Friday, June 4.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

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

Marine Insurance—Abandonment—Total or Partial Loss—Period when Question of Total or Partial Loss is to be Determined—English Law.

Held (following the settled rule of English law, and over-ruling the decision of the Court of Session in *Robertson, Forsyth, & Co.* v. *Stewart, Smith, & Co.*, February 10, 1809, F.C.) that under a valued policy of marine insurance the question whether the insured is entitled to claim for a total or only for a partial loss is to be determined by the state of matters at the date of the action, and not when notice of abandonment is given.

This was an action at the instance of the Sailing Ship "Bairmore" Company, Limited, the owners of the sailing ship "Blairmore," and Thomas Dickie & Company, shipowners and marine insurance brokers, Glasgow, as the managing owners of that vessel, in which the pursuers sought to recover as for a constructive total loss under certain time policies of insurance effected by them for £15,000 on the "Blairmore" for the period from 2nd April to 3rd June 1896, of which sum £100 was underwritten by the defender. It was arranged that the pursuers' claims against the other underwriters should be ruled by the decision in the present case.

The summons was signeted on 1st December 1896.

Each of the policies contained a clause providing that "the acts of insurer or insured in recovering, saving, or preserving the property insured shall not be considered waiver or acceptance of abandonment."

The following statement of the facts as alleged or admitted by the pursuers is taken from the opinion of the Lord Ordinary (KYLLACHY):—"The 'Blairmore' was, it appears, lying in San Francisco Bay on the 9th April 1896. On that day she was struck by a squall and sank. She thereby became, at least for the time, a constructive total loss. This, I think, is hardly disputed. At all events, notice of abandonment was duly given to the underwriters on 15th April 1896, and although that notice was not accepted, but declined, it must, I think, for present purposes be assumed that at the date of the notice the vessel was so placed that, if an action had been at once brought, the owners must have recovered as for a total loss. But what happened in point of fact was this. The owners did not at once bring their action, and the underwriters declining to accept the notice of abandonment, proceeded to raise the ship, and before action was brought they had succeeded in doing so, and in placing her safely in San Francisco harbour. The cost was considerable, amounting, as is averred by the defender, to £7600, a cost considerably exceeding what, having regard to the value of the vessel, a prudent owner would have expended for the purpose. Such at least is the pursuers' statement, and, accordingly, it must at this stage be taken as true that but for the high valuation expressed in the policy (a valuation which, in the event of total loss—actual or constructive—fixes the payment to the assured), the underwriters would not have thought of raising the vessel at so great a cost. They did, however, raise her, and she now lies in San Francisco harbour, not indeed ready for sea, but capable of repair, and that at a cost which, as I have said, the pursuers do not allege would equal her actual value."

The pursuers averred—"(Cond. 4) 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 or thereby in raising the vessel and bringing her into a place of safety."

The pursuers pleaded, *inter alia*—"(1) The said ship having become a constructive total loss, through the perils insured against, and within the period insured against by said policies, the pursuers are entitled to decree against the present defender, with interest and expenses as concluded for. (3) The defences are irrelevant."

The defender pleaded, *inter alia*—"(1) The pursuers' averments are irrelevant. (3) The defender's liability as for a constructive total loss, falls to be determined according to the state of matters as they existed at the time when this action was raised. (4) The salvage expenses incurred by the underwriters before the action was raised should be excluded in considering the question of constructive total loss as at that date. (5) In the circumstances above set forth, the vessel at the date of raising this action was not a constructive total loss, the defender ought to be assoilzied."

The Lord Ordinary, after hearing counsel in the Procedure Roll, on 18th February 1897 issued the following interlocutor:—"Finds that the pursuers' statements are irrelevant as founding a claim under the policy in question for a total loss: Therefore sustains the first plea-in-law for the defender, and dismisses the action and decerns: Finds the defender entitled to expenses; allows an account, &c.

"*Opinion.*—The pursuers' company are owners of the ship 'Blairmore' of Glasgow, which in April 1896 stood insured on a time policy for the sum of £15,000, and the present action is brought against the underwriters (or rather against one of their number who has been selected to try the question), concluding as for a constructive total loss of the ship. There are several defences, but in the first place the defender pleads that the action is irrelevant, in respect that it is not alleged by the pursuers that as matters stand, and as they stood at the date of the action, the ship is

incapable of repair at a cost within her actual value.

"The record is not, perhaps, in the best shape for a judgment upon relevancy—which apparently both parties desire; but I think it may be taken that the following is the state of the facts, as alleged or admitted by the pursuers.

[*His Lordship then stated the facts as above set forth, and proceeded*]—

"These being the facts, the first question which arises is this. Is it necessary for the pursuers to aver and prove not only that there was a total loss, actual or constructive, at the date of abandonment, but also that that state of matters continued down to the raising of the action?

"On this head the controversy between the parties comes, I think, to a very narrow point.

"It was conceded on both sides that the question is one of a kind on which the Scottish Courts, having no established rule of their own, are rightly accustomed to follow the rules established in England. It was also conceded that in the law of England (differing from the law of most Maritime States, including France and America) it has long been a settled rule that, in deciding as between total and partial loss, the date to be looked to is not the date of abandonment, but the date of action. All this the pursuers concede. But according to them the rule or principle thus expressed means, when examined, only this—that the insurers, equally with the insured, are entitled to the benefit, by way of evidence, of all light which may be derived from anything which may have occurred prior to the date of the raising of the action.

"Now, as to this, I have only to say that I am unable so to limit the English rule. So limited, it would not, as it seems to me, really differ from the French and American rules, which yet it notoriously does. Moreover, on the construction suggested it would not really be the date of the action, but the date of trial which would have to be looked to. It is not, therefore, surprising that the pursuers could cite no authority for their proposition. I have looked into the English authorities, and rightly or wrongly they seem to me to establish quite clearly that, however well justified the notice of abandonment was when given, yet, if before action is brought the situation has changed, the insurers have the benefit of the change. This is, perhaps, sufficiently apparent from the opinion of Lord Blackburn in the case of *Shepherd* v. *Henderson*, L.R., 7 App. Cas. p. 70.

"There is, however, a second point raised by the pursuers which is perhaps more arguable. Be it, they say, that the insurers may take advantage of any accident or any act of third parties bettering the situation of the vessel at the date of action, this does not imply that the insurers can themselves intervene, and by operations of their own—conducted it may be at exorbitant cost—convert a total into a partial loss, and so, it may be, escape from their just obligations under a valued policy.

"I confess I was at first rather impressed by this argument. But on consideration I have not been able to find any sufficient ground for it. If the rule be that the question between partial and total loss is in suspense until the date of the action I have failed to discover any term in the contract of insurance, or any rule of general law, which should disable the insurers from doing their best in the interval between notice and action to improve the situation to their advantage. The vessel is, we shall say, abandoned and derelict. The underwriters send in search of her and tow her into port. Or she is, as here, submerged—they raise her and place her in a graving dock. I do not, I confess, see why, having done so lawfully, they should be bound to discuss with the insured the propriety or cost of their operations; or why, not choosing to do so, they should be bound to charge as for salvage, and to have such charge treated as a charge affecting the vessel. The true position is rather, I take it, this, that the shipowner in the cases figured has had the benefit of a gratuitous, just as he might have had the benefit of an accidental, salvage; and that his claim under his policy, which is a claim for indemnity, must be considered in view of that fact.

"It would of course be a different matter if the defender's interference with the vessel could be construed as an acceptance of the abandonment; or, what comes to the same thing, could be held as implying an assumption of ownership. But there are two difficulties in the way of that conclusion. In the first place, as has more than once been decided, salvage operations by the insurers do not *per se* imply acceptance of abandonment. They only do so when the whole circumstances justify the insured in so inferring. In the second place, there is in the present policy an express clause providing that 'the acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment.'

"I cannot, therefore, hold that the underwriters were not at liberty, after notice of abandonment, to raise the ship with a view to converting her from a total into a partial loss; or that the cost which they incurred in doing so falls to be treated as if it were a charge by outside salvors affecting the vessel. I should perhaps add that although I have not been able to find any express decision upon this point, it is a point noticed in Arnould on Marine Insurance, 2, 972, 6th ed., and the author's opinion seems to be that the English rule (being what it is), involves as a corollary the right of the insurers to repair as far as they please after notice of abandonment and before action.

"The result on the whole is, that as the ship is now raised and in safety, and as the pursuers do not aver that she cannot be repaired within her actual value, I must hold this action to be irrelevant, and dismiss the same. This of course will not prevent the pursuers from bringing, if

necessary, another action claiming as for a partial loss."

The pursuers reclaimed, and argued—(1) The question whether there was a constructive total loss must be determined by the state of matters at the date when notice of abandonment was given—*Robertson, Forsyth, & Company* v. *Stewart, Smith, & Company*, February 10, 1809, F.C. Though the ultimate decision of that case in the House of Lords (2 Dow 474) rested on other grounds, the view upon which the Court of Session had proceeded was not disapproved. That case had never since been questioned in Scotland. As a decision of the Whole Court it ruled the present. In *Shepherd* v. *Henderson*, February 25, 1881, 8 R. 518, there were *dicta* by Lord Craighill at page 527 and Lord Young at page 529 in favour of the proposition now maintained, which was more in consonance with principle than that sustained by the Lord Ordinary, and was, moreover, in accordance with the law of France—Arnould on Marine Insurance, 1029, and the law of America; Arnould on Marine Insurance, 1030; 2 Phillips, No. 1705; see also 2 Valin 143, tit. Insurance, art. 60; Emerigon, c. 17, tom. 2, p. 194. If the law of England was as maintained on the other side it was unique. The decisions of the English Courts were not binding on this Court. (2) Even if the law of England was to be followed, it was not at variance with the reclaimers' proposition. They did not dispute that if it appeared subsequent to the date of notice that at the date of notice there had been no constructive total loss, then the notice would not be good or binding on the underwriters, and the English rule as conclusively and generally established went no further than this. In *Bainbridge* v. *Neilson* (1808), 10 East. 329, 10 R.R. 316, the ship was erroneously supposed to be in possession of the enemy, whereas before notice was given she had been recaptured. In *Holdsworth* v. *Wise* (1828), 7 B. and Cr. 794, the ship had been brought into port when notice was given, and was not in fact a derelict as supposed. In *Lozano* v. *Jansen* (1859), 2 Ellis and Ellis, 160, the facts were very special and it was held that a constructive total loss was made out. Lord Eldon's doubts in *Robertson, Forsyth, & Company, cit.*, had never been departed from in the House of Lords. Lord Blackburn's statement of the law of England in *Shepherd* v. *Henderson*, 7 App. Cas. at page 70, was confined to cases where it "turned out" at the date of action that there had not been a total loss at the date of notice. In this case it was admitted that at the date of notice the ship was a total loss. That could not be disputed, as she was at the bottom of the sea. In any view, the English rule as formulated by the respondent was only established in cases of capture which had no analogy to the present. Actual submersion was a different case altogether from capture. When a ship was at the bottom she ceased to be a ship. A ship was finally and conclusively a constructive total loss when she was in such a position that no prudent owner uninsured would have thought it worth while to salve her.—See *The Scottish Marine Insurance Company of Glasgow* v. *Turner*, March 3, 1853, 1 Macq. 334, *per* Lord Truro at page 339. Here no prudent owner uninsured would have thought of attempting to salve the vessel. (3) Even if the law of England was settled to the effect maintained by the defender, and even if this Court were bound to follow it, the ship here was a constructive total loss at the date when action was brought. The cost of raising and repairing the vessel was £15,000, and her value when repaired would be only £9600. The reclaimers were not barred from maintaining that the vessel was worth less than the value mentioned in the policy—Arnould on Marine Insurance, 1051; *Irving* v. *Manning* (1847), 1 H. of L. Cases (Clark) 287. The amount expended by the underwriters in raising the ship must be taken into account in considering whether at the date of action brought the ship was a constructive total loss—Arnould on Marine Insurance (6th ed.), 1034 and 1048. The underwriters were not entitled to raise the ship and then decline to pay for a total loss on the ground that she could be repaired for less than she would be worth when repaired—Emerigon, c. 17, sec. 6, p. 231; Arnould, 972; 2 Phillips' Insurance, No. 1706. If they were to be held justified in so acting, then they could always escape liability under a valued policy when it was their interest to do so. It would be no valid answer to a notice of abandonment that the underwriters would undertake to raise a vessel, neither was it a good answer that they had in fact raised her.

Argued for the respondent—(1) It was settled in England by a long series of decisions that the existence of a constructive total loss must be determined by the state of matters as at the date of action brought—Arnould Marine Insurance (6th ed.) 1028; *Bainbridge* v. *Neilson*, *cit.*; *Falkner* v. *Ritchie* (1814), 2 Maule & Selwyn, 290; *Patterson* v. *Ritchie* (1815), 4 Maule & Selwyn, 393 (decided subsequent to and in view of Lord Eldon's doubts in *Robertson, Forsyth, & Company, cit.*); *Brotherston* v. *Barber* (1816), 5 Maule & Selwyn, 418; *Shepherd* v. *Henderson, cit., per* Lord Blackburn, 7 App. Cas. at p. 70. No contrary rule was established in Scotland—*Robertson, Forsyth, & Company, cit.*, was ultimately decided on another ground. It had always been assumed that the laws of England and of Scotland on this question were the same—Bell's Comm. (ed. M'L.) i. 654. When in a question of maritime law a rule was well settled in England and no contrary rule was established in Scotland, the Scottish Courts were bound to follow the English rule—*Currie* v. *M'Knight* (1897), App. Cas. 97; *Hay* v. *Le Neve*, 2 Sh. App. 403. The law maritime was common to all civilised maritime states. It was not either Scottish or English municipal common law. It was derived both by England and Scotland from a common source. Decisions by English Admiralty Courts therefore were decisions with reference to law which was

in force both in England and Scotland, and in the absence of Scottish authority to the contrary ought to receive effect in this Court—*Currie* v. *M'Knight, cit., per* Lord Halsbury, L.C., at p. 101, and *per* Lord Watson at p. 103, and authorities cited by him. If the English rule were to prevail then the proposition contended for was that "if, before action brought, the goods have been restored to the assured . . . under such circumstances as ought to have induced a prudent man to take possession of them, his claim could only be made for a partial loss"—*Lozano* v. *Jansen, cit.*, 2 Ellis & Ellis, 160, *per* Lord Campbell, C.-J., at page 177. The English rule was not confined to cases where the ship had been erroneously supposed to be lost at the date of notice, and that error had been discovered before action brought, but applied also to cases where the ship was truly a constructive total loss at the date of notice but had ceased to be so before action brought—*Patterson* v. *Ritchie, cit.*; *Brotherston, cit.*; Arnould Marine Insurance (6th ed.) 1028. It was quite general, and not confined to cases of capture—*Holdsworth* v. *Wise, cit.*; Arnould, 1028. (2) Apart from authority the English rule was well founded. Even in the case of a valued policy the obligation of the insurer was to indemnify. The value in the policy was merely the conclusive standard of indemnity (Arnould, 301); subject to that qualification the contract was one for indemnity only (*Irving* v. *Manning, cit.*), and the assured's right of action "must be founded upon the nature of his damnification, as it really is at the time of action brought" — *Hamilton* v. *Mendes* (1761), 2 Burr. 1198, *per* Lord Mansfield, C.-J., at page 1210; Bell's Comm. (ed. M'L.), 655, note 4; *Patterson* v. *Ritchie, cit.*; *Brotherston, cit.*; Arnould, 1029. If at the date when action was brought all the loss which the insured could suffer was a partial loss, he was no more entitled to sue for a total loss than he would be to sue for a sum of money which had been paid to him—*Patterson* v. *Ritchie, cit. per* Lord Ellenborough, C.-J., at page 396. If any other view were taken, a valued policy was a gambling contract and illegal—*Brotherston, cit. per* Lord Ellenborough, C.-J., at page 423. This branch of law was highly technical. The total loss was only a total loss by fiction of law, and the property was not in fact lost at all. There could be no hardship to the insured when he got the property insured handed over to him in as good a condition as it ever was. (3) It followed from the doctrine of indemnity that if at the date of action brought the vessel insured was in such a condition that she could be repaired to be worth more than it would cost to repair her, without taking into account what the underwriters had expended before action brought, the insured could only claim for a partial loss. The amount expended by the underwriters before action brought was not to be taken into account in estimating whether the loss was total or partial at the date of action brought—Arnould, 972; and see 2 Valin Comm., liv. iii., tit. vi., des Assurances, art. 60, page 144. The underwriters were entitled at common law, apart from the clause in the policy, to raise the ship as salvors without committing themselves to acceptance of abandonment (see *Shepherd* v. *Henderson* [1881], 7 App. Cas. 49, *per* Lord Penzance at page 63), but the clause was conclusive. Where outside salvors salved at a cost of two-thirds of the value when salved, the loss was held only partial — *Thornely v. Hebson* (1819), 2 B. and Ald. 513; where the repairs were made at the expense of the owner and exceeded the value of the ship when repaired, the bulk of the cost for repairs having been incurred before notice of abandonment, it was held that there was no total loss—*Chapman* v. *Benson* (1847), 5 C.B. 330. (4) As matter of expediency it would be intolerable if the obligations in a policy of marine insurance underwritten in the United Kingdom were to vary according to the domicile of each individual underwriter.

LORD TRAYNER—I agree with the Lord Ordinary in thinking that it is now settled in the law of England that a claim made under a policy of marine insurance, in circumstances similar to those presented in the case before us, must be determined by a consideration of the state of matters at the time when the claim is judicially made, and not as at the time of the occurrence out of which the claim arises. 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 I have said is now settled in England. As matter of individual opinion I do not concur in that view. Nor do I think it could have been held by Lord Blackburn in 1881, when delivering his opinion in the case of *Shepherd* v. *Henderson* (L.R., 7 App. Ca. 71), for there, dealing with the very question we have now before us, he stated the law of England on the point, referred to it as a matter not yet finally decided in Scotland, and declined to express any opinion "as to how it would be in Scottish law."

In this case I arrive at the same conclusion as the Lord Ordinary for several reasons. First, because there is no rule or principle in Scotland contrary to that which has been settled in England. The only case in Scotland on the point before us is the case of *Robertson, &c.* v. *Stewart, &c.*, 10th February 1809, F.C., and the decision in it was contrary to the English rule. That case was affirmed on appeal, but not upon the ground on which the Court of Session proceeded, that ground being neither approved nor disapproved in the House of Lords. I am unable to say that that one decision pronounced nearly a century ago can be regarded as settling a rule which in the administration of Scottish law we are now bound to follow. It is true that there is nothing to show that that decision was ever questioned; it is equally true that there is nothing to show that it was ever followed; and it is not im-

probable that underwriters and others interested in such questions may have regarded the decision as doubtful because it did not receive the further sanction of the House of Lords. It is noticeable that Professor Bell in referring to this case as one in which, on the general doctrine, the Court of Session had "entirely differed" from the law as laid down by the English Court, expresses no opinion on the question himself. There is nothing, therefore, beyond the decision of the Court of Session in *Robertson's* case, which can be referred to in support of the argument that the rule of the Scottish law differs from that held in England. The law of both countries applicable to mercantile and maritime questions has been much developed since 1809, and that is another reason for declining to hold a single judgment pronounced in that year as fixing a rule binding upon us now. Second, where there is a well-settled rule on any question in the law of England, and no existing rule or principle in our law with which the English rule conflicts, it is desirable that the same rule should be followed here as there in order that there may not be conflicting rules on the same question prevailing in different parts of the same kingdom, and that even where the doctrine so settled differs from the rules of other states. Third, I think the application of the doctrine of the English law does full justice to the parties here. To hold that the pursuers are entitled to claim for the loss actually suffered by them and for nothing more (which is practically what the Lord Ordinary has determined), is a step towards recognition of the view that in valued policies, as in all other policies of insurance, the contract is one of indemnity only. When valued policies are treated on any other footing, then they are really wager polices—a kind of policy which for very good reasons was declared illegal more than a century and a half ago.

LORD YOUNG—I am also of opinion that the interlocutor of the Lord Ordinary should be affirmed. The only thing which I desire to say is that we must decide this question according to the law of Scotland, which is the only law with which we are supposed to be acquainted. If, as happens sometimes, a case ought in our opinion to be decided in accordance with English law—when for example the case relates to the construction of a will made in English form by an Englishman—we have recognised means for discovering what the law of England is. We can state a case and send it for the opinion of an English Court, or we can take the opinion of English counsel on the case, and so ascertain as matter of fact in the case what the law of England may be. We are very glad to be informed that the law of England is the same as the law of Scotland on any question. In the same way we are glad to know that the law of America or France is the same as ours in any case. It is desirable that the same rule should obtain in all civilised countries. But it is not an accurate statement to say that the law of England in any branch of it must also be held to be the law of Scotland. We do not know what the law of England is. We do not know the most recent views which have been taken as to what the law of England may be. We do not know what may have been decided in England yesterday or last week. We may discover that the law of England is the same as our law, but we must decide according to the law of Scotland. Here, determining the case according to Scots law, I agree that the interlocutor of the Lord Ordinary ought to be affirmed.

LORD MONCREIFF—The general question which was argued to us, viz., whether the date of notice of abandonment or of the raising of an action is to be looked to in deciding whether a total loss has or has not been sustained, is still a moot point in the maritime law of Scotland. There is indeed one express decision upon the point, viz., *Robertson, Forsyth, & Company* v. *Stewart, Smith, & Company*, February 10, 1809, 15 F.C. 165. In that case the First Division of the Court, affirming the judgment of the Court of Admiralty and the Lord Ordinary, decided in favour of the shipowner on the ground that the matter must be judged of as at the date of the notice of abandonment. It appears from the report of the opinions of the Judges that the Court considered the question to be entirely new. The judgment was appealed to the House of Lords and affirmed, but not upon the grounds adopted by the Court of Session; the ultimate ground of judgment being that the underwriters had accepted the notice of abandonment (2 Dow's App. 474). The case is interesting on account of the doubts expressed by Lord Eldon in the House of Lords as to the soundness of two English decisions—*Bainbridge* v. *Neilson*, 10 East. 329; and *Falkner* v. *Ritchie*, 2 Maule & Selwyn 290, to the effect that the date of the action was the time to be looked to. But in the end the House of Lords waived deciding that question, and subsequently, notwithstanding Lord Eldon's doubts in *Robertson, Forsyth, & Company* v. *Stewart, Smith, & Company*, the cases of *Bainbridge* and *Falkner* were followed in England in a long series of cases. Therefore in England the law has been settled for more than half-a-century.

On the other hand, the law of many foreign countries, and in particular of France and America, is to an opposite effect.

As regards Scotland, the decision in *Robertson, Forsyth, & Company* v. *Stewart, Smith, & Company*, has not been repeated, neither has there been a decision to the opposite effect.

Mr Bell in his Commentaries, (i., 7th ed. pp. 654, 655, 5th ed. pp. 608, 609), contents himself with narrating the history of the case of *Robertson* and the course of decision in England, without expressing his opinion as to what the law of Scotland is or ought to be. In

his Principles, sec. 487, in which he deals with the effect of notice of abandonment, he says:—"But before acceptance, if what appeared a total loss has become not so, as by recapture, recovery, or partial preservation, the policy then is for indemnity only of a partial loss." But in support of this he only cites the English decisions beginning with the case of *Bainbridge* v. *Neilson*. It may be inferred that Mr Bell regarded the matter as settled by the current of the English decisions, but there is no later Scottish decision to support this view.

The matter was very fully discussed in the recent case of *Shepherd* v. *Henderson*, 8 R. 518, and 9 R. (H. of L.) 1. But the decision of that question was not essential to the judgment, because the Court of Session held that it was not proved that there was a constructive total loss at the date of the notice.

Lastly, there is no averment or evidence of practice in Scotland.

The point therefore being open we have to decide whether we should follow the law of England or the law of France and America; we are free to take either course. There are weighty considerations on both sides. For those in favour of the date of notice I need only refer to the note of the opinions of the Judges in the case of *Robertson, Forsyth, & Company*, and the opinion of Lord Craighill in *Shepherd* v. *Henderson*, 8 R. 526-7.

But on the other hand there are counter considerations which, on the whole, I am inclined to think should prevail. We are not bound by the English decisions, but looking to our close commercial relations with England, and the fact that our merchant shipping law is regulated by a code applicable to both countries, it would be unfortunate if a different rule on this point obtained in Scotland from that established in England. There are other considerations pointing in the same direction which I need not mention in detail. On the whole matter I think that in the absence of any authority in our own law to the contrary, there are sufficiently strong reasons of expediency to lead us to adopt that of England.

So much on the general question, but I am further inclined to think that on the terms of the policy the same practical result would be reached.

The policy contains this declaration:—"And it is expressly declared and agreed that the acts of the insurer or insured in recovering, saving, or protecting the property insured shall not be considered a waiver or acceptance of abandonment."

Now, the acts here specified are necessarily acts to be done after notice of abandonment has been given, and this seems to imply that notwithstanding that notice of abandonment has been given the insurers may do what they can before action raised to diminish their liability and reduce the loss without being held to have accepted the abandonment.

Therefore I think we should hold that the third and fourth pleas for the defenders are well founded, and that as this action is laid upon the footing of the ship having become a constructive total loss, the action has been rightly dismissed by the Lord Ordinary.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Salvesen — Craigie. Agent — James Russell, S.S.C.

Counsel for the Defender and Respondent —Sol.-Gen. Dickson, Q.C.—Aitken. Agents —Webster, Will, & Ritchie, S.S.C.

Tuesday, June 8.

FIRST DIVISION.

MACKAY'S TRUSTEES *v.* MACKAY'S TRUSTEES.

Succession — Vesting—Fee and Liferent — Gift Qualified by Restrictions — Repugnancy.

A truster directed his trustees at the close of a general liferent given to his widow, to "divide or convey or pay and make over the whole estate and effects then belonging to me . . . to and among my children . . . equally share and share alike . . . it being provided in regard to the shares of my daughters that my trustees are hereby directed to hold the share of each daughter while unmarried in trust for her behoof in liferent for her liferent use allenarly . . . and on the marriage of such daughter it shall be the duty and right of my said trustees" to settle her share in accordance with the directions in the deed.

M, one of the daughters who survived her father and mother, died unmarried. *Held* that M had a vested interest in the fee of her share of her father's estate.

Per Lord M'Laren—An original gift of a fee on partition of a residue amongst the members of a family will not be cut down to a liferent by the effect of a subsequent direction to pay the income to one or more of the objects of the gift for life, unless the primary gift is so qualified in expression as to show that no higher right is meant to be given than is more fully explained in the sequel.

Mr John Mackay, Edinburgh, died on 19th April 1881, leaving a trust-disposition and codicil dated respectively 16th January 1878 and 18th July 1879. By his trust-disposition Mr Mackay conveyed his whole estate to trustees. By the third purpose of it, he directed his trustees to pay the whole income of his estate (except so far as required to meet a provision in favour of his eldest son, and certain annuities) to his wife Mrs Agnes Christie or Mackay in liferent, for her liferent use only.