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

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

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

Interlocutors reversed.

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

MARCH 14, 1853.

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

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

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

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

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

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

2. Because the appointment was necessary, in the circumstances, for the common interest, the surviving partners not having, according to the conditions of the contract, the powers requisite for winding up the company affairs. 3. Because the appointment was not only expedient, but necessary, in the circumstances, for the protection of the respondent's interests, the appellants having neglected the business of the company, having ignored his right to interfere, and having set up pretensions inconsistent with his claims and rights as a copartner,—which pretensions were altogether unfounded, but to which, nevertheless, they would be able to give effect if put in possession of the company property. 4. Because the appointment, in the circumstances, was proper and lawful, and in unison with the practice of the Court.

Sol.-Gen. Bethell, and *Rolt* Q.C., for appellants.—A petition for a judicial factor in Scotland is like a motion for a receiver in England. The sole question is, in both countries, whether sufficient ground is shewn for the interference of the Court. There is no such ground shewn in this case. The petition does not allege fraud, but only delay, which the answers expressly deny. The petition also alleges, that the contracts which formed the subject matter of the joint adventure were at an end, which we also deny. So that the petition and answers contradict each other on the most material points, yet the Court took no means to direct an inquiry into the truth. Nor are these two pleadings, though they formed the sole materials out of which the Court informed itself, even upon oath. Nevertheless the Court below has gone upon the assumption, that the one was false and the other true. We are therefore thrown back on the law. The contract between the parties must be taken to be an ordinary mercantile contract, and the rule is, both here and in Scotland, that the surviving partner is the person who has a right to wind up the affairs of the joint adventure.—*Philips* v. *Atkinson*, 2 Brown's Ch. C. 272; *Harding* v. *Glover*, 18 Ves. 281; 2 Bell's Com. 645. In Scotland, there is no precedent for an application like the present; the cases of *Dixon* v. *Dixon*, 6 W. S. 229; and *Maxtone* v. *Muir*, 7 D. 1006, do not touch the point. Nothing can turn on the circumstance, that a mandate had been granted by the respondent in favour of Collins; for no such authority was necessary, each partner having an implied authority to give a discharge in any business within the scope of the adventure. Hence the recall of the mandate by the death of the respondent, merely leaves things as they would have been, had no mandate ever existed. There is no ground even of expediency to warrant the appointment of the judicial factor. On the contrary, inasmuch as we have two thirds of the money to receive, it is much more our interest than the respondent's to have the affairs wound up promptly, and it is harsh in the Court to deprive us of the conduct of the pending negotiations before the arbiter, and give it to a stranger who is totally ignorant of the circumstances, and, therefore, less competent to deal with the common interest. It may be said, we may keep the respondent out of his money for an indefinite time; but he has always his remedy of a count and reckoning, and we shall be prepared to meet that action when it is raised.

Lord Adv. Moncreiff, and *W. M. James* Q.C., for respondent.—Our application is founded, *first*, On delay. The contracts are substantially completed; large sums have been received by Collins, as he himself admits, and yet no progress is made. *Second*, The mandate under which Collins acted, is recalled. This adventure was of such a nature, that each partner could not bind the others by a discharge, and the mandate alone enabled Collins to do so. In Scotland, a contract with two persons does not survive, and it was never contended in the Court below that the survivor could receive the money due. In the circumstances which have happened, the appellants are merely entitled to receive their shares, and we ours.

[LORD CHANCELLOR.—But it don't follow that you can restrain them from receiving theirs.]

When the amount is ascertained, they shall be paid as well as we, and the only proper way to ascertain it, is through a judicial factor, who is a neutral person.

LORD CHANCELLOR CRANWORTH.—My Lords, this is an appeal against an interlocutor of the Court of Session appointing a judicial factor in a case in which certain contractors had agreed to do certain railway works, and one of them dying before they were actually completed. They have since been completed. The dates seem to be as follow:—The contracts were entered into some time about the year 1847; the works were proceeded with, and, as is alleged by the respondents, were completed in the year 1850. That is disputed by the appellants; they say they were not really completed till, as to some of them, September 1851, and as to others of them, November 1851. Now, the difference between the statement of the two parties, as I conceive, arises from this, that the respondent treated the works as completed when in point of fact they were done; the appellants say they were not completed in the only sense in which this Court can deal with them as completed, till their liability in respect of those works had come to an end, and that they were, by the contracts, bound to keep them in repair for one year after they were actually done; so that they were not in truth, for this purpose, completed till September and November 1851. The contractor died in January 1851, and in January 1852 his representative applied to the Court of Session by petition for the appointment of a judicial factor, or, as it is called in this country, of a receiver—a neutral party, as it may be termed—to wind up the concern for both parties. It appears that a large sum was due to the contractors, amounting to somewhere about £15,000, and the Court of Session appointed the judicial factor. Of

that the appellants complained. When I say the Court of Session appointed the judicial factor, I have no doubt that is strictly correct. The Court of Session ordered him to be appointed, the majority having so decided, though there was one very learned Judge who took a contrary view of the case—the same view which is now contended for by the appellants. The question is, whether the petition did make a case which justified the Court of Session in appointing the judicial factor?

Now I confess, with all respect to the very learned persons who constituted the majority of the Court of Session, I have come to the conclusion, and I am bound so to state to your Lordships, that I think the reasoning of the learned Judge who took the contrary view, is the correct view in this case. Three persons entered into a contract—it was not strictly a partnership, but it was very candidly admitted by the respondent's counsel in the course of the argument, that the contract must be dealt with, in this winding up, upon the same footing as a mercantile contract would have to be dealt with. The interests of mankind require that it should be so considered, and there is no doubt, in most countries, it would be so considered. What is the law of Scotland with regard to the surviving partners in a mercantile contract? I take it to be exactly the same as the law of England, and as is stated in the very learned judgment of Lord Cockburn, who says—"When a partner dies, a right to wind up the partnership concerns is by law vested in the surviving partners. This is the principle on which all such estates are managed. This is a right, unquestionably, which, like all other things, is liable to be abused, and the Court may be called upon to interfere with the surviving and legal winder up. But, then, a case of abuse must be at least stated against him, why the winding up should be taken out of his hands." That is the view of the law as stated by Lord Cockburn, and, as I conceive, correctly stated.

That being so, the contracts having now been completed, and there remaining nothing to do but to wind up the concern, that is, to collect (in truth, substantially, that is the whole matter) the £15,000, or whatever may be strictly said to be the sum due from the railway company, why are the two surviving partners not to exercise their right of winding up the concern, and getting in the assets?

Two grounds have been alleged for calling on the Court to interfere and prevent them from exercising the right—the one is, that whatever may be the ordinary right, it is said in this case the right is specially limited by the terms of the contract. I confess that it was a long time before I could understand how that was meant to be contended; but I see now how it is put—it is thus: It is said, by the terms of the contract it was stipulated that Collins should receive the money that was coming from the railway company. It was so stipulated by what is called a mandate, that is, an authority given to him by the two other partners, by Young, and by the other surviving partner. Young having died, the mandate came to an end, it is said. What then? Suppose it is so, undoubtedly the result of that is, that Collins can no longer continue to receive by virtue of that mandate. All that follows is, that the parties are remitted to the same rights that they would have had if there had been no such mandate—that Collins and his partner are the parties entitled to receive the money, as if no such mandate had ever existed.

It seems to me going a long way to argue, that because there was that instrument executed, giving to Collins the right *inter se*, amongst the partners, of being the hand that was to receive—that when that can no longer be acted on by reason of the death of the party who gave the authority—you should imply from it a stipulation, that if the party who gave the authority died, the others should not have the rights which they would have had if no such authority had been given, but that those rights should be completely varied. It seems to me to be a very strange construction, and one which cannot be successfully contended for. I rely upon the matter with the more confidence, because, although the ingenuity of counsel has put their finger upon this as something which might introduce a special construction of this instrument, no such point was ever made below, and, in truth, there is no mention in the petition, of the mandate at all; it is only because it accidentally found its way into the answers to the petition, that the parties now seize upon it as a *tabula in naufragio*—as something that may float them through when everything else has failed.

Then the other point is this, which is to be found in what Lord Cockburn says, that "this is a right, unquestionably, which, like all other things, is liable to be abused, and the Court may be called upon to interfere with the surviving and legal winder up." Then, upon that ground, the respondent argues there are such circumstances, for here there has been an unwarrantable delay in getting in this money. If there be nothing suggested but delay—if the delay be unconscionable and unreasonable—that might be, I think, and would be, a very proper ground; but unless it is very clearly made out, one would be very loath to believe that in point of fact there can have been any unnecessary delay in a case where the monies to be got in belonged, as to two thirds, to the parties who were endeavouring to get them in, and who have had every interest to act with the greatest possible diligence. They might, however, have neglected their duty, and if they have neglected their duty, the Court might have been justified in acting on the delay so established. But what are the facts of the case? It is said in the petition, unsupported by any evidence, that they have been guilty of delay—the delay is totally denied by the

answer; the answer says, We did everything we possibly could; what we had to get in has not been a contracted sum of money, the amount of which could have been at once ascertained; we cannot put our finger here and say, pay us £10,000; what we have not got in has been the payments that we claim for extra work,—the railway company dispute the accuracy of our demand in respect of them, and, consequently, there has been obliged to be an arbitration,—we are doing all we can to force it on, but it is not in our power to come to any conclusion without the concurrence of the parties who are acting for the railway company. Therefore there undoubtedly has been that which is injurious to the respondent, though in a twofold degree it has been injurious to the appellants, but over which we have no control. The appellants say: we are doing the best we can—the delay is as injurious to us as it is to you—we have been guilty of no delay that we could avoid—on the contrary, we have done all we could to push the matter forward with all the rapidity in our power.

With all due deference to the learned Judges, it seems to me they have acted in the judgment on which they founded their opinions, upon an assumption of the untruth of the facts stated in the answer, there being nothing to rely on but the answer. If that be untrue, some steps should have been taken,—this is not the proper remedy. Here the only question was, whether a case was made on the petition and answer, shewing that there had been delay. It is alleged there was, and it is positively denied. How can you say, then, that delay is established?

It appears to me that that ground also fails—consequently it was a case in which no order ought to have been made. I shall therefore feel it my duty to move your Lordships that this interlocutor be reversed, and that it be remitted to the Lord Ordinary of the Court of Session with directions to discharge the petition.

LORD BROUGHAM.—My Lords, I entirely agree with the judgment which my noble and learned friend has so voluminously and satisfactorily pronounced. The only question would be, as the judicial factor has already gone in, it is quite clear it would be to the interest of both parties, that whatever he has done should stand—that the interlocutor should be so framed as to enable the parties to go on since the period at which the judicial factor entered; because, as the matter stands, the consequence of this would be, that everything *ab initio* would be upset.

Solicitor-General.—That has been provided for, my Lord, by a subsequent interlocutor. There has been a subsequent interlocutor by which the judicial factor has been permitted to proceed. The respondent has been ordered to answer whatever should be done by the judicial factor in the mean time, in the event of the interlocutor being reversed, and to restore matters to their former state.

LORD BROUGHAM.—It would be simply to reverse the interlocutor.

Solicitor-General.—It would, my Lord, be in this manner:—That this House do order the interlocutor to be reversed, the petitioner being held liable in the expenses of the petition, and remitted to the Court of Session to do in conformity with this judgment. The petition being utterly irrelevant, your Lordships will kindly give us the expenses of the petition; not of this appeal.

Lord Advocate.—I do not think that is the usual course. The course is this—When the interlocutor is reversed, the case goes back to the Court of Session. Your Lordships may leave it to the Court of Session to deal with the question of costs.

LORD BROUGHAM.—No; we give the expenses of the refusal.

LORD CHANCELLOR.—The House decide what ought to have been done below. What is it? That the petition should have been refused with costs. We must so declare—reverse the interlocutor—declare the petition ought to have been dismissed with costs—and remit it back to the Court of Session.

Solicitor-General.—There will be the same judgment in the other case.

LORD BROUGHAM.—Of course.

Interlocutors reversed, and case remitted.

Second Division.—Robertson and Simpson, *Appellants' Solicitors.*—Richardson, Loch and M'Laurin, *Respondent's Solicitors.*

MARCH 17, 1853.

THE RIVER CLYDE TRUSTEES, *Appellants*, *v.* JOHN MORRISON DUNCAN, *Respondent.*

Principal and Agent—Mandate—Factor—Minor—Promissory Note—*A sum of money belonging to a minor was lent out (upon a promissory note) by D of Glasgow in name of C of Liverpool, "curator for J., a minor." D was factor for the curator and minor. At the request of*