the use of the word "successors" applied to the parties of the first and third parts respectively when and where they were to be bound in perpetuity. It was said in argument that it becomes necessary to read "successors" as applied to the fourth parties in the eighth article of the agreement which it is contended would be incompatible with a construction of the fourth parties being only personally bound. I fail to see the incompatibility; what was laid down on the lands was a mere tramway. The only expense on the *locus in quo* was the value of the rails and the cost of the laying down of them. The article provides that the rails are to be taken up and taken away by the company when the tramway ceased to be used. But it appears to me that the draftsman of the agreement intended to and did put the question now raised by the appellant out of dispute. The last article of the agreement dealing with the consent of the first and fourth parties provides as follows: "It being distinctly understood that no warrandice and no privilege in perpetuity, notwithstanding anything in the aforesaid agreement to the contrary, is given by them respectively, but simply their respective consent thereto under the conditions aforesaid and of its removal as aforesaid." I fail to follow the reasoning whereby a privilege in perpetuity is now practically conferred by an agreement which states that it is understood between the parties it is not to be given. I entirely concur in the opinion given by the Lord President of the First Division, and I think the interlocutor appealed from should be affirmed.

Ordered that the interlocutor appealed from be reversed, and the case remitted to the First Division of the Court of Session with directions to assoilzie the appellant company from the conclusions of the summons, the respondents to pay to the appellants their costs both in House of Lords and in the Court below.

Counsel for the Appellants—The Dean of Faculty, Asher, Q.C.—Balfour, Q.C.—Cooper. Agents—Loch & Company, for James Watson, S.S.C.

Counsel for the Respondents—The Lord Advocate, Graham Murray, Q.C.—Guthrie, Q.C.—Burnet. Agents—A. & W. Beveridge, for Clark & Macdonald, S.S.C.

Monday, July 11.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Herschell, and Shand.)

SAILING SHIP "BLAIRMORE" COMPANY, LIMITED *v.* MACREDIE.

(*Ante*, June 4, 1897, 34 S.L.R. 678, and 24 R. 893.)

Marine Insurance—Constructive Total Loss—Total or Partial Loss—Change of Circumstances Occasioned by Intervention of Underwriters.

A vessel insured by a valued policy against total or partial loss was struck by a squall and sunk while in port. The underwriters, after notice of abandonment had been given by the insured, raised the vessel at their own expense, and, in defence to an action for the sum assured in the event of a total loss, pleaded that the loss was partial, the cost of subsequent repairs not exceeding the value of the vessel when repaired.

Held (*rev.* the judgment of the Second Division) that the right of the insured to recover as for a total loss was not limited by the salvage or recovery of the vessel through the gratuitous intervention of the underwriters, whereby the loss was reduced to a partial loss at the date when action on the policy was raised.

Opinion reserved whether by the law of Scotland the right of the insured would be so limited if by a change of circumstances, independent of any intervention by the underwriters, a loss constructively total at the date of notice of abandonment is reduced to a partial loss before action is raised.

Robertson, Forsyth, & Company v. *Stewart, Smith, and Others*, F.C., February 10, 1809, and 2 Dow, 474, *commented on.*

This case is reported *ante ut supra.*

The Sailing Ship "Blairmore" Company appealed against the interlocutors of the Lord Ordinary and of the Second Division.

At delivering judgment—

LORD CHANCELLOR—In *Miles* v. *Fletcher* Lord Mansfield said that the great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be certainly known.

In this case a controversy has been raised which I thought had long since been laid to rest.

During the existence of a time policy a ship covered by it has been struck by a squall and sunk, and it is contended that if the underwriters can raise her up again by an expenditure of their own, and that then when she is raised she can be repaired by the expenditure of less money than her total value, when thus raised they are only to be liable as for a partial loss.

It seems to me that such a proposition would unsettle the law as between insurers

and insured as it has been understood and acted upon for something like a century.

I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again; and I think in construing a contract now for many years a common contract, no one could doubt that that contract was intended by the parties to contemplate the loss of a ship as comprehending the case of her being sunk.

It is, I think, a total misapplication of what has been found to be a convenient test to distinguish a total from a partial loss to apply it to a case where the vessel insured has gone to the bottom. The question is, what did the contract between the parties mean?

No such case has arisen before, inasmuch as I think so bold a contention has never been made. The cases of capture and re-capture have sometimes given rise to somewhat difficult questions of fact rather than law, and I think their application to cases of loss by perils of the sea has occasionally given rise to confusion, but even in such cases it has always been held that the principle that the existence of the thing *in esse* is not conclusive against the loss being a total loss; and I think that now after all the discussion that these questions have received, both insurer and insured must be taken to have understood the words "total loss" in the business sense of those words.

I am disposed here to adopt the language of Erle, C.-J., in *Adams* v. *Mackenzie*, 13 C.B., N.S., where a ship was insured in the peculiar form of "against total loss only." The learned Judge says—"It has been urged on the part of the underwriters that they only intended to become answerable for one of two descriptions of total loss, namely, the actual total destruction of the subject-matter of insurance, and not for that which all persons conversant with insurance business understand as being a total loss. All I can say is, if they so intended they have failed to express their intention." And Williams, J., with whom Wills, J., concurred, says—"If the parties intended only to insure against the total and absolute physical destruction of the ship, they should have expressed themselves in different language."

My view is that in the contemplation of both parties to this contract a total loss is incurred when the ship goes to the bottom. See *Irving* v. *Manning*, 1 H,L. Cases, 287.

In this particular case, for the reasons I have given, the familiar test which brings a constructive total loss into a partial loss I think is not applicable at all, but if it were the formula would have to be altered. It would no longer be what would a prudent uninsured do, but how much would an astute underwriter expend to turn a total into a partial loss.

The change of circumstances which in our jurisprudence has been held to turn a total into a partial loss has arisen, certainly originally if not altogether, in respect of insurances against capture, where to my mind totally different considerations arise. A vessel by being captured is certainly lost to its owner, but, as in one case where the question arose, a vessel may be taken and re-taken before anyone knows of the loss, and as the contract of insurance is mainly a contract of indemnity, one could see how the Courts would struggle against a large profit being made out of such a contract. But where the laws of other countries differ from ours in this respect, I think it will be found that the difference arose from positive enactments and regulations, apparently directed to avoid the solution of difficult and complicated questions of fact.

The Scotch Judges have held, apparently, that the law of Scotland is the same as the law of England, and as in mercantile and maritime law, unlike in this respect to some other parts of Scottish jurisprudence, the sources of the laws of both England and Scotland are the same, I am glad to think in this respect the learned Judges are right. It would be very inconvenient if in such questions as arise in this case the law were different.

I think the judgment should be reversed, with the usual consequences as to costs.

LORD WATSON—The sailing ship "Blairmore" was in the beginning of April 1896 at San Francisco awaiting employment. The appellants, her managing owners, had on the 7th April insured her against total loss, valued at £15,000, under a time policy for two calendar months, in port at San Francisco, and for San Francisco Bay and for its tributaries, commencing at midnight on the 3rd April 1896.

On the 9th April 1896 the "Blairmore," whilst moored in the Bay of San Francisco, was struck by a squall and sunk. An offer was made by salvors at San Francisco to raise the vessel for £5760, which was not accepted. On the 15th April 1896 the appellants gave notice of abandonment to the underwriters, including the respondent Mr Macredie.

The underwriters on the 19th April 1896 sent Captain Burns, an officer of the Glasgow Salvage Association, to San Francisco; and when the offer for £5760 was communicated to them, they replied that they would prefer lifting operations to be delayed until his arrival, if the delay were not prejudicial. After his arrival, Captain Burns, acting on behalf of the underwriters, proceeded to raise the vessel, which he at length succeeded in doing on the 16th July 1896, at a total cost to his employers of about £7600, which was paid by them before the present action was raised.

The action was brought by the appellants in the beginning of December 1896, against the respondent, for recovery of his proportion of the total sum insured. The facts which I have already stated are substantially admitted on the record. In their condescendence the appellants state that the cost of raising and repairing the ship would be about £15,000, and that her value after being raised and repaired would be about £9600. The respondent in his separate statement of facts avers that, owing to the

failure of the appellants, or of those for whom they are responsible, to take certain necessary precautions, which he specifies, the "Blairmore" was not on the 9th April in a seaworthy condition, and that the casualty which befell her was due to that cause. He avers that in estimating whether the vessel was a total constructive loss the appellants are "not entitled to include in the cost of repairs the expenditure by the underwriters themselves for the preservation of the property, which expenditure the owners were not bound to reimburse. Further, even if the cost of lifting the vessel had to be reckoned as part of the cost of repairs, it could only be taken at £4500, which in ordinary circumstances would have been sufficient to meet the cost of raising the vessel." He also averred that the fair value of the vessel at San Francisco, when repaired, was £15,300. Upon the record, the parties are directly at issue as to the truth of the statements respectively made by them which I have last noticed.

The respondent's first plea was to the effect that "the pursuer's averments are irrelevant." The Lord Ordinary (Kyllachy), at the desire of the parties, and before any inquiry as to the disputed facts, heard them upon the question of relevancy. On the 18th February 1897 he found that the appellants' statements were "irrelevant as founding a claim under the policy in question as for a total loss"; and he therefore sustained the plea and dismissed the action. His interlocutor was, on the 4th June 1897, affirmed by the Second Division of the Court, consisting of Lords Young, Trayner, and Moncreiff. In giving judgment the Lord Ordinary pointed out that the record was not "in the best shape for a judgment upon relevancy," and in my opinion it would have been a much more expedient course to have allowed the parties a proof in regard to the facts as to which they were not agreed, and to have reserved the preliminary plea for discussion along with the merits of the case.

The plea directed against the relevancy of the action, as it was maintained in both Courts below, and at the bar of the House, turned upon the single question, which is one of law and not of fact, whether the appellants, in calculating the total loss for which they claimed, were entitled to take into account either the costs of raising and righting the vessel, which had actually been paid by the underwriters, or an estimate of the expense which would have attended that operation if the underwriters had not intervened. The respondent argued that neither of these factors ought to be taken into calculation, and that in that aspect of the case the appellants' averments showed a partial and not a total loss; that these averments disclosed that the raising of the vessel had been completed some months before the date of the action, leaving no loss to be borne by the insured beyond the cost of repairing her; and that the fact of her having been raised by the underwriters at their own expense placed the insured in the same position as if the raising had been effected by natural causes, such as volcanic action under the bed of the sea, or by some neutral person acting in furtherance of his own purposes. The appellants made two answers to that contention. They maintained, in the first place, that by the law of Scotland the liability of the underwriters depends upon the state of circumstances existing at the date when notice of abandonment is given—in this case on the 15th April 1897—and that subsequent occurrences, such as the raising of the vessel, between that time and the date of the action, cannot be considered, unless at the date of notice they were matters of such certainty or of such probability that a prudent uninsured shipowner would have relied upon them. In the second place, they maintained that, assuming the law of Scotland to be the same with that of England, both as to the time at which and the manner in which a total constructive loss ought to be ascertained, whatever might be the effect of a change of circumstances produced, subsequent to the notice of abandonment, by natural causes or neutral operations, the underwriters cannot legally effect any such alterations at their own hand, either with the view or with the result of evading their liability under the contract of insurance.

It is obvious that the success of the respondent's plea must depend upon the view which your Lordships may take of the two propositions which are advanced by the appellants in reply to it. If either of them be affirmed, the plea must necessarily fail. Both propositions are discussed and rejected by the Lord Ordinary in the opinion which he delivered, and were stated by counsel for the appellant, without contradiction, to have been pleaded in the Inner House. The report of the case (S.L.R.) bears out that statement; but it is the fact that, in the judgments which they delivered, the learned Judges of the Division deal exclusively with the first of them, and take no notice whatever of the second. I regret that omission, because, in the view which I take, the legal question raised by the second proposition is the only one which it is necessary to consider and determine for the purposes of this appeal.

In the admitted circumstances of this case I do not think it is matter of necessary inference that the "Blairmore," when she went to the bottom of the sea on the 9th April 1896, became immediately an actual total loss. She did not become, in the strict sense of the term, a total wreck, seeing that she was not reduced to the condition of a mere congeries of wooden planks, or of pieces of iron which could not, without reconstruction, be restored to the form of a ship, and that she had sunk in a depth of water which admitted of her being raised to the surface and repaired. But the vessel might, nevertheless, in these circumstances be a constructive total loss, and in my opinion the proper test for ascertaining whether she had become so or not is the same in Scotch as in English law, although these laws may differ in regard to the date at which the test ought to be

applied. The test as I understand it is simply this, that in order to instruct a total constructive loss, at the date to which the inquiry relates, it must be shown that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the cost of restoration.

The only judicial authority to be found in the law of Scotland upon the first point taken by the appellants is *Robertson, Forsyth, & Company* v. *Stewart, Smith, & Others* (F.C., February 10, 1809), in which the First Division affirmed a decree made by the Admiralty Court against underwriters, on the footing that there had been a total loss of the vessel insured. The ship, which was insured at Glasgow and Greenock, was captured by a Spanish privateer on the 16th September, and on the 19th October her owner gave notice of abandonment to the authorities, and requested a settlement. On the 24th October the Glasgow underwriters "agreed to settle on the footing proposed," and the Greenock underwriters had previously, on the 21st of that month, "declared themselves satisfied"; but they subsequently resisted the shipowner's action for recovery as for a total loss, on the ground that the vessel had been recaptured on the 25th October and taken into Guernsey. In their defence they offered to pay salvage and other loss which had arisen from the capture. The opinions delivered by the learned Judges of the Court of Session are not given, but the substance of them is stated by the reporter, from which it appears that the principal, if not the only ground of decision was—"that on the news of the capture of the vessel, the owners were entitled to abandon, and and that after the capture intimation of the abandonment had been duly and regularly made. That it was necessary to draw a line when this transfer of ownership should be complete and definitely made. That there was no line more proper, more suitable to the strict terms of the contract of insurance, more consistent with justice and expedience, than that where a fair and full exercise of the right of abandonment had been made, upon a view of a total loss, at the time against which the policy provided the right of the insured to recover for that loss, should be complete, and that the insurer should not be permitted to undo the transaction merely because subsequently emerging circumstances may have been made more agreeable to his interest."

The underwriters appealed to this House (2 Dow, Ap. Ca.), where they maintained that the Courts below had proceeded upon a misapprehension of the law of Scotland, and that they ought to have decided the case in conformity with the principles followed by the Court of King's Bench in *Bainbridge* v. *Neilson* (10 East. 329), and in *Faulkner* v. *Ritchie*. At the end of the argument the Lord Chancellor (Eldon), with whom Lord Ridesdale sat, criticised not altogether favourably the decisions of the King's Bench, and observing "that the decision on this question of mercantile law ought in both countries to be the same," intimated that inasmuch as in deciding the case their Lordships might affect the decisions of their own Courts, it was proper that the case should be argued in the presence of the Judges. The Judges were never summoned to attend the House, because on reconsideration the noble and learned Lords affirmed the judgment of the Court of Session upon the express ground that the underwriters, by their acceptance of the notice of abandonment as for a total loss, were precluded from disputing their liability.

The question of Scotch law, which was brought before but was not decided by this House in *Smith and Others* v. *Robertson and Others* is, in my opinion, as open now as it was in the year 1814. Since that date more than eighty years have elapsed. During that period the English decisions which were criticised by Lord Eldon have been consistently followed in English courts, and to my apprehension it would be beyond the function of this House to alter them now, as might have been done in the beginning of the century. In Scotland during the same period there has not been a single decision upon the point save in the present case. I agree with the learned Judges of the Court below in thinking that one decision of the First Division in 1809, upon a ground which was not affirmed on appeal, cannot be regarded as so settled an authority in the law of Scotland that it can neither be revised nor altered by the Court of Session or by the House of Lords.

It appears to have been held by the learned Judges in both Courts below that there being no firmly established rule upon the point in Scotland, the decision of it ought to be in conformity with the law of England. One of the learned Judges observed—"It has been stated recently on high authority that the law upon maritime questions is the same in Scotland as in England, and if this view so broadly stated is adopted, then we have nothing to do in this case beyond applying to it the rule which, as I have said, is now settled in England. As matter of individual opinion I do not concur in that view." I do not think I am mistaken in supposing that the preceding passage refers to the recent decision of this House in *Currie* v. *M'Knight* (1897, App. Cas. p. 97). All that was determined in that case was that in maritime causes which exclusively belonged to the jurisdiction of the Admiralty Courts in both countries, the law applicable was neither English nor Scotch, but British law, and therefore one and the same code. But the jurisdiction exercised by these Courts in the two countries has never, so far as I am aware, been precisely co-extensive. In Scotland the Admiral's jurisdiction, although cumulative with that of the Court of Session, extended to all questions arising in regard to policies of maritime insurance, and had also been extended "by long possession" to the right of cognisance in bills of exchange and other mercantile questions

which were in no sense maritime (Ersk. Inst., b, I. tit. iii., secs. 33 and 34). In England, on the other hand, policies of marine insurance were regarded simply as matters of mercantile contract, and actions brought upon them belonged to the jurisdiction, not of the Admiralty, but of the Common Law Courts. Accordingly, I do not think that *Currie* v. *M'Knight* has any application to the first point raised by the appellants in answer to the respondent's plea of irrelevancy, and I see no reason to differ from the observations made by Lord Blackburn in the Scotch case of *Shepherd* v. *Henderson* (7 App. Cas. 71), to which Lord Trayner refers with approval. I may observe, however, that the findings of fact contained in the interlocutor appealed from, which in that case were binding upon the House, were not calculated to raise the question discussed in those observations by the noble and learned Lord, one of them being to the effect that, on the day the vessel was driven ashore, there was, and continued thereafter to be, a reasonable prospect of her being got off without greater expense than a prudent uninsured owner would reasonably incur. In either view of the law that finding was sufficient to negative the claim made for a constructive total loss.

I should have been unwilling to decide the first point without hearing an argument going beyond Scotch and English cases, and embracing the *rationes* which have governed the practice and decisions of other countries which have not adopted the English rule, but I am relieved from the necessity of considering and deciding it, having come to the conclusion that the second point advanced by the appellants is well founded in law.

In considering the second I shall assume that the first point was rightly decided by the Courts below, and also that if the "Blairmore" had been raised after notice of abandonment and before the date of the action by the operation of natural causes, or by the action of neutral persons without expense to the insured, the appellants would, according to English law, have been disabled from claiming under their policy for a total constructive loss if it were shown that the value of the ship when repaired would have substantially exceeded the cost of repairing her. But the question still remains, whether the gratuitous act of the underwriters in raising the vessel at their own expense, leaving nothing but the cost of repairs to be borne by the insured, will, according to English law, have the effect of reducing a total to a partial loss, and of relieving the underwriters from their contract liability. It might be that in every case where the ship has been raised by causes or persons which entail no liability upon himself, a prudent uninsured owner would repair the vessel; but I have been unable to arrive at the conclusion that in the circumstances which occur in this case, the consideration of what would be the action of a prudent owner uninsured affords the true test of the liability of the underwriters as for a total constructive loss. In my opinion that test is excluded by the contractual relations which exist between the insured and his insurers.

Not one of the English authorities, so far as I understand them, goes near to the length of deciding that the insurers can avoid their liability as for a total constructive loss by their intervening gratuitously and taking upon themselves part of the expenses which *primâ facie* fall upon the assured, and would otherwise have been taken into account in estimating whether there has been such a total loss. To admit an exception of that kind would be contrary to general law, and it is not, in my opinion, recommended by any principle of equity. The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil. The result of admitting the exception in this case would be that the underwriters, who would otherwise be bound to pay to the appellant the sum of £15,000, would escape from that obligation by making an expenditure of £8000, which the contract did not oblige them to make or contemplate that they should make. It was strongly argued for the respondent that if the exception were admitted, the appellants would be indemnified, and that the contract being one of indemnity, their claims under it would be fully satisfied. The conclusive answer to that argument is in my opinion to be found in the circumstance that the indemnity which he proposes to give to the appellants is not that which they contracted to get. The underwriters had no larger right, and were under no greater obligation to raise the ship than to pay for her repairs, and on principle, if the exception were admitted, I do not see why they should not also have been permitted to avoid their responsibility for total loss by paying the repairing shipwrights' bill, or by sending the assured a cheque for its amount.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the respondent's plea against the relevancy of the action repelled. I do not think that in the present shape of the record your Lordships are in a position to dispose of the action upon its merits. There must be a remit to the Second Division to give final judgment after the disputed facts have been ascertained either by proof or by mutual admission. I think the appellants ought to have their expenses in the Court of Session after the date of closing the record, and their costs of this appeal.

LORD HERSCHELL—In this case the Lord Ordinary held that the pursuers' statements were irrelevant as founding a claim under the policy for a total loss, and therefore dismissed the action. To this interlocutor the Second Division adhered. The averments in the first three articles of the condescendence disclose the following facts—The "Blairmore" was insured by time policies for the period from the 3rd of April to the 3rd of June 1896 for £15,000. During this period she was struck by a squall and

sunk. The pursuers having ascertained that the ship could not be raised and repaired except at a cost greatly exceeding her value when raised and repaired, gave notice of abandonment, which, however, the underwriters did not accept. Then follows this averment—"The cost of raising and repairing said ship would be about £15,000, and her value after being raised and repaired would be about £9600. The pursuers believe and aver that the underwriters actually expended a sum of £8000 thereby in raising the vessel and bringing her into a place of safety."

It is contended that these averments show that, although the notice of abandonment was properly given, there being at that time a constructive total loss, yet they also show that at the time the action was brought the loss was not total, because if the cost of repairing the vessel, which was all that then had to be done by the assured, be alone regarded, it would be less than the value of the vessel when repaired.

According to the laws of some foreign countries, whenever a notice of abandonment has been properly given, the rights of the parties to the contract of insurance are regarded as fixed, and are unaffected by anything which may happen between that date and the time when legal proceedings are commenced. In England a long course of decisions has established a different rule, notwithstanding the unfavourable criticism by Lord Eldon of some of the earlier ones. The decisions referred to have been nearly all pronounced in cases of loss by capture where the ship having been recaptured and being in good safety at the time when the action was brought, it was held that the loss was not total. In *Holdsworth* v. *Wise* (1828), 7 B. & Cr. 794, however, a ship in a leaky state having been deserted at sea by her crew, acting *bona fide* for the preservation of their lives, was on the following day taken possession of by the crew of another vessel, who succeeded in bringing her into port, where she was repaired and afterwards sent to this country, but subject to claims for salvage equal to or exceeding her value. Bayley, J., said—"The mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss. The ship must be *in esse* in this kingdom under such circumstances that the assured may, if they please, have possession and may reasonably be expected to take it." This was adopted as the test by Lord Campbell, C.-J., in delivering the judgment of the Court of Queen's Bench in *Lozano* v. *Jansen* (1859), 2 Ell. & Ell. 160. In both these cases, however, the loss was held to be total and not partial.

I take it, then, that the general rule applicable is, according to the law of this country, that if in the interval between the notice of abandonment and the time when legal proceedings are commenced, there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss.

The question is, whether a constructive total loss can be reduced to a partial loss by the expenditure on the part of the underwiters of so much of the cost necessary to enable the vessel again to take the sea, as to leave what still needs to be expended for the purpose of putting the vessel into that condition less in amount than the value of the vessel when so repaired. In the present case the assurance is against partial as well as total loss; but the question must, I think, be answered in the same way, whether the policy covers total loss only or partial loss also. Could the underwriter of a policy against total loss escape liability, although there had been a constructive total loss, by doing part of the repairs? I cannot think so. A constructive total loss is as much a total loss within the meaning of a policy of insurance as an actual total loss. And in the case of a total loss by perils insured against, whether constructive or actual, the underwriter has agreed to pay the sum insured. Where such a liability has accrued the underwriter cannot, in my opinion, incur part of the expenditure required to make the ship fit to take the sea, and then insist that the loss has become a partial one only. The rule adopted in this country with reference to a change of circumstances between the time of notice of abandonment and the time when the action is brought has never been applied to change such as I have referred to brought about by the underwriter. And I am not disposed to extend it to a case of this description. I think it would be unreasonable, and would not give due effect to the contract between the parties.

Although the Lord Ordinary dealt with the point I have been considering, it seems to have passed unnoticed in the Inner House, where it was apparently assumed that if the law of Scotland was the same as that of England the judgment must be adverse to the pursuers. The argument appears mainly to have turned on the question whether the rule established in this country is the law of Scotland also. I think it right to say that, in my opinion, this question is quite open to discussion. It is certainly not concluded in a sense adverse to the pursuers' contention by any authority in the Scotch Courts, and in view of the fact that the English rule does not prevail generally in maritime countries, the reasons on which it is founded, and its reasonableness, will have to be considered if the question, what is the law of Scotland, should ever arise for decision. In the present case it is unnecessary to decide it, because in my opinion, even if the law of Scotland be identical with that of England, the argument of the appellants must prevail.

For the reasons I have given I agree in thinking that the judgment should be reversed.

LORD SHAND—In the decision of this case, in which there has been no inquiry

and no evidence adduced, the pursuer's statements must be accepted as true. The action has been dismissed on the ground of irrelevancy—that is, that assuming the truth of the pursuer's averments, it does not follow that in law they are entitled to recover as for a total loss of their ship "The Blairmore."

It is clear that the pursuers have in effect averred that when the vessel went to the bottom no prudent uninsured owner would have thought of proceeding to incur the expense of raising and repairing her. The cost of doing so would have been £15,000, while the vessel when raised or repaired would have been worth £9600 only—in other words, an uninsured owner who was so imprudent as to proceed to raise and repair the vessel so as to restore her to her former condition would have simply thrown away £5400. When, therefore, the notice of abandonment was given on 15th April 1896 there was a constructive total loss; and if the appellants had accompanied their notice by the institution at the same time of an action, there could have been no defence. The appellants would have at once obtained decree as for a total loss, unless indeed the respondents could have shown that the loss of the vessel was not caused by a peril covered by the policy. I say there was a constructive total loss, because I understand the law to be that the test of whether a constructive total loss has or has not occurred is to be found in the answer to be given to the question what would a prudent owner do if not insured, and that if such an owner having regard to all the circumstances would abandon his vessel and would not attempt to raise and repair her because the cost of doing so would exceed her value when thus restored to her former condition, a constructive total loss has been incurred. Cases in which a prudent owner would certainly proceed to raise and repair his ship, as for example where it appears that at a cost say of £2000 a vessel worth £10,000, or £5000 could be recovered and fitted up so as to be substantially as good as before she sank, would not according to the test I have stated be regarded as a total loss, actual or constructive, but your Lordships have no such case for consideration here.

Now, in the present case, although on the 15th April 1896, when the notice of abandonment was given, a constructive total loss had occurred, this action was not raised till 1st December of that year. In the meantime on 26th April the underwriters succeeded in raising the vessel at a cost according to the respondent's statement of £7600, but which according to the appellants' statement was greater. The question for decision is, what is the effect of this change of circumstances? The underwriters say to the shipowners, "Your ship is now restored to you in such a condition that, after paying for her repair, she will be of much more value in her repaired and restored condition than the cost of repairs—and whatever may be said as to a constructive total loss having occurred in April, you must take the vessel now, because in consequence of our successful operations in raising the ship at our cost there was no such loss in December, when you raised your action, or indeed after 26th April, when the ship was raised."

To this contention two answers were made by the appellants—the first of these being that according to the law of Scotland the date of determining whether a total loss has or has not occurred is the date of the notice of abandonment and not the date of action raised; and secondly, that even if this latter date be taken, the underwriters cannot successfully maintain that the case is no longer one of total loss because by their operations and the expense incurred by them they have in the meantime become able to restore the vessel in a state requiring only repairs of less cost than the value of the ship when repaired to render her seaworthy as before.

On the first of these points I think it is an open question according to the law of Scotland whether the law will regard circumstances intervening between a notice of abandonment and action raised as capable of altering or converting a total loss into a partial loss only. The account of the decisions as given by my noble and learned friend Lord Watson, and also by Lord Moncreiff in the Court of Session, and particularly the account of what took place in the case of *Robertson, Forsyth, & Co.*, shows, I think, that there is room for the argument that the law of Scotland is rather in accordance with that of France and America than with the rule or law which receives effect in England. The House was informed by counsel that it is not now uncommon for the shipowner by himself or his agent, when a notice of abandonment is given, to require the underwriters to hold the notice as equivalent to action brought. Should this practice become universal the question may probably not arise again even in a Scotch case. Should the question, however, again occur and require to be decided, it seems to me, that desirable though it no doubt is that in mercantile matters the law of the whole United Kingdom should be the same, yet the considerations referred to by my noble and learned friends Lord Herschell and Lord Watson should have weight, and that the reasons on which the different rules adopted in maritime countries are rested should be fully examined and considered so as to attain the most just result; and it may ultimately result in legislation should the present rule in England not be found to be most in accordance with sound principle.

But, again, as occurred in the case of *Robertson, Forsyth, & Co.*, I have come to the conclusion that it is not necessary here to decide what is the law of Scotland on the matter; for I concur with your Lordships in holding that the underwriters, by raising the vessel and offering her in her damaged condition to her owners, were not entitled to be relieved from responsibility as for a total loss.

I have felt the decision of this question, on which this House now differs in opinion

from all of the learned Judges who have taken part in the decision in the Court of Session, to be one of considerable difficulty. If by natural causes or by the actings of third parties the ship had been in April 1896 restored to the appellants without cost to them, though in a disabled condition, but requiring only repairs of less cost than the value of the ship when repaired, the authorities seem to show that they would not be entitled to prevail in a claim against the underwriters as for a total loss, and in some cases of capture and recapture the result has been the same.

These cases have, no doubt, as the respondent's counsel urged, a certain analogy to the present. But it appears to me that there is a material distinction in fact between them and the present case, inasmuch as here (1) the operations were undertaken and large outlay made by the underwriters, who were themselves the obligants under the contract of insurance, in order by changing the real state of matters as these had occurred to get rid of the obligation which they had incurred, and which might have been enforced by action brought as for a total loss, and (2) unlike the cases of recapture, in which the vessel is restored in a fit state to take the sea, and in which different considerations may arise from those which determine liability incurred from the ordinary perils of the sea, in this case the vessel is tendered still in a disabled condition, requiring large expenditure to make her seaworthy. There is undoubtedly a broad difference between such a case and those to which it is said to be analogous, and in agreement with the views of your Lordships I am not prepared to carry the analogy so far as to apply it in circumstances so different from those of the cases referred to. I cannot think it was the intention of the parties, or that it is according to the true construction of the contract of insurance, that after a total constructive loss has unquestionably occurred it should be in the power of the underwriter, if he can only succeed in inducing the shipowner to delay raising action for the requisite time, by outlays however large and operations however extensive, to reduce a total to a partial loss, and so, if he has become bound to indemnify for a total loss only, to leave the shipowner without indemnity to make large expenditure in repairing the ship to fit her for the sea. The cases decided have never gone this length, and I do not think when this question is now for the first time raised that the contract of insurance should be so construed as to enable astute underwriters in this way, as my noble and learned friend on the woolsack has already said, to turn a total into a partial loss.

On these grounds I am also of opinion that the judgment complained of should be reversed with costs, and the case remitted to the Court of Session that a proof of the facts may be allowed.

Ordered that the cause be remitted back to the Second Division to give final judgment after the disputed facts have been ascertained, either by proof or by mutual admission; the appellants to have the expenses in the Court of Session after the date of closing the record, and the costs of this appeal.

Counsel for the Appellants — Robson, Q.C. — Salvesen — Hon. M. Macnaghten. Agents — Learoyd, James, & Miller, for James Russell, S.S.C.

Counsel for the Respondents — Joseph Walton, Q.C.—Aitken. Agents—W. A. Crump & Son, for Webster, Will, & Ritchie, S.S.C.

Monday, July 11.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, Macnaghten, and Morris).

INGLIS *v.* ROBERTSON AND BAXTER.

(*Ante*, March 18, 1897, 34 S.L.R. 577, and 24 R. 758.)

Foreign — Arrestment — Competition as to Real Right in Moveables—Lex rei sitæ.

Held (*aff.* the judgment of the Whole Court) that the right of a Scotch creditor, completed by arrestment of goods in Scotland belonging to a foreign debtor, cannot be defeated by a transaction between the debtor and another foreigner which would be, according to the law of their domicile, but is not, according to the law of Scotland, sufficient to create a real right in the goods.

Right in Security—Pledge of Document of Title—Factors Act 1889 (52 *and* 53 *Vict. c.* 45)—*Factors* (*Scotland*) *Act* 1890 (53 *and* 54 *Vict. c.* 40), *sec.* 51.

The Factors Act 1889 (extended to Scotland by the Factors (Scotland) Act 1890) provides by section 3 (a section falling within the group of sections headed "Dispositions by Mercantile Agents"), that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods;" and by section 9 (a section falling under the heading "Dispositions by Buyers and Sellers of Goods"), that "where a person having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person . . . of the goods or documents of title under any sale, pledge, or other disposition thereof to any person receiving the same in good faith and without any notice of any lien, or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

A buyer of goods, after they had been transferred into his name by the warehouse-keeper in whose custody