ordinary circumstances the pauper until puberty would have followed the birth settlement of her father, and the question comes to be, whether, if when she is after the age of puberty still an idiot, the birth settlement of her father continues to govern? All the authorities tend to show that the effects, or rather the disabilities, of pupillarity in the case of an idiot extend to beyond the age of twelve or fourteen, as the case may be. In *Hopkins* v. *Ironside* the Judges use the expression "perpetual pupillarity," and I feel here bound to hold similarly that the pauper is still in pupillarity.

LORD GIFFORD—I concur, and it appears to me that the ground upon which the Lord Ordinary has based his judgment is entirely satisfactory.

In addition to that, however, I go upon this further, ground that the pauper must be held actually to have become chargeable during her father's lifetime, because it is admitted that the father became a pauper before his death, and died when in receipt of parochial relief. This, indeed, is just the case of a father with a helpless imbecile daughter getting parochial relief, and accordingly the parish of his birth cannot rid themselves of liability. I am therefore for adhering, on this as well as the ground taken by the Lord Ordinary.

The Court adhered.

Counsel for Pursuer—Fraser—Burnet. Agent—J. Knox Crawford, S.S.C.

Counsel for Defender—Balfour—Young. Agents—W. & J. Burness, W.S.

Friday, November 24.

FIRST DIVISION.

BURRELL *v.* SIMPSON & CO. AND OTHERS.

Ship—Marine Insurance—Total Loss—Underwriters.

In the case of the total loss of an insured ship, the rights which as incidents pass to the underwriters are retrospective, and take effect from the time when the casualty occurred.

Merchant Shipping Act 1854, *sec.* 514—*Merchant Shipping Act Amendment Act* 1862, *sec.* 54—*Collision—Reparation.*

Two steam-ships belonging to the same owner came into collision. One was sunk, the fault being solely attributable to the other. There was no loss of life; and in a petition brought under the 514th section of the Merchant Shipping Act 1854, and 54th section of the Merchant Shipping Act Amendment Act 1862, for a limitation of the liability of the petitioner *qua* owner of the offending vessel, and for a ranking of claimants upon the ascertained fund—*held* (1) that the claims of the owners of the cargo, of the crew, and of the underwriters of the lost vessel, were good as against the petitioner; and (2) that, *inter se*, the owners of cargo, the crew, and the underwriters, fell to be ranked *pari passu* upon the fund.

Merchant Shipping Act Amendment Act 1862, *sec.* 54—*Freight—Interest—Expenses.*

The 54th section of the Merchant Shipping Act Amendment Act 1862 provides for a limitation of the liability of the offending vessel, *inter alia*, where "loss or damage is . . . caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat." —*Held* (1) that claims for damages for loss of the freight of the sunk ship, and for a sum of expenses incurred by her crew after the collision, were not under the statute good claims upon the fund; and (2) that a claim for freight would pass as an incident of the ship to the underwriters.

Held that the owner of a ship—though his liability to damages in respect of loss inflicted by collision is restricted in amount by the Merchant Shipping Act Amendment Act 1862, sec. 54—is liable to pay interest on that amount from the date of the collision; and (2) that when he applies to the Court to have the damages assessed and claimants ranked in terms of the Act, he must pay the expenses.

Merchant Shipping Act Amendment Act 1862, *sec.* 54—*Construction—Steam-Ship—Gross Tonnage.*

In estimating the amount of liability for damages by a steam-ship, under the 54th section of the Merchant Shipping Act Amendment Act 1862, it is provided that the tonnage upon which the amount is to be calculated shall be "the gross tonnage, without deduction on account of engine-room."—*Held*, upon a construction of the clause by reference to sections 21 and 23 of the Merchant Shipping Act 1854, that "'gross tonnage' implies a deduction of the space appropriated to the berthing of the crew."

This was a petition at the instance of William Burrell, shipowner in Glasgow, sole registered owner of the steam-ships "Fitzmaurice" and "Dunluce Castle," of Glasgow. On 4th February 1876 the two vessels, while on their passage between London and Leith—the "Fitzmaurice" being bound to London, and the "Dunluce Castle" to Leith—came into collision near Lowestoft, and the "Dunluce Castle" was sunk. Those in charge of the "Fitzmaurice" were admittedly to blame. Both ships had cargoes, but neither had passengers, and no lives were lost. The owner was therefore, under the provisions of section 54 of the Act 25 and 26 Vict. cap. 63 (the Merchant Shipping Act Amendment Act 1862), not answerable "in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage." This petition was accordingly presented by Burrell, under section 1 of the above mentioned Act, and section 514 of the Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104), praying the Court, *inter alia*, to limit the petitioner's liability as owner of the "Fitzmaurice" to a sum of £8 per ton upon 448·80 tons, and to rank claimants according to their respective rights upon that fund.

Claims were lodged (1) by Simpson & Co., engineers, London, as owners of cargo on board the "Dunluce Castle," and a number of others in a similar position; (2) by the seamen of the "Dunluce Castle;" (3) by the underwriters of the "Dunluce Castle," to whom Burrell had granted an assignation of all right and interest he had in

her; and (4) by Burrell himself, for loss of the freight which he would have earned had the voyage of the "Dunluce Castle" been completed.

In the arguments, the nature of which sufficiently appears from the opinions of the Court, the following authorities were cited—(1) Upon the title of the claimants *inter se*—*North of England Insurance Co.* v. *Armstrong*, January 21, 1870, 5 L. R., Q. B. 244, 39 L. J., Q. B. 81; *Stewart* v. *Greenock Marine Insurance Co.*, January 13, 1846, 8 D. 323, 2 Clark and F. 159; *Turner* v. *Greenock Marine Insurance Co.*, February 12, 1851, 13 D. 652 (H. of L.) 1 Macq. 334; *Yates* v. *White*, 1838, 4 Bingham's N. C. 272, 5 Scott's C. B. Reps. 640; *Caledonian Ry. Co.* v. *Watt*, July 9, 1875, 2 R. 917. (2) Upon the question whether interest was due upon the fund, and upon the question of expenses—*Northumbria*, L. R., 3 A. and E. 6; *Smith* v. *Kirby*, December 15, 1875, L. R., 1 Q. B. Div. 131; *African S.S. Co.* v. *Swanzey*, 1856, 25 L. J., Chanc. 871; *Amalia*, 32 L. J., Prob. and Adm. 191; *Miller* v. *Powell*, July 20, 1875, 2 R. 976; *ex parte Rayne*, 1 Ad. and Ell., Q. B. Reps. 982.

The tonnage of the vessel, upon which the petitioner maintained the amount of the fund fell to be calculated, was 448·80. Originally he had stated it at 473·65, but he claimed a deduction for the space occupied for berthage of the crew, as explained in the Lord President's opinion.

At advising—

Lord President—The facts out of which these questions of which we are now to dispose have arisen are these—It appears that on the 4th of February 1876, while the "Dunluce Castle" was on her passage from London to Leith, she was run down by the steam-ship "Fitzmaurice;" the vessels came into collision near Lowestoft, and the result was that the "Dunluce Castle" was sunk, and became a total loss. The fault of the collision is admitted to have been entirely on the side of the "Fitzmaurice." And accordingly this petition is presented by the owner of the "Fitzmaurice," under the 54th section of the Merchant Shipping Act of 1862, for limitation of his liability in respect of the damage done by the collision. The statute provides that in such a case as the present, where there was no loss of life, the liability of the owners of the offending ship shall be limited to £8 a ton upon the tonnage of the vessel.

The claimants who are first in the field are the owners of the cargo of the sunk ship "Dunluce Castle;" and they claim not only to rank along with other claimants, but they claim an exclusive preference over the fund, which, if it be sustained, will have the effect of repairing their damage to the full amount and leave a balance for the other claimants. There is another small claim on behalf of the seamen of the "Dunluce Castle," which I think it was hardly disputed must rank *pari passu* with that of the owners of the cargo, and even giving effect to both these claims there would still be a balance of somewhere about £800.

The next claim to be considered is for the underwriters upon the ship "Dunluce Castle;" and they claim, in the first place to rank *pari passu* with the other claimants upon the fund, and alternatively, in the event of the owners of the cargo and the seamen being preferred to them, they then claim the balance.

The questions which have thus been raised would not be very difficult of solution, if it were not for one fact, viz., that the owner of the sunk ship is also the owner of the offending ship; that is to say, the petitioner here, Mr Burrell, is the sole owner of both the offending vessel and of the sunk vessel; and that certainly gives rise to some considerations of an unusual kind and of very considerable delicacy. I do not think it can be disputed that the owners of the cargo have a good claim, and also the seamen, and I do not think it can be disputed either that under ordinary circumstances the underwriters in the sunk ship would have a good claim. But it is said that in respect of their being the assignees of Mr Burrell in the property of the ship, or what remains of the ship "Dunluce Castle," they are not entitled to compete with parties who derive no right through him, but claim adversely to him, and so that the owners of cargo must prevail against them. Mr Burrell says that in a question between him and the underwriters upon the ship "Dunluce Castle," the latter are not entitled to claim, and could not maintain an action against him for the wrong done to the "Dunluce Castle" by the "Fitzmaurice," because of the identity of ownership of the two vessels.

Now, in order to determine these questions it is necessary to consider very particularly what is the effect of a total loss, either actual or constructive, as in a question between the owner and the underwriters of the lost vessel. There can be no doubt that whether the loss be actual or constructive, if it be a total loss, the property of the sunk vessel passes to the underwriters. And it is also quite settled that all the incidents of that property pass with it. But it is necessary to go a little deeper than that general statement of principle in order to see what is the precise relation of the underwriters and the owner after the property of the vessel has so passed from the one to the other. It is quite clear that in any transference either of an heritable subject or of a corporeal moveable by voluntary conveyance nothing passes as an incident of the subject of the nature of a claim of damages. The disponee of a heritable subject, or the assignee of a corporeal moveable, takes it just as it stands at the time of the conveyance, with, of course, all the incidental rights belonging to it as a piece of property; but it is quite clear that in such a case a claim of damage for injury done to that property before transference takes place could never pass along with the conveyance of the subject. Now, it is quite settled that in that kind of vendition which takes place by the operation of law,—when the underwriter pays the contents of his policy upon a sunk ship,—a claim of damages against a vessel which has caused the loss of the ship by collision does pass along with the property of what remains of the vessel; and therefore it is quite obvious from that consideration alone, without going any farther, that the transference which is operated by force of law when the underwriter pays under his policy upon the lost ship is something quite different from an ordinary voluntary conveyance of a corporeal moveable.

It has been questioned whether in strictness it can be held that the property of the ship passes at all; and the difficulty has been suggested that the property of a British ship cannot pass from one owner to another except in the form provided by the Registry Act; and that, therefore, what is

meant when the law says that the property of a ship passes from the owner to the underwriters is no more than this, that from that time the owner becomes trustee for the underwriters, the formal title of property remaining in him, and the beneficial interest alone passing to the underwriters. That was a suggestion made by Lord Truro in one of the cases of the *Greenock Marine Insurance Company*, arising out of the loss of the ship "Laurel"—(*Turner* v. *Marine Insurance Company*, 13 D. 652, H. of L., 1 Macq. 334). It was no part of his Lordship's judgment in disposing of that case on appeal, and can only be taken as *obiter dictum*, and I humbly think that his Lordship proceeded upon a mistake in making the suggestion. It is quite true that the property of a registered British ship cannot pass except in the form provided by the statute. But the thing which passes in the case supposed is not the property of a British ship; it is the property of a wreck, which is no longer a ship—which may no doubt, notwithstanding its being totally lost within the view of the law, be raised from the bottom of the sea and repaired and become a ship again. But if it be so, it will no longer be the same ship, and it will no longer be entitled to the registry of the old ship, but will require a new register of its own. And therefore I think it plainly a mistake to suppose that any difficulty arises out of the Registry Act, and that there can be none in holding, in the literal sense of the term, what is laid down by all the authorities, that when a vessel becomes totally lost the underwriters upon her, by paying the contents of their policy to the owners, acquire the property of what remains of the ship; that is to say, they acquire the property of the wreck, and they acquire with that all the rights which were incident to the ship. They also subject themselves to all the liabilities attaching to the ship and its owners. For example, they will be liable for the reward of a salvor who had performed services in the way of saving some portion of the ship, and they might be liable also, in all probability, for debts which were constituted a lien over the ship.

But the one thing to be observed, and which is of the greatest importance in the present case, is that the rights which the underwriters acquire, and the liabilities to which they are subjected, are the proper rights and liabilities of the sunk ship, and of the former owner of that ship only as owner. They do not represent the owner in any proper sense. They represent him in one sense, in so far as they have in themselves the ownership of the ship and all the rights and liabilities thence resulting; but they do not by any means represent him in the same sense in which an ordinary assignee represents his cedent. All that they take upon them, and all that they acquire under this legal transference to them, are the rights of the ship and liabilities of the ship. I apprehend that the true doctrine, as contrasted with what I have represented as the view of Lord Truro, has been extremely well stated in the case of the *North of England Iron S. S. Insce. Ass.* v. *Armstrong*, 39 L. J., Q. B. 81, by the present Lord Chief-Justice of England, and I venture to quote his words as being very weighty authority, and at the same time, I think, clearly explaining the view which I am now endeavouring to submit to your Lordships. He says—"It is one of the rights of underwriters in cases of total loss to possess themselves of whatever remains of the vessel in the shape of salvage; and that all other rights which accrue to the shipowner in respect of the vessel pass to them at the moment when they are called upon to satisfy the amount insured. It is admitted that if the vessel had been recovered from the bottom of the sea it would pass to the underwriters, and that if its real value were greater than that stated in the policy they would still be entitled to it." It is only necessary to add a single word of explanation to this statement of law, because it is quite true that the right passes to the underwriters at the time when they satisfy their obligation under the policy. But then the passing of the right has a retrospective effect; it takes effect from the time when the casualty occurred which is the cause of the total loss, whether actual or constructive.

Now, keeping these principles in view, the first question which I venture to put is, Whether in the circumstances that have here occurred the underwriters upon the "Dunluce Castle" have a good direct claim for damages against the owner of the "Fitzmaurice?" Under ordinary circumstances there cannot be the smallest doubt that they would. That is quite settled; and the only peculiarity is that the owner of the "Fitzmaurice" was owner of the "Dunluce Castle." Is that a good reason for rejecting the claim as a claim by the underwriters upon the sunk ship against the owner of the offending ship? The right which has passed to the underwriters by the legal transference of the vessel is a right to maintain this claim against all who are liable to satisfy it; and it must be kept in mind that the owner of the offending vessel is not the only person who is liable to satisfy that claim. The persons whose actual and direct fault caused the collision would also be answerable—the persons who were charged with the navigation of the offending ship. The owner is answerable in the strict sense only in a sort of secondary liability. The culpa is the culpa of the persons navigating the ship. The owner is answerable in the claim only because he is responsible for them. Is it to be said that when the property of the sunk vessel has passed to the underwriters with all its incidents—including the right to claim against the offending ship for the damage done by the collision—that the owner of the offending vessel shall escape from this liability because he was also owner of the sunk ship? I confess I am quite unable to see any ground in law for holding that. It seems to me, on the contrary, to be quite clear that the operation of the legal assignment of the ship from the owner to the underwriters is to carry with it all the rights which would have belonged to any owner of that vessel, no matter who he might be; and as soon as by that legal assignment the owner of the offending ship ceased to be owner of the "Dunluce Castle" there was no longer any identity of persons between the party who makes the claim and the party who is liable to satisfy it. That identity is put an end to by the operation of law, and therefore I think that the underwriters in these circumstances would have a perfectly good ground of action against the owner of the "Fitzmaurice" to make good the damage caused by the collision.

That being so, the next question comes to be,

whether as against the fund which we have now to distribute they have or have not as good a claim as the owners of the cargo? The liability of the owner of the offending vessel but for the statute would be a liability to meet both of these claims in full, and apart from the statute that liability could never be satisfied except by a payment in full, unless in the case of bankruptcy of the party who was liable as the owner of the offending vessel; and supposing such a case had occurred—that the owner of the offending vessel became bankrupt before these claims were satisfied—is there any reason to say that in a ranking in bankruptcy the one claim must be postponed to the other? I see none. Now, this case that we have to deal with is what may be called a case of statutory insolvency. The statute interposes for the protection of the owners of the offending vessel, and says, they shall not be liable in all for more than a certain sum per ton of the tonnage of their vessel. In other words, Their liability is limited, and there is thus created an insufficient fund it may be to meet the claims of those who are damaged by the collision. That is nothing more than a case of insolvency created by statute. And therefore it seems to me that the case is just the same here as if the owner of the offending ship had become bankrupt and these parties had been claimants in the sequestrations. And if it be so, I do not see why the one party should be preferable to the other. I have said already that it does not appear to me that the underwriters represent the owner of the offending vessel in any sense. They may represent him as the former owner of the "Dunluce Castle," but they certainly do not represent him as the owner of the "Fitzmaurice;" and I do not know anything that the owners of cargo can say against them, other than—You are identified with the offending party here in some way or other, and therefore you cannot in his right be entitled to claim in competition with us. That is the nature of their argument, but it seems to me to want facts for its foundation. There is no identity between the parties; there is no community of interest; nay, there is no community of title. It is not the act of the owner of the "Dunluce Castle" and of the "Fitzmaurice" that has given to the underwriters the right upon which they are now claiming; it is the act of the law, and they are strangers to the owner of the "Dunluce Castle" and of the "Fitzmaurice" just as much as the owners of the cargo of the "Dunluce Castle" are. The relation between the carrier and the owner of the cargo is quite as intimate as the relation between the owner and the underwriters of the ship; and it is out of the relation of the owner and underwriters upon the ship that the law has created the right upon which the underwriters of the ship are now claiming. I am therefore of opinion upon the main question raised in this case that the underwriters upon the ship have not only a good claim as in a question with the owner of the "Fitzmaurice," but that they have also a perfectly good claim to rank *pari passu* with the owners of the cargo of the "Dunluce Castle." The claimants before us, therefore, in so far as their claims have been stated, I think must be all ranked *pari passu* upon the fund in question.

But there are one or two other points to which it is necessary to advert, which were separately raised here. There is a question as to what is to be taken to be the tonnage of the "Fitzmaurice" in estimating the amount of the fund. In the petition, as it was originally presented, the petitioner stated that the tonnage of the vessel was 473·65. He has since desired to amend that, and to state it as being 448·80. Now, the difference between the two is accounted for by the space occupied for the berthage of the crew, and the question is whether in estimating the tonnage of the "Fitzmaurice" for the purpose of this petition we are to take it as being the former or the latter? The "Fitzmaurice" is a steam vessel, and the provision of the statute with regard to the measurement of steam vessels is different from that which applies to sailing vessels. In the Act 17 and 18 Vict. cap. 104, sec. 21, we have the rule for measuring tonnage of vessels, and in subsection 4 there is a particular rule given for measuring or excluding poops and other enclosed spaces; and in the end of that subsection there is the following proviso:—"(1st) That nothing shall be added for a closed-in space solely appropriated to the berthing of the crew unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of such excess the excess only shall be added; and (2dly) That nothing shall be added in respect of any building erected for the shelter of deck passengers."

Now, it is admitted that the space here proposed to be deducted does not exceed one-twentieth of the tonnage of the ship; and therefore in the ordinary case, measuring this ship for the purpose of registry, the space appropriated to the berthing of the crew would fall to be deducted. Then, in section 23 there is this provision with regard to steam vessels—the provision I have just read is applied to sailing ships, but in section 23 we have the 3d rule with regard to measurement:—"In every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as aforesaid, and the remainder be deemed to be the registered tonnage of such ship; and such deduction shall be estimated as follows:" and then follow the particular rules for the mode of estimating the deduction. The point to be noticed here is, that the space occupied by the propelling power is to be deducted from the gross tonnage of the ship, ascertained as aforesaid. Now, I apprehend that that means the gross tonnage of the ship ascertained under the various provisions and rules of section 21, and one of these rules is to deduct the space occupied by the berthage of the crew. It seems to me, therefore, pretty plain that under this Statute of 1854, in measuring a steam vessel the owners are entitled to have deduction from the gross tonnage, in the first place for the berthage of the crew, and in the second place for the space occupied by the propelling power.

In the next place, the 54th section of the Act of 1862 (25 and 26 Vict. cap. 63), under which this question arises, provides that "the owners of any ship, whether British or foreign, shall not," in certain cases named, "be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, and to an aggregate amount exceeding £15 for each ton of their ships, nor in respect of

loss or damage to ships, goods, merchandise, or other things, to an aggregate amount exceeding £8 for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam-ships the gross tonnage without deduction on account of engine-room." Now, the argument which is maintained by the claimants here is, that this means that the tonnage of a steam-ship is to be taken without any deduction whatever, not only without deduction on account of engine-room, but also without deduction on account of berthage of seamen. It certainly seems a somewhat unreasonable view, there being no apparent ground for making a distinction between sailing-ships and steam-ships as regards the deduction of berthage room for seamen, and it is based only, so far as I can see, upon the use in this clause of the term gross tonnage. It seems to be contended that gross tonnage without deduction on account of engine-room, necessarily means gross tonnage in the sense of tonnage without any deduction at all.

Now, comparing that with the previous statute, it appears to me that that is not a reasonable construction. What is meant here, I apprehend, by gross tonnage without deduction of engine-room, means just the actual tonnage without deduction of engine-room. In other words, the contrast between a sailing-ship in this clause and a steam-ship, is this, that in the case of a sailing-ship the registered tonnage is to be taken,—in the case of a steam-ship it is not to be the registered tonnage, but what is called the gross tonnage without the deduction of engine-room, which if deducted would make it the registered tonnage. In short, it is the want of the deduction of engine-room that makes this gross tonnage instead of being registered tonnage. And therefore I am of opinion that the petitioner is right on this point, and that he is entitled to state the tonnage of his vessel at the lower amount which is now proposed, giving effect to the deduction for the berthage of the crew.

The next question regards the interest upon the fund,—whether the petitioner is liable in interest? He maintains that the statute has so limited his liability that he never can under any circumstances be called upon to pay out of his pocket anything more than £8 a ton. But it rather appears to me that although £8 a ton is the limit of his liability, here must be a term at which that is due and payable. Like all other debts it must be due at some particular time; and if it is not paid, then it must bear interest like any other debt. I do not think the statute has provided him with any protection against that. Accordingly, I think the claim which is made for interest on this fund is well founded, and that interest must run from the time when the liability attached—that is to say, the time when the collision took place and the damage was done. No doubt under ordinary circumstances damage does not bear interest, but then the reason of that is that interest is just one of the items of damage to be taken into account by a jury in an ordinary case of assessing damages. The jury take into consideration everything that affects the position of the pursuer when he comes before them, and estimate to the best of their ability how much he has lost by reason of the fault of the defender down to the time at which they are estimating his claim, and it seems quite reasonable that there should be no interest upon that sum. But in the present case the sum is fixed by Act of Parliament. We are not assessing damages at all. We are distributing a limited fund, and if the statute had said that this fund should not bear interest I could have understood the reason of that enactment; but without the statute saying so I cannot imagine that that which by the operation of the statute has become a debt, or rather a kind of composition upon a debt, should not bear interest from the time that it was actually due and payable; and upon that point therefore my opinion is adverse to the petitioner.

For a similar reason, I am against him also upon the question of costs. I do not know any reason why a party who is liable in damages and who finds it necessary—absolutely indispensable—to come into Court for the purpose of having the damages assessed against himself in terms of an Act of Parliament, should not be liable for the expense of the necessary proceedings to accomplish that object. And therefore, unless it can be shown that there was some misconduct of the litigation under this petition on the part of the claimants, I think the petitioner is fairly liable to pay the expenses of these proceedings. To be sure, if it can be shown that there has been any discussion between the claimants themselves for which the petitioner is not answerable, he could not justly be saddled with that expense. But I am not aware that anything of that kind has occurred here.

Lord Deas—This case has been repeatedly and carefully considered at consultations upon more than one occasion, and I do not think it necessary to say anything more than that I am of the same opinion with your Lordship upon all the points.

Lord Mure—I have come to the same conclusion as your Lordship, both as to the principles on which these matters are regulated, and particularly I concur in the observations which your Lordship has made with reference to the opinion of Lord Chief-Justice Cockburn, which your Lordship has quoted. I feel it unnecessary to add anything to what has fallen from your Lordship. It was conceded in the argument that if the delinquent vessel had belonged to a different owner, the underwriter's claim was good, and that being the case I cannot see how in the case where the statutory sum of £8 per ton stands for distribution between the parties any different rule should be applied from the rule applicable where the owner of the delinquent vessel is the owner also of the sunk vessel.

Counsel for the petitioner then asked to be allowed out of the fund the amount of freight which he had upon the "Dunluce Castle;" and second, certain expenses for the crew.

Lord President—We are in the case which is No. 4 under the 54th section of the Act 1862"—"Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat." Now, in that case the provision is that the owner of the offending ship shall not be liable for more than £8 a ton upon the tonnage of his ship in respect of loss or

damage to ship, goods, merchandise, or other thing—that is to say, ship's goods, merchandise, or other things whatsoever, on board of any other ship or boat. The claim for Mr Burrell that we are now considering is a claim, in the first place, for loss of freight. Now, he never can bring that claim within the operation of the 54th clause of the statute except as "loss or damage," occasioned to the ship. There is nothing about freight. There is no claim against this limited fund except for losses within the meaning of that section which I have read. And therefore, if there is to be a claim for freight, it must be a claim for freight as an incident or part of the ship. But the ship with all its incidents has passed to the underwriters, and there cannot be the smallest doubt, after the decision in the case of the *Greenock Marine Insurance Company*, that if there had been freight earned notwithstanding of the total loss, it would have belonged to the underwriters on the ship. It would be a very strange thing if another person should be entitled to come forward and say—I claim damages in respect of its not having been earned, when it would not have belonged to me if it had been earned. That seems to me to be a sufficient answer to the claim in respect of the freight.

With regard to the amount which Mr Burrell has expended in maintaining the crew of the "Dunluce Castle" on shore after the occurrence of the shipwreck, there can be no doubt in the world that he was bound to do that. He was bound to do that in two capacities properly—first of all as owner of the "Dunluce Castle;" but if he had made that expenditure as owner of the "Dunluce Castle" he would have had a very good claim against the offending ship for repayment; but he was also clearly bound to do so as the owner of the offending ship, because these people had been wrecked and thrown upon the world through his fault. But there is no room for saying that that is a claim which the crew of the "Dunluce Castle" could have made under the 54th section of the statute. Their board on shore, their loss of employment, is not a thing that was on board of the sunk ship; and unless it be something that was on board of the sunk ship it cannot form the subject of a claim here.

Lord Deas—I think this matter might be a little clearer, but I do not differ.

Lord Mure—I have arrived at the same result as your Lordship. The words of Lord Moncreiff in the case of *Stewart* v. *The Greenock Marine Insurance Company*, Jan. 13, 1846, 8 D. 336, seem to settle the question—"I am of opinion that the vessel stands transferred to the underwriters, with all her defects, but also with all her advantages, as at the moment when the last occurrence took place before she came from the voyage into the dock at Liverpool, and therefore that the freight, however it might in fact be received by the owners, belongs of right to the underwriters."

The following interlocutor was pronounced:—

"Find that the petitioner is liable in respect of the collision mentioned in the petition for the sum of £3590, 8s. sterling, with interest thereon at the rate of four per centum per annum from the 4th February 1876 till the date of consignation, and limit the liability of the petitioner as owner of the steam-ship "Fitzmaurice" in respect of said collision accordingly: Repel the claim made by the petitioner, and rank and prefer the whole other claimants *pari passu* on said fund, and appoint a state or scheme of division of said fund to be lodged by the petitioner, shewing the amount due to each claimant in respect of the above findings: Recal the restraint imposed by interlocutor of 1st June 1876 upon the claimants Simpson & Company, to the effect of allowing them to proceed in the action, mentioned in the petition, at their instance against the petitioner: Find the petitioner liable to the claimants in the expenses of this process, except such expenses, if any, as have been solely occasioned by the discussion between the claimants Thomas Thomson and others and Simpson & Company and others; and with regard to said last-mentioned expenses, Find the said Simpson & Company, and Henderson, Hogg, & Company, William Dickson (Limited), John Jeffrey & Company, A. & J. Alexander, Miller and Young, The Edinburgh and Leith Brewing Company, J. Hutchison & Sons, J. Boyd, and J. K. Smith & Company—all claimants jointly and severally—liable to the said Thomas Thomson and others: Appoint accounts of said expenses to be lodged, and remit the same to the Auditor to tax and report, and decern."

Counsel for Petitioner—Balfour—R. V. Campbell. Agents—Webster & Will, S.S.C.

Counsel for Owners of Cargo, and Crew—Trayner—Jameson—Lang. Agents—Scott, Moncrieff, & Wood, W.S., and others.

Counsel for Underwriters — Asher — Alison. Agents—Frasers, Stodart & Mackenzie, W.S.

Friday, November 24.

FIRST DIVISION.

[Lord Craighill, Ordinary.

WAUGH AND OTHERS (SHAW'S TRUSTEES) *v.* CLARK.

Cautioner—Factor.

Facts and circumstances *held* insufficient to liberate the cautioner for a factor appointed by trustees to manage the trust estate.

This was an action at the instance of Robert Waugh, farmer, Bathgate, and others, trustees of the late William Shaw of Trees, against Alexander Clark of Wester Inch and Whitehill, Bathgate. The summons concluded (1) for payment of £94, being the balance due to the pursuers by Robert Brock, sometime banker in Bathgate, on the accounts of his intromissions as factor for the pursuers with the funds of the trust-estate of the said deceased William Shaw, conform to account-current between the said Robert Brock and the pursuers, and for which balance the defender was liable to the pursuers as cautioner for the said Robert Brock; and (2)