perils mentioned in the policy, and thereby the freight insured being earned. He does not engage that the assured should be able to procure a loading, or that he should be entitled to retain the freight, as between him and any other persons, after it shall have been earned. I understand his liability to indemnify against the loss of freight, is limited to a loss occasioned by the ship's being prevented from performing the voyage insured, by any of the perils within the policy. With a loss of freight sustained from any other cause, or by any other means, than the incapacity of the ship to perform the voyage and earn the freight, I do not understand the underwriter is at all concerned.

In *Benson* v. *Chapman*, 2 H. L. C. 696, which was a case relied upon by the pursuer, Mr. Baron Alderson, in delivering the opinion of the Judges to your Lordships' House, expressly stated, that there was no case in which it had been held there was a loss of freight, where the voyage had been performed, and the freight had been earned; and that the underwriters engaged only that freight should be earned, and it had been earned. I own, my Lords, it struck me with some surprise that that case should be stated, and that principle distinctly enunciated; but yet no answer, that I can see, is to be found in any part of the argument below, and none has been stated at your Lordships' bar, which can in any respect impeach the soundness of that general principle which the learned Baron pronounced in delivering the opinion of the Judges. No case has been cited, and I believe none can be cited, inconsistent with that doctrine. It is correctly stated, that the decision of the Court of Common Pleas was upon the distinct ground that the voyage had been lost,—that is to say, that the ship had been reduced to such a state of damage by the perils insured against, as that she could not be put into a condition to perform the voyage without an outlay, such as no uninsured prudent owner would incur. The owner, in order to save the underwriters, would not be bound to do that greatly to his injury, which he would do if uninsured; and therefore, in that respect, he was entitled to abandon the ship. And when he abandoned the ship, he of course would be entitled to nothing which the future owner of the ship might earn by means of the ship, which, though once belonging to the original owner, had ceased to be so by the effect of the abandonment, justified by the consequences of those perils against which he had insured. That Judgment, it is true, was reversed in the Exchequer Chamber, the reversal being sustained by this House; but nobody, that I am aware of, uttered a word tending to impugn the correctness of the law which had been laid down in the Court of Common Pleas. It was argued in the Court of Common Pleas upon a special case—that is, a statement of facts agreed to by the parties. That special case stated, that certain circumstances had occurred to the ship, the parties leaving it to the Court to say whether those circumstances amount to a total loss or not. But when they bring a writ of error to review the judgment, it is then necessary that that special case, with the statement of the circumstances, should be altered so as to state the conclusion of fact to which those circumstances lead. The Court, in hearing the argument upon the special case, in the first instance draw the conclusion of fact as if they were a jury; but when it goes to a Court of Error, there is no licence to the Court of Error to draw a conclusion of fact; they can only deal with the facts actually recorded. In the Court of Common Pleas, the Court inferred that there had been a total loss. When the facts with the conclusions came to be drawn out into the form of a special verdict, the fact was stated, that no prudent owner would have incurred the expense which was necessary to repair the ship; but the record did not state, that the ship being at Pernambuco, and the owner in England, no prudent owner would have incurred the expense, if he had been at Pernambuco—in other words, the captain upon the spot having been induced to repair, exercising his best judgment in regard to the facts—the Case, in stating that no prudent owner here would have incurred the expense, did not state, that a prudent owner upon the spot, aware of the facts which the captain was aware of, would not have repaired. The Court of Error said—therefore, we cannot say that a prudent owner at Pernambuco would not have repaired, merely because you tell us a prudent owner in England would not have repaired. The captain stood in the place of the owner, and therefore you must give us that conclusion of fact, placing the owner in the situation in which the captain was placed; and unless the verdict state that no prudent owner at Pernambuco would have incurred the expense, we cannot say that the owner was authorized to abandon the ship, because it is only on the footing, that no prudent owner, in the circumstances in which he is supposed to be placed, would incur the expense, that he is entitled to abandon her. The judgment, therefore, was reversed, because the Court of Error could not draw that conclusion of fact upon the special verdict, which the Court of Common Pleas had drawn upon the special case, the law being perfectly unimpugned, either in the Court of Exchequer Chamber, or at the bar of this House. The case, therefore, was ultimately determined upon the ground, that there did not appear to have been such a constructive total loss upon the ship as to warrant the owner in abandoning her.

Now, my Lords, if the true construction of the policy, or, in other words, the obligation of the underwriters upon the freight, be what the noble Lord has stated, and what I have in other terms repeated, the facts of this case appear to be conclusive against the claim of the respondent. As I before stated, it appears by the record, that the voyage was performed notwithstanding the injuries which the ship received, and the freight was not only earned, but also received. The decision against the underwriters below, however, was founded upon a different view of the effect of the policy, and it becomes necessary to examine the correctness of the construction so adopted, and the application of that construction to the facts of this case.

The expression, "the loss of freight," has two meanings, and the distinction between them, and its effects, it is material to bear in mind. Freight may be lost in the sense, that, by reason of the perils insured against, the ship has been prevented earning freight—that is the sense in which it has been lost in this case. Or you may use the expression, loss of freight, in the sense, that it may be lost to the owner, after it has been earned, by some circumstances unconnected with the contract between the assured and the underwriters on the freight. For a loss of freight in the first sense, that is, the ship being prevented earning the freight by the non-performance of the voyage insured, the underwriter on the freight is liable. But for any loss of freight sustained by the owner after it has been earned, I conceive the underwriter is not liable. I can extract no obligation whatever from the policy, which should subject him to such a loss. He has performed his warranty by the freight being earned, and he has no concern whatever with who may be entitled to the freight when so earned.

In this case, at the time the owner received the freight, he so received it on his own account, for his own benefit, and, as the facts then stood, was entitled to retain it against all the world. The contract between the owner and the underwriters on freight had been entirely performed, and the relation between them determined, and the assured was at that time entitled, not only to retain the freight, but to recover a full compensation for any pecuniary loss he might have incurred by reason of the damage which his ship had sustained. But having valued his ship at £7500, and the cost of the necessary repairs of the damage being £4000 only, he preferred to claim a total loss and to abandon the ship, and thereby obtain £7500, rather than to claim a partial loss, by which he would be entitled to recover only his actual damage of £4000, retaining at the same time his ship; and the consequence of his electing to take that course, was to make the freight, which he had received for his own benefit, an item in account between him and the underwriters of the ship, and upon that he founds a claim to a total loss of freight against the now appellant. The act of abandonment, if it did not operate as an assignment of the ship, at least enured as a binding agreement to assign it, and thereby invested the underwriter on the ship with all the rights which belonged to him as owner, among which rights, it is said, was that of having the benefit of the earnings of the ship during the voyage—the assignment by abandonment, as I call it, being supposed to entitle the underwriter to all the profits which had arisen throughout the voyage. If the ship had been uninsured, this question could never have arisen. But it is said, that although, if the owner had stood his own insurer, there would have been no loss, yet, by reason of his having thought fit to make a contract of insurance with others, and afterwards to constitute those insurers, owners of the ship in his place, the underwriters on the freight have been guilty of a breach of their contract by not indemnifying him for what he calls loss of freight arising out of his having invested the underwriter of the ship with his title to the freight actually earned. I think such a claim is not founded in law or in justice. If uninsured, there could have been no pretence of loss, but, if insured, the amount of claim against the underwriter of the freight is, according to the argument of the respondent, to vary according to the proportion in which the assured happens to have insured the ship.

Besides, what has been the effect of the judgment in the Court below? In substance, to make the underwriter of the freight an insurer of the ship. Hitherto his liability has been to answer for the loss of freight, provided the owner is prevented by the perils insured against from earning freight. But, according to the decision, freight may be earned, the underwriter upon the freight may have performed his duty, the ship may afterwards be lost in consequence of perils previously incurred, and, by reason of such loss of the ship, the underwriters upon the freight become liable. What does he receive premium for? That the owner may be able to earn the freight, notwithstanding the perils of the sea and the perils of navigation. He knows that the ship may receive such damage as not to be able to perform the voyage, but the goods may be carried forward and the freight earned. He knows that the insurance upon the ship may be made to last longer than the insurance upon the freight. Look at the form of the policy in question, which is, that the insurance is to last until ten days after the report of the custom house on the ship. So that, the ship having arrived and delivered her cargo, the freight earned and paid—if the ship sinks within the time of the insurance of the ship—that sinking resulting from perils which had been incurred, before the underwriter is to be answerable for the loss of freight, because the ship had been lost after the freight had been earned. My Lords, his premium is not measured by any such degree of risk—it is not within the terms of his contract—it is not within the spirit of his contract—and, I think, not within the terms of the policy.

Some question is raised in this case in regard to the necessity of an abandonment, and it is said, that if an abandonment was unnecessarily made, it ought not to affect the rights of the parties. My Lords, I own I am clearly of opinion that abandonment was, at all events, essential in this case to entitle the assured to recover for a total loss. Whether, where a ship continues to exist in specie, the assured can ever recover for a total loss without abandonment, it is not necessary to consider, because I think that in this case no doubt can be reasonably entertained but that it was competent to the assured, as my noble and learned friend has stated to your Lordships, to retain his damaged ship, and to recover the £4000, enabling him to repair, or any other sum of money which he might expend in order to repair the damage which the ship had sustained. The underwriters, if the assured had thought fit to claim his indemnity as for a partial loss, could have had no pretence to claim any interest in the damaged ship. The option rested entirely with the assured, either to abandon the ship and claim a total loss, or to repair his ship and claim the partial loss. It does not always become necessary, but the course is, where it does become necessary, for the assured, upon the abandonment, to assign the ship to the underwriters, as was done in the class of cases which your Lordships will recollect, arising out of the Russian embargo. In that case, the ships being under embargo, and it being uncertain whether they would be deemed to be captured or released, in order to put the underwriters in the perfect situation of owners, you find by the reported cases that assignments were generally taken when the abandonment was made, or soon after. Therefore the option rested with the assured, either to abandon and to claim a total loss, or to repair his ship and claim a partial loss; and unless he had declared his election within a reasonable time after he had become acquainted with the state of his ship, he would have waived his right of election, and his claim would have been confined to a partial loss. The title of the underwriter on the ship to the freight, was not founded upon the policy, or upon the extent of the damage which the ship had sustained, but upon the election of the assured to abandon, that is, to assign his ship to such underwriter. And a doctrine which leads to this, that an arrangement between the assured and the underwriter upon the ship will render an underwriter upon the freight liable to pay a total loss upon the freight in relief of the underwriter upon the ship, and that in a case where the freight has been actually earned and received, I say such a doctrine as that should be watched with great jealousy. Wherever a ship is so circumstanced, as that the assured has an election to treat it either as a total loss or a partial loss, I conceive abandonment is a condition to be performed either prior to, or contemporaneously with, his claim of total loss. And I can see no just ground for doubting that this was at least a case of election, assuming, as I have before stated, that such an election exists, after the voyage has been actually performed. The cases in the books in which it is said, that where it is in the option of the assured to claim as for a total or a partial loss, abandonment is necessary to be made within a reasonable time, in order to support an election to treat the loss as a total loss, are too numerous and too well known to make it necessary for me to fatigue your Lordships by referring to them by name.

It appears to me, therefore, upon principle, that the judgment which has been pronounced in this case is erroneous, and decidedly at variance with the legal result of the whole record, which shews an ordinary insurance for freight, the voyage performed, and the earning of freight not only not prevented by the perils insured against, but actually accomplished, and the freight actually received by the owner at a time when he might have retained it for his own benefit, except for his subsequent voluntary election to constitute the underwriters on the ship, as between him and them, the owners of the ship, and thereby transfer his previously vested right to the freight so earned to them—circumstances negativing any breach of the contract on the part of the underwriters upon the freight, that the vessel should not be prevented from performing the voyage insured, and thereby entitling the owner to the freight in consequence of any of the perils mentioned in the policy.

In *Thompson* v. *Rowcroft*, *supra*, it is said, that underwriters on the ship stand in the place of the owner after abandonment; and in *Case* v. *Davidson*, 5 M. & S. 79, Lord Tenterden says—"Abandonment is equivalent to a sale." There are numerous authorities to the same effect. I think there is no authority in support of the plaintiff's claim, but there is authority very strong in opposition to it. In illustration of the effect of a policy on the freight, the case of *Everth* v. *Smith*, *supra*, may be referred to, by which it was decided, that such a policy was not an insurance on specific freight, but on the freight generally, and that, if any freight was brought home, no loss would happen for which the underwriter was liable. *Macarthy* v. *Abel*, *supra*, seems to me directly in point, and was referred to and adopted in *Everth* v. *Smith*. There were insurances in that case on both ship and freight. The ship had been detained by the Russian government at Riga, and the cargo taken out, and, while in that state under detention, there was an abandonment of ship and freight to the respective underwriters, all of whom paid the owner for a total loss. The ship, however, was afterwards released, delivered her cargo, performed the voyage, and the underwriters on the ship received the freight; whereupon the assured brought an action on the policy on the freight for a total loss. Lord Ellenborough, in giving judgment in that case, said—"The case resolves itself into a single point, viz. whether

the freight had been in this case lost or not? If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned, and received by or on behalf of the plaintiffs, the assured, and if so, no loss can be properly demandable against the underwriters on the freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be considered as having been in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves, with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that *quacunque via data* —that is, whether there has been no loss at all of freight, or, being such, it has been a loss only occasioned by the act of the plaintiffs themselves—they are not entitled to recover, and therefore a nonsuit must be entered." My Lords, that appears to me to be a distinct authority upon the present case; and although the attention of the learned counsel at the bar was called to the case, undoubtedly it has received no answer. Nothing has been said to impugn the doctrine there laid down, nor any distinction pointed out with reference to its just application to the present case.

It is also to be observed, that there is no case shewing underwriters entitled to the freight by reason of there having been a total loss, except where there has been an abandonment, which I own I should have expected it would have been thought necessary to produce evidence of in sustaining the present argument. I repeat, that there is no case in which the underwriters of a ship have ever been held entitled to the freight, except where there has been an abandonment.

The case has been argued with great learning and ability by the judicial authorities in Scotland, and ample justice has been done to the case by very able and learned arguments at the bar —though there are some principles which have been stated, which were new to me, and which I think, upon examination, would be found to be erroneous. I feel bound to state, with every respect for a contrary opinion, that it is clear to my mind that there has been no loss of freight in this case within the meaning of the policy. I therefore concur in the opinion which has been pronounced by the noble and learned Lord, and I think your Lordships are bound in point of law to allow this appeal, and to reverse the decision of the Court below.

Interlocutors reversed.

Second Division.—W. H. Cotterill, *Appellants' Solicitor.*—James Turner, *Respondents' Solicitor.*

MARCH 14, 1853.

DANIEL COLLINS and PETER FEELY, *Appellants*, *v.* ANDREW YOUNG, *Respondent.*

Judicial Factor, Recal of—Death of partner—Joint Adventure—*Three parties entered into a joint adventure to execute railway contracts. One of the three died after the completion of certain contracts, and while one contract was still pending. A large balance was due by the railway company to the joint adventurers, and formed the subject of a submission between them and the company. The executor of the deceased partner applied for the appointment of a judicial factor to manage the matters of the joint adventure, with the view to a speedy settlement and winding up. No allegation of fraud or insolvency was made against the surviving partners.*

HELD (reversing judgment), *that no delay had taken place in winding up the matter of the joint adventure, and that the appointment of a judicial factor was, in the circumstances, unnecessary.*[1]

The *appellants* appealed against the judgment, maintaining in their *printed case* that it ought to be reversed, because—1. The respondent had not produced evidence that he was vested with a proper title to the interest of the deceased Alexander Young in the joint adventure. 2. It was incompetent, on the application of the representative of a deceased partner, to appoint a judicial factor for the purpose of ousting the surviving partners from the right of administration of the company assets. 3. Even if it were competent to appoint a judicial factor to manage the partnership concerns, there were no grounds in fact sufficient to establish the expediency of such a proceeding.

The *respondent* in his *printed case* supported the judgment on the following grounds:—1. Because the application was competent in itself, and in the form in which it was presented.

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[1] See previous reports 14 D. 543; 24 Sc. Jur. 253. S. C. 1 Macq. Ap. 385: 25 Sc. Jur. 329.