sufficiently appears that the increases in the takings are of what one may call a maintainable character.

Further, when a hypothetical tenant is considering the rent that he will pay for such subjects he will necessarily have regard to the possibility of competition in the immediate future. If the prices of building were so low that he might have to face competition in the same or in an adjoining street, that fact would naturally very much affect him in considering what rent he could afford to pay. Now it is quite evident that for some years to come a hypothetical tenant of any one of these theatres in Edinburgh would be justified in considering that he was protected by the existing building conditions from the fear of his *quasi* monopoly being invaded. And that would have a material effect upon the rent which he might be induced to offer.

There was a great deal of argument in the case upon the question of what part profits ought to play in determining what rent a tenant will offer. I quite agree with what Mr Fleming said, that profit *per se* is not a determining factor in arriving at a conclusion as to what valuation this Court should put upon a heritable subject. I take two illustrations which will indicate what my view is—If the profits in a particular shop were made from selling tobacco of particular excellence, then it might be a matter of indifference whether the heritable subject was in street A or in street B, because the consumers of that tobacco would follow it to the shop in which it happened to be sold. Therefore in a case of that kind profit might have very little bearing upon the question of what rent would be offered for the heritable subject. But, on the other hand, if the subject let were a salmon fishery, and if it were shown that the number of salmon caught had increased over such a period as to indicate that there would be a maintainable increase in the takings, then that would have a very material bearing upon the rent which a hypothetical tenant would be willing to pay for the particular casts in the salmon reaches of a particular river or part of the shore round the coast. That I think illustrates the difference between the shop and the theatre, because I certainly regard the theatre as much more nearly related to the salmon fishing, and if it is shown that the public are resorting to the theatres in increased numbers, and if there is every indication that that increased attendance will be maintained, then I think that has a material bearing upon the question of the rent.

I regard the published profits which have been spoken to in the case as having a certain bearing upon the matter. The theatre companies declined to produce evidence in regard to the takings of each particular house. They may have been justified in taking up that position; but I certainly draw the inference from their refusing to divide up the profits in order that those which effeired to a theatre in a particular town might not be disclosed, that if that had been done it would not have aided their case, and to that extent I think one is entitled to take into account the profits which have been spoken to.

There can be no question that the increase of the capital value of a subject like a theatre does have a bearing upon the rent which a hypothetical tenant would pay. I do not know that it is necessary to take the view that a tenant of such a subject would enter into a lease for twenty years. It would be quite sufficient if the maintainable profits extended over a substantial period, although it might be much less than that.

Accordingly I am of opinion that the assessor has put a moderate valuation upon these subjects.

LORD CULLEN—I agree with your Lordship in thinking that the assessor has shown an alteration of the conditions affecting the annual values of these theatres which *prima facie* justifies a revision and increase of their valuations.

The appellants complain that the valuations which he proposes are not verified by detailed evidence as to these altered conditions. But that evidence is all in the exclusive possession of the appellants themselves, and they have not seen fit to use it in order to refute the assessor's figures, and have indeed declined to produce it.

In these circumstances I am satisfied with the assessor's skilled valuations, with the modifications subject to which they have commended themselves to the Valuation Committee.

The Court were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellants — Moncrieff, K.C.—D. P. Fleming. Agents for Howard & Wyndham—Skene, Edwards, & Garson, W.S.; for the King's Theatre (Edinburgh) Limited — Duncan, Smith, & Maclaren, S.S.C.; for Moss' Empires, Limited — Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Respondent — Dean of Faculty (Murray, K.C.) — W. T. Watson. Agent—G. L. Sturrock, S.S.C.

COURT OF SESSION.

Saturday, February 21.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

LONDON AND EDINBURGH SHIPPING COMPANY, LIMITED *v.* COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

Contract — Hire — Ship — Rei interitus — Notice of Loss—Date of Termination of Hire.

A vessel which was requisitioned by the Government under a contract of hire stranded on 6th September 1917. In an action at the instance of the

owners for payment of hire to 25th October 1917 a joint minute was lodged, in which it was admitted that the stranding took place owing to a miscalculation of the navigating officer as to the tides, that on 8th September all attempts to salve the vessel were abandoned, that after 8th September salvage was impossible, that the vessel was a total loss as at 9th September, as and from which date salvage operations were restricted to her armament, and that no notice was given by the defenders to the pursuers that salvage operations had been abandoned until 25th October 1917, and that no notice was at any time given that the vessel had been discharged from Government service. *Held* (*rev.* judgment of Lord Blackburn, Ordinary) that the contract of hire terminated on 9th September, at which date the vessel became a total loss.

The London and Edinburgh Shipping Company, Limited, Leith, registered owners of the steamship "Fiona" of Leith, *pursuers*, brought an action against the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, *defenders*, for payment of the sum of £2147, 4s. 11d., with interest from 25th October 1917 for hire of the steamship "Fiona," which while in the defenders' service under a contract of hire stranded on 6th September 1917.

The defenders pleaded—"(1) The 'Fiona' not having been in His Majesty's employ since said date, September 7th, the defenders are entitled to absolvitor. (2) No hire being due or resting-owing by the defenders, they should be assoilzied from the conclusions hereof, with expenses. (3) The 'Fiona,' the subject of hire, having ceased to exist on September 7th, 1917, no hire was payable thereafter."

On 12th March 1919 the Lord Ordinary (BLACKBURN) allowed a proof; but in place thereof, on 14th May 1919 a joint minute of admissions for the parties was lodged.

The *joint minute* stated that the parties "admitted and hereby admit—1. That the letters produced in process, or the originals where copies only are produced, were written and dispatched by the parties by whom they bear to be written and dispatched of the date they respectively bear, and were received by the parties to whom they bear to be addressed in ordinary course of post. 2. That No. 8 of process is the form of charter-party B referred to on record, upon the terms of which the s.s. 'Fiona' was chartered by the defenders. No form of charter-party was ever filled up and signed by the parties as applicable to the 'Fiona.' 3. That the date at which the 'Fiona' was placed at the disposal of the Admiralty was 27th October 1914. That during the currency of the said charter-party the officers and crew of the 'Fiona' were the servants and under sole control of the defenders. 4. That during the currency of the charter-party the 'Fiona' stranded on Louther Skerry Rocks on 6th September 1917, owing to a miscalculation of the navigating officer in regard to the tides. That no notice was given by the defenders to the pursuers of the said stranding other than that contained in the letter of 20th September and 25th October referred to on record. 5. That on 6th September an effort was made to put a salvage pump on board, but the heavy sea running prevented this being done. On the same day an attempt was made to tow the 'Fiona' off the rocks by the tugs 'Alliance' and 'Labour,' but this attempt was unsuccessful. 6. That on 7th September the 'Fiona' had canted over considerably to port, and appeared lower in the water than on the preceding day. She was more broadside to the reef, and was moving with the swell. No attempt at salvage or boarding was practicable owing to the heavy sea and the rush of water over the reef. 7. That on 8th September the scene of the wreck was visited by a party of officers and men, who, after waiting some hours, at 9·15 a.m. when the tide was slack succeeded in boarding her. It was found that the ship was flooded fore and aft, that it was impossible to place the salvage pumps or gear on board, and that under the conditions of wind and swell no steps could be taken to proceed with operations for the salvage of the ship although a number of tugs were on the spot and available. The boarding party succeeded in salving a certain amount of gear, such as gun sights, gun fittings, chronometers, and other effects. They were able to remain aboard one hour, when the state of the weather forced them to leave. On that day the tugs returned to Longhope, and all attempts to salve the vessel were abandoned. 8. That on 9th September a heavy sea was running and a strong wind blowing. The ship was again visited by a party of officers and men, who were only able to remain a quarter of an hour, as heavy seas were beginning to break right over her. 9. That it is uncertain whether the 'Fiona' could have been salved if the weather conditions had been favourable, but after 8th September salvage of the vessel was impossible, and no further attempt was made to salve her. The vessel was a total loss as at 9th September 1917. 10. That as and from that date the salvage operations were restricted to the armament on board of her belonging to the defenders. On 10th September no salvage work was done; on 11th September the ship was visited and boarded and a twelve-pounder gun salved; on 12th September the ship was visited but owing to bad weather no boarding was practicable; on 13th September the ship was visited, and a four-inch gun was salved with much difficulty; on 14th September the ship was visited, boarded, and some books salved; on 18th September the ship was visited, but owing to bad weather no boarding was practicable; on 29th September the ship was visited, and two shackles of cable, two lavatories, and two cowls were salved. On 30th October it was ascertained that the 'Fiona' had broken up during the previous night, leaving only one of her masts visible. 11. That no notice was given by the defenders to the pursuers that the salvage

operations on the 'Fiona' had been abandoned until 25th October 1917, and that no notice was at any time given by the defenders to the pursuers that the 'Fiona' had been discharged from His Majesty's service or had ceased to be in His Majesty's employ. 12. That hire was paid by the defenders to the amount of £49,965, 11s. 10d., less a sum of £879, 5s. 6d. deducted by the defenders, as mentioned in the succeeding article. 13. That by warrant dated 9th May 1918 the defenders paid £40,470, 14s. 6d. under clause 7 of the charter-party in settlement of the loss of the vessel, but under deduction of said sum of £879, 5s. 6d., being the amount by which the payments made exceeded hire to 7th September 1917. No interest was paid upon the compensation moneys. 14. And further, that both parties hereby renounce probation."

The form of *charter-party* B referred to in the joint minute contained, *inter alia*, the following clause—"1. The owners have let and the Admiralty have hired and taken to freight the good ship under mentioned, viz. . . . for service and employment on monthly hire from the day of 19 for the space of calendar months certain, and thenceforward, until the Admiralty shall cause notice to be given to the owners that she is discharged from His Majesty's Service, such notice to be given when the said ship is in port in ."

The *letters* produced in process contained, *inter alia*, the following:—

Letter, Ministry of Shipping to pursuers.

"20th September 1917.

"Gentlemen,—With reference to your letter dated 11th September respecting the present position of H.M.S. 'Fiona,' I have to acquaint you that this vessel is ashore, but efforts are now being made to salve her. A further communication will be made as soon as fuller details as to the possibility of her salvage are received.—I am, gentlemen, your obedient servant,—H. GRIFFIN,

p. Director of Naval Sea Transport.

"The London and Edinburgh Shipping Company, Limited, 8 and 9 Commercial Street, Leith."

Letter, Ministry of Shipping to pursuers.

"25th October 1917.

"Gentlemen,—With further reference to your letter dated 11th September and my letter of the 20th September in answer thereto respecting the present position of H.M.S. 'Fiona,' I regret to inform you that all efforts to salve this vessel have proved fruitless and salvage operations accordingly have been suspended. As this vessel was abandoned on the 7th September, it is proposed to regard this date as her last day on hire. I have to request that you will forward your claim for compensation to the Accountant General, Ministry of Shipping (Room 24).—I am, gentlemen, your obedient servant,—B. A. KEMBALL-COOK,

Director of Naval Sea Transport.

"The London and Edinburgh Shipping Company, Limited, 8 and 9 Commercial Street, Leith."

On 31st May 1919 the Lord Ordinary decerned against the defenders in terms of the conclusions of the summons.

Opinion.—"In my previous note, after the discussion in procedure roll, I stated that the pursuers' right to freight, for which they sue, must depend upon the date when the contract between them and the defenders was terminated, and I indicated an opinion that the contract might only terminate upon the date when the ship was actually destroyed, and not upon the date when she became a 'total loss' within the meaning of a contract of marine insurance. I did not consider it necessary to say more until the facts had been ascertained as to the position of matters from and after the 6th of September, when the ship stranded. Instead of going to proof, the parties have adjusted a minute of admissions, which I do not regard as entirely satisfactory in enabling me to decide the case; but as they have renounced further probation I must dispose of it upon such admissions as they have made.

"In order to ascertain when the contract between the parties terminated it is necessary in the first place to consider its terms. At the discussion in procedure roll it was stated that the form of charter-party B was an unfilled-up form of the charter-party under which the 'Fiona' was requisitioned, and that the filled-up form would be produced. It now appears from the minute of admissions that this form of charter-party was neither filled up nor signed, but it is admitted in the minute that No. 8 of process as it stands 'is the form of charter-party upon the terms of which the s.s. "Fiona" was chartered by the defenders.' It is not stated in the minute, but was admitted at the bar, that the rate of hire left blank in clause 5 of the charter-party was fixed by a board of arbitration in terms of the Admiralty letter of 27th October 1914, which contained the intimation to the pursuers that their vessel was to be requisitioned. The above letter refers to an 'accompanying tender form' to be filled up and returned to the Director of Transports. This tender form has not been produced, and the case is presented by both parties on the footing that [the form of charter-party] constitutes the terms of the contract between the parties and must be construed as it stands.

"The nature of the contract is disclosed by the first four and the seventh clauses of the charter-party, from which it appears that the defenders hired the ship for 'service and employment' until they shall cause notice to be given to the owners that she is discharged from service. It is provided that such notice is to be given when the ship is in a port the name of which is left blank. It is not necessary to consider the questions which might have arisen from this failure to name the port. I think the proviso sufficiently indicates the intention of parties that termination of the contract by delivery of the ship could only be accomplished at a port where the defenders could reasonably be expected to accept delivery. It is also agreed that the defenders 'may at any time while the ship . . . is . . . on hire . . . upon giving notice to the owners of their intention' purchase the vessel at a price which again is left blank. I do not think that the

omission of the price has the effect of cancelling the power to purchase, and I construe clause 2 of the charter-party as entitling the defenders to terminate the contract at any moment by giving notice of their intention to purchase, at a price to be afterwards fixed. The same 'exigencies of the case' referred to in the defenders' letter of 27th October 1914 as precluding prior arrangement as to the rate of hire would apply to the fixing of the price in the event of purchase. The uses to which the defenders might put the vessel are unrestricted. She was to be at their absolute disposal and control, and they had power to alter her outfit and machinery in any way they might think fit, provided only that she should be restored to the owners in the same condition as she was at the date of requisition. Finally the defenders undertook all risk and expense of the ship during the continuance of her service under the charter-party.

"Although the form of contract is a charter-party, and although the hire paid is designated as freight and was to be calculated at a rate per ton on the ship's tonnage, the nature of the contract differs *toto cœlo* from the ordinary commercial contract of carriage which one usually finds embodied in a charter-party. In my judgment the contract, to quote from Carver on Carriage by Sea, section 112, 'is really one of letting the ship, and, subject to express terms of the charter-party, the liabilities of the ship owner and the charterer to one another are to be determined by the law which relates to the hiring of chattels and not by reference to the liabilities of carriers and shippers.'

"Now a contract of hiring of a chattel or specific subject gives to the lessee the use and enjoyment of the subject hired while the property remains with the owner, and where the contract has been entered into between free agents it may readily be construed as importing an implied condition that the lessee is only to be bound by its terms so long as the subject hired is capable of such use and enjoyment as was in contemplation of the parties when the contract was entered into. In a contract between free agents for the hire of a ship, whether for commercial or pleasure purposes, I think it might readily be implied that if through no fault of the lessee the ship became unavailable for such further use and enjoyment as a ship is ordinarily capable of, the contract of hiring would be thereby terminated. An illustration of the application of such an implied condition is to be found in the case of *Scottish Navigation Company* v. *Souter & Company* (1917, 1 K.B. 222), and I refer to the opinion of L.J. Swinton Eady at pp. 236-7. I do not, however, think it is possible to imply any such condition in connection with the charter-party now under consideration. The pursuers were not free agents in entering into the contract, but were acting under a letter of requisition. The defenders, although under the charter-party nominally lessees of the ship, acquired rights over and obligations towards her which in many respects are more akin to those of an owner than those of a lessee. They could alter her structure and make unrestricted use of her, and they took all risk of the vessel upon themselves. That the freight bore no direct relation to the beneficial use and enjoyment of the ship appears to follow from the fact that the lessees would be bound to pay freight throughout the periods during which the ship might be undergoing alterations or repairs, when she would be incapable of beneficial use or enjoyment. If at any time the lessees considered the payment of freight inconsistent with the use being made by them of the ship, they had their own remedy in their power to purchase, which would at once terminate the contract and constitute them owners in title as well as in substance. The mere fact that the lessees took upon themselves the risk of the vessel would, in my opinion, be enough to deprive them of their right at common law to abatement of hire if the ship had been partially destroyed by accident (1 Bell's Com., 482). Accordingly I cannot read into the contract any such implied condition as I have referred to, and in my judgment it must be construed as binding upon the lessees so long as the ship remained in form and substance a ship and the contract itself had not otherwise been terminated.

"But even if I thought any such implied condition could be read into this contract, I should have held that its application was excluded under the circumstances of the present case. It is admitted that the 'Fiona' stranded on the Skerry Rocks on 6th September 1917 owing to a miscalculation of the navigating officer in regard to the tides. I hold this to be an admission of fault on the part of the defenders, and in my opinion a contract of hiring cannot be held to be terminated because the lessee has temporarily lost the use of the subject, where the loss of use is due to his own fault and the subject still answers to the description of what was originally hired out. There can be no doubt that total destruction of the subject hired will terminate the contract of hire although it may create other liabilities between the parties, and in my opinion the question upon which the decision in this case depends is the *punctum temporis* at which the 'Fiona' was destroyed and ceased to be a ship. On this question the decision in the case of *Barr* v. *Gibson* (1838, 3 Meeson & Welsby, 390) appears to me to be much in point, although the contract in that case related to the sale and not to the hire of a ship. At the date when the contract was completed, 21st October, the ship was on a voyage. It subsequently transpired that on the 13th October she had gone aground in a storm on the coast of the Prince of Wales Island, and had been abandoned by the crew, who, however, subsequently had access to her. Had the weather been favourable she might have been got off, but this proved impossible, and the captain, after calling a survey, had sold her on the 24th October for £10. The price paid under the contract of sale was £4200, and the Court held that the purchaser was bound by the

bargain, as at the date of the contract the ship was capable of being transferred. In giving judgment Baron Parke said—'We are of opinion that upon the evidence given on the trial the ship did continue to be capable of being transferred as such at the date of the conveyance, though she might be totally lost within the meaning of a contract of insurance, which proceeds upon a different principle and may take place with less of damage to the ship itself than occurred in this case. It proceeds upon the loss of the subject insured for beneficial purposes. Here the subject of the transfer had the form and structure of a ship, although on shore with the possibility though not the probability of being got off. She was still a ship though at the time incapable of being, from the want of local conveniences and facilities, beneficially employed as such.'

"It may be conceded that the above decision would have no application to an ordinary contract of hiring of a ship under which delivery of the ship had not been given to the lessees before she stranded. In such a case the owner would in my opinion be bound to deliver a ship capable of beneficial use and enjoyment, and under the circumstances would be unable to do so. But if I am right in the construction which I have placed on the present contract the considerations are entirely different, and the only question is whether the ship after she stranded was still a ship though at the time incapable of being beneficially employed as such. On this question the dicta of Baron Parke are directly in point, and the decision in the case establishes that a ship may continue to be a ship after she has become a total loss within the meaning of a contract of insurance. In allowing a proof I directed attention to the distinction between 'total loss' under a policy and the total destruction of the ship, as there were no averments on record to indicate when the latter event occurred. The minute of admissions is not much more specific on the subject. The ship stranded on 6th September 1917, and it is admitted (article 9) that 'it is uncertain whether the "Fiona" could have been salved if the weather conditions had been favourable, but after 8th September salvage of the vessel was impossible and no further attempt was made to salve her. The vessel was a total loss as at 9th September 1917.' It is right to say that when the proof was called the minute had not been finally adjusted, and the Dean of Faculty for the pursuers stated that his difficulty in agreeing to the minute lay in this article and in the use of the expression 'total loss,' which he considered cryptic when read along with the statements in the following article of the minute of admissions. The Solicitor-General, however, for the defenders, refused to alter the terms of article 9, and the Dean finally accepted the minute, reserving his right to construe the meaning of 'total loss' by reference to article 10 of the minute. Now I think the admissions in article 10 make it clear that the ship continued to be a ship for some time after the 9th September. She was 'visited and boarded' on the 11th, and a twelve-pounder gun was salved. She was visited again on the 11th and 12th, and on the latter date a four-inch gun was salved. On the 14th she was visited, boarded, and some books salved, and on the 18th and 29th she was visited and two shackles of cable, two lavatories, and two couls were salved. The minute is silent as to her condition between 29th September and 30th October, but it is stated that on the latter date 'it was ascertained that the "Fiona" had broken up during the previous night.' These admissions appear to me to be quite inconsistent with what is requisite, according to the decision in *Barr* v. *Gibson*, to establish the total destruction of the ship on the 9th September. Accordingly the first conclusion I reach is that the words 'total loss' in article 9 of the minute are used in the same sense as in reference to a contract of insurance. I rather think that the defenders present their case on the footing that what would amount to total loss under a contract of indemnity is sufficient to terminate the contract of hire, and that this is the meaning of their third plea-in-law. They did not maintain in argument that the ship had ceased to be a ship on the 9th September, but only that in the event of its proving thereafter impossible to salve her the contract was terminated as from that date. I have already indicated that in my opinion the termination of the contract depends upon the destruction of the ship, and I have now to consider whether it is possible to ascertain with any certainty from the established facts at what date this took place. In addition to the admissions in articles 9 and 10 of the minute already referred to there are the two letters addressed to the pursuers dated 20th September and 25th October, and narrated in the condescendence, which throw some light on the matter. That of 20th September announces that the '"Fiona" is ashore but efforts are now being made to salve her.' In their answers the defenders state that this letter was written under a misapprehension, but there is no admission of this averment in the minute unless it be in article 9, which, however, does not amount to more than this, that it was the weather conditions alone which rendered salvage of the vessel impossible after 8th September. The letter of 25th October narrates 'that all efforts to salve this vessel have proved fruitless, and salvage operations accordingly have been suspended.' It further appears from articles 12 and 13 of the minute that the defenders had actually paid £879, 5s. 6d. of hire for the ship for an undisclosed period subsequent to 7th September, and that this sum was deducted from the amount due for the loss of the vessel under clause 7 of the charter-party. As the hire was, in terms of clause 6 of the charter-party, paid monthly on the 25th of each month, I think it may be assumed that the defenders did in fact pay the hire up to the 25th of September, and that it was only an afterthought that they maintained that the contract had been terminated by the stranding of the vessel, and that they were entitled to repeti-

tion of the hire paid subsequent to 7th September.

"Under these circumstances I do not think one can reach any more definite conclusion than that the ship still existed as a ship on 29th September, but had ceased to do so on 30th October. But the *onus* of proving that the contract had been terminated and that they were no longer liable for hire rests upon the defenders, and as they have produced no evidence that the ship was not still a ship on 25th October I see no alternative to finding that the pursuers are entitled to freight down to that date, which is what they sue for. I reach this conclusion with some reluctance, as it is obvious that the pursuers have already been handsomely paid for the use and loss of their vessel, and have received a very much larger sum than they would have done had she been purchased at the first instead of being chartered for freight. But I can only give effect to what I think is the legal meaning of the contract that was made with them.

"There is only one other matter I need refer to. In my former note I expressed the opinion that the charter-party provided for the *pro rata* payment of freight after the expiry of three months, which I was informed would prove to be the number of months inserted in the first clause of the charter-party as limiting the period of payment of freight by the month. Pursuers' counsel argued that I should reconsider this opinion, and maintained that the failure to fill in the blank in the first clause left the defenders bound to pay a full month's freight for the use of the vessel for any part of a month so long as the contract subsisted. I still adhere to my former opinion and think that the provisions of clause 6 of the charter-party which provide that sums should be paid to account of the freight at the completion of each month's service, and that on the termination of the contract 'the balance of hire' should be paid, indicate the understanding of the parties that on the termination of the contract there might be a balance due of less than a full month's freight. This question only arises if the contract be held to terminate at any date other than the 25th September or 25th October. Accordingly, had I been able to hold that the contract of hire was terminated when the ship became a 'total loss' within what I take to be the meaning of article 9 of the minute of admissions, I should have found the pursuers only entitled to freight for the two days between 7th and 9th September and not for the whole of that month."

The defenders reclaimed, and argued — Hire was not due if there was either actual physical or constructive total loss. Hire was only due as long as the ship was in existence, and having ceased to exist it was no longer a subject of hire. The Lord Ordinary had held that it was enough if the subject of hire was in form and substance a ship, but she must be capable of hire before she could be subject to payment of hire. *Barr* v. *Gibson*, 1838, 3 M. & W. 390, founded on by the Lord Ordinary, was a case of warranty between buyer and seller, and had no application to the present circumstances. There was no peculiarity in the meaning of total loss in a contract of insurance. The provision as to notice only applied where the ship was discharged and had reached port. The date of loss and not the date of notice determined the liability to pay.

Argued for the pursuers and respondents —The destruction of an article without the fault of the lessee would terminate the hire, but the *onus* was on the hirer to show that it had perished without his fault—Stair, i, 15, 2; *Taylor* v. *Caldwell*, 1863, 3 B. & S. 826. When the subject of hire was destroyed through the fault of the lessee, then notice was necessary to terminate the contract—Ersk. Inst. iii, 3, 14-15; Bell's Prins., secs. 141, 142, and 145; Story on Bailments, secs, 414 and 418: Pothier, Contrat de Louage, secs. 308 and 309. In the present case such fault was made matter of admission, and notice was therefore necessary, but no such notice was given till 29th October. There was no undertaking on the part of the lessors that the vessel should be seaworthy, and she might have been used by the Admiralty for any purpose. The contract in the present case was one of demise, and not merely for the purpose of navigation. *Barr* v. *Gibson*, *cit. sup.*, was in point. The question was whether the vessel was an entity called a ship, capable of beneficial enjoyment, and not whether there was total loss in the sense of a contract of marine insurance. When the subject perished through the fault of the lessee, the lessee was liable for the hire and for the value of the subject at the date of intimation of conclusion of his contract of hire. When the lessee refused to pay, the contract was terminated by the breach, and gave rise to (1) damages for refusal to pay the hire, and (2) damages for failure to re-deliver the subject of hire. Reference was also made to Arnould on Marine Insurance (9th ed.), sec. 1045, and to Carver on Carriage by Sea (6th ed.), sec. 112.

At advising—

LORD JUSTICE-CLERK — In this case the pursuers sue for hire of their ship the "Fiona," alleged to be due to them under a charter-party, as to the terms of which the parties are agreed. The question we have to decide is whether the contract of hire was or was not determined by the destruction of the ship in September 1917. On that question the parties were not in agreement, and the Lord Ordinary on 12th March 1919 allowed a proof before answer. It became unnecessary to take the proof, because the parties agreed on a minute of admissions in which after making certain admissions they renounced probation.

In my opinion we must accept that minute as containing the whole facts as agreed upon between the parties.

In the minute it is set out in article 4 "that during the currency of the charter-party the 'Fiona' stranded on Louther Skerry Rocks on 6th September 1917, owing to a miscalculation of the navigating officer in regard to the tides. That no notice was

given by the defenders to the pursuers of the said stranding, other than that contained in the letter of 20th September and 25th October referred to on record." It is also thereby agreed (in article 7) that on 8th September "all attempts to salve the vessel were abandoned," and (in article 9) that "after 8th September salvage of the vessel was impossible and no further attempt was made to salve her." The vessel, it was further admitted, was a total loss as at 9th September 1917, and "as and from that date the salvage operations were restricted to the armament on board of her belonging to the defenders." Article 11 of the minute states that "no notice was given by the defenders to the pursuers that the salvage operations on the 'Fiona' had been abandoned until 25th October 1917, and that no notice was at any time given by the defenders to the pursuers that the 'Fiona' had been discharged from His Majesty's service or had ceased to be in His Majesty's employ."

In my opinion the minute imports that the 'Fiona' was a total loss as at 9th September. I do not read the words "total loss" as having any technical meaning, or as meaning anything else than that the subject of the charter-party had perished on 9th September. The minute was adjusted and signed for this case, which is one in which the pursuers sue for hire under a contract for the hire of their ship, and the minute must in my opinion be construed accordingly.

I hold therefore that the subject of hire had as matter of admission perished on 9th September. In the note to his interlocutor of 12th March the Lord Ordinary says that "total loss would clearly terminate the contract." I think that is a sound view according to our law. Lord Neaves in the case of *Duff* v. *Fleming* ((1870) 8 Macph. 769, at p. 771) says — "By the law of Scotland the contract of location is dissolved *rei interitu*." In my opinion it is matter of admission that there was such *interitus* of the "Fiona" on 9th September. The pursuers argued that on the correspondence this was not so—that the defenders by their letters had continued the hire indefinitely so far at least as to cover the period for which hire is now claimed. The defenders replied that the main letter had been written under a misapprehension. In my opinion the minute of admissions excludes argument on this point. It is as if it had been found as an admitted fact that the ship had ceased to exist and had been totally destroyed on 9th September. The pursuers make no case either by way of averment of fact or plea-in-law of personal bar against the defenders, but only a case of a contract of hire of the "Fiona" under the charter-party. The "Fiona" having been lost in the sense of having perished the contract of hire terminated, and with it the pursuers' right to claim hire came to an end.

Even assuming (as rather appears to me to be the case) that there is an admission that the *interitus* was due to the fault of the defenders or of those for whom they were responsible, that does not in my opinion preserve the contract of hire as an existing contract. It may give the pursuers a right to claim damages under two heads—(1) for the loss of what they would have made under the contract of hire, and (2) for the loss of their ship. Neither of these things is claimed in this action, which is not an action of damages, but an action for the hire of the "Fiona" regarded as a proper subject of location down to 25th October 1917 under an existing contract of hire. In my opinion the *interitus* of the "Fiona" on 9th September destroys any ground for such a claim.

The defenders admitted that hire was due for two days, 8th and 9th September. *Quoad ultra* the defenders in my opinion should be assoilzied from the action as laid.

LORD DUNDAS—I am of the same opinion.

In this case the parties elected to renounce probation upon an agreed joint minute of admissions in fact. This course has its advantages but also its risks. The adjustment of such a minute is in my judgment one of the most difficult and delicate tasks which fall to the lot of counsel. An unguarded admission, or an inadvertent omission, may be fatal. But once adjusted, the minute forms the evidence in the case; it is the proof at large, in synthesis; and its statement of admitted facts must be accepted as final.

Now the minute contains, *inter alia*, admissions (article 8) that on 8th September 1917 "all attempts to salve the vessel were abandoned," and (article 9) that "after 8th September salvage of the vessel was impossible, and no further attempt was made to salve her. The vessel was a total loss as at 9th September 1917." I do not think these words are ambiguous or admit of construction. But it was argued that the admissions in article 10 show that the words "total loss" must be read in a qualified sense, such as that which they might import in a contract of insurance, and not in accordance with their plain and ordinary meaning. All the admitted facts must, no doubt, be taken into account and duly weighed. In article 10 it is stated that on various dates after 9th September and down to the 29th the ship was visited and certain things salved from her. That does not seem to me to be inconsistent with the statement in article 9 that she was at 9th September a total loss, in the ordinary meaning of the words. It may quite well be, and indeed we must, in my judgment, accept as admitted fact that the "Fiona" was as at 9th September a total loss, though it was possible thereafter to salve certain things from the wreck, and she did not "break up" till the night of 29th October. But then the pursuers' counsel relied strongly on a letter dated 20th September 1917 in which the Admiralty, writing to the pursuers, "have to acquaint you that this vessel is ashore, but efforts are being made to salve her. A further communication will be made as soon as fuller details as to the possibility of her salvage are received." It was urged that this representation on the part of the defenders shows that the admission that the "Fiona" was as at 9th September a

total loss must be accepted with reservation. I do not think that this will do. The joint minute admits (article 1) that the letters in process, including that of 20th September, were duly written and despatched, and duly received. This does not of course cover or include any admission as to the accuracy in fact of statements in the letters. On record the defenders explain that the letter of 20th September was written under a misapprehension, but this is not admitted by the pursuers, either on record or in the joint minute. The position thus is that we have on the one hand an admission in fact that the "Fiona" was a total loss as at 9th September, and on the other hand an admission that on 20th September, the defenders made certain statements in a letter. It may be noted by the way that the pursuers do not suggest that these statements in any way prejudiced their position at the time. In these circumstances it seems to me to be clear that if there be apparent inconsistency between the fact admitted in article 9 of the minute and statements contained in the letter of 20th September, the former must prevail. The letter is really of no material importance, it drops out of the case; the admission in article 9 is equivalent to an agreed finding in fact as on a concluded proof.

We must therefore, in my judgment, hold that the "Fiona" was on 9th September 1917 a total loss in the ordinary meaning of the words. If that be so, I cannot understand how it should be possible that rent or hire money should be exigible by the pursuers after that date. The contract between the parties was in my opinion necessarily dissolved at that date *rei interitu* by the perishing of the subject of the contract. Assuming that article 4 of the joint minute imports that the destruction of the vessel occurred through the fault of the defenders, the result could not in my judgment be different. If the subject perishes through the fault of the lessee, the contract is, I apprehend, none the less dissolved, though the quality and measure of damage may be affected.

These reasons lead me to differ from the conclusion which the Lord Ordinary, with expressed reluctance, arrived at. The Solicitor-General, for the defenders, admitted that they were liable in hire money till 9th, and not 7th September 1917. The pursuers are entitled to be paid as for these two days, but *quoad ultra* the defenders should in my opinion be assoilzied from the conclusions of this action as laid.

LORD SALVESEN — This is an action for payment of the hire of a vessel chartered by the defenders from the pursuers. The vessel stranded in the course of a voyage on 6th September 1917. Efforts were made to salve her on the two following days but without success. After 8th September salvage of the vessel had become impossible, and according to the joint admission of parties she "was a total loss as at 9th September 1917." Thereafter some armament and equipment were salved on successive visits made by persons acting on behalf of the defenders, the last visit being made on 29th September. On 30th October it was ascertained that the ship had broken up on the previous night leaving only one of her masts visible.

The pursuers sue for hire up to 25th October, being the date when they were first informed that the vessel had been abandoned. The defenders offer two days' hire in addition to the hire already paid down to 7th September, and plead that they are absolved from any further liability for hire by the destruction of the subject hired.

I am of opinion that the defenders are right. The liability to pay the stipulated hire of a specified article ceases with the existence of the article. According to the facts here admitted the vessel was a total loss on 9th September. In face of this admission it appears to me to be immaterial that she retained the form of a ship. So does a ship that is at the bottom of the sea. In either case if it is admitted that she cannot be salved except at a cost exceeding the value of the subject salved, she is a mere wreck incapable of serving the uses to which a ship is put. She has ceased to exist as the subject of hire. When a servant dies the right to wages dies with him. While the pursuers concede that this is also true where the subject of hire perishes without fault on the part of the lessee, they say that this does not follow where the destruction is brought about by his fault, and a passage in Stair's Inst. was cited in support of this proposition. In my opinion that passage is to be understood in the sense that all rights and obligations arising out of the contract of hire terminate with the destruction of the subject hired where the destruction is due to causes beyond the lessee's control. It does not lend any countenance to the idea that the obligation to pay hire continues where the loss is due to the lessee's fault. If it were so, when would the obligation terminate? The pursuers seem to answer that it goes on till the lessee intimates the loss. There is neither principle nor authority to support such a contention. A right to claim damages, no doubt, at once emerges on the negligent or wilful destruction of the lessor's property, but the existence of such a right is inconsistent with a continued obligation to pay hire.

I am therefore of opinion that the Lord Ordinary has erred in giving decree for the stipulated hire up to 25th October. The case of *Barr* v. *Gibson* (3 M. & W. 290) on which he relies has, I think, no application, for it was not found as a fact that at the date of the sale the vessel had become a total loss. Had there been such a finding I apprehend the decision would have been the other way. While there was still a prospect of the vessel being salved the hire continued to run, as it did here during the two days following the stranding. Whenever it was definitely ascertained that the ship was a total loss the contract for payment of hire came to an end. Of course if the ship was lost through the fault of the defenders as here alleged their obligation to compensate the owners remains, but this is a claim arising *ex delicto* and not *ex contractu*, and the present action

is not for payment of damages but for payment of hire.

LORD GUTHRIE—The decision of this case turns, in my opinion, on the sound construction of article 9 of the minute of admissions. Towards the end of his opinion the Lord Ordinary says that the defenders "have produced no evidence that the ship was not still a ship on 25th October." But there is no room in this case for considering a balance of evidence. The parties superseded the order for proof allowed on 19th March 1919 by their minute of admissions, and the only question to be determined is the question of construction above mentioned, or alternatively, the sound construction of article 9, taken along with the other articles of the minute and the letters addressed by the defenders to the pursuers dated 24th September and 25th October 1917. In whichever form the question be stated I think the defenders are entitled to absolvitor.

The Lord Ordinary holds that the minute of admissions, read as a whole, necessitates a limited construction for the words "total loss" in article 9, the construction applicable to a contract of insurance, and excludes the wider construction that as at 9th September the subject had perished because it was impossible to salve the vessel. Taking article 9 by itself, I do not know that the Lord Ordinary would have reached this conclusion. It is difficult to see how he could, for article 9 contains its own interpretation of a total loss, namely, a ship which had not only become an unhireable subject, but which had perished because it was impossible to salve it. This element was not present in the case of *Barr* v. *Gibson*, 3 M. & W. 290, relied on by the Lord Ordinary. In that case instead of it being impossible at the date in question to salve the vessel, Baron Parke refers to "the possibility, though not the probability, of the vessel being got off." The Lord Ordinary indeed founds on the introductory words of article 9 and glosses them thus—"It was the weather conditions alone which rendered salvage of the vessel impossible after 9th September." But no such positive assertion is made in article 9. All that is said is "that it is uncertain whether the 'Fiona' could have been salved if the weather conditions had been favourable"—an academic statement which could be made in many cases of undoubted "total loss" in the fullest sense of the words.

I find no sufficient reason to limit the ordinary meaning of the words "total loss," or their meaning as defined in article 9, by anything either in article 10 of the minute or in the letters above mentioned. Article 10 does not refer to salvage of the ship, but to salvage of particular articles which it was possible to retrieve from a wreck which, as previously admitted, it had become impossible to salve.

As to the letters, the representation therein made seems to me irrelevant in the present question. It may be that if the pursuers can prove loss incurred by them through action taken by them on the faith of these representations, they may in a properly averred and proved action of damages have a remedy by way of damages. No such averments are made in this case. But even if they were, they would be irrelevant to what is the only issue, namely, at what date did the "Fiona" become a total loss, in the sense of a vessel the salvage of which was impossible? As I read the minute of admissions, the parties fixed that date as at 9th September 1917. I therefore agree that the Lord Ordinary's interlocutor must be recalled and the defenders found entitled to absolvitor, subject to the adjustment agreed on at the bar.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers (Respondents)—Dean of Faculty (Murray, K.C.)—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Defenders (Reclaimers)—Sol.-Gen. (Morison, K.C.)—Black. Agent—Thomas Carmichael, S.S.C.

Wednesday, February 4.

SECOND DIVISION.

(BEFORE SEVEN JUDGES.)

[Lord Sands, Ordinary.

CIE DES FORGES ET ACIERIES DE LA MARINE ET D'HOMECOURT *v.* GEORGE GIBSON & COMPANY, LIMITED.

Ship—Collision—Duty of Holding-on Vessel—When Departure from Collision Regulations Justified—Regulations for Preventing Collisions at Sea, Art. 21 *and Note.*

The Regulations for Preventing Collisions at Sea provide:—Article 21—"Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed." *Note.*—"When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

In order to justify a departure from Article 21 of the Regulations for Preventing Collisions at Sea it is not necessary for the holding-on vessel to prove that by no possibility could a collision have been avoided had she maintained her course and speed, but only such facts and circumstances as would justify a skilled seaman in believing that a collision could not be avoided by the action of the giving-way vessel alone.

Circumstances in which, in a collision between two vessel, *held* (*rev.* judgment of Lord Sands, Ordinary, *dis.* Lord Justice-Clerk) that the holding-on vessel was justified in departing from Art. 21