consulted Judges, I do not think that the present case requires that this vexed question should be reconsidered just now. Postponement of such reconsideration appears to me to be preferable in respect that few if any cases can now occur under the 1897 Act, and that when it arises under the 1906 Act certain different considerations arising on the different provisions of that Act will apply, rendering a decision on the Act of 1897 no conclusive authority in a case arising under the Act of 1906.

I think it is unnecessary to entertain it in the present case, because I am satisfied that the learned Sheriff was bound by the terms of the medical report, on a remit made nearly three years after the date of the accident, and which report conclusively determined that the respondent had recovered his capacity for his ordinary work. No proof being tendered, as I think it might, that notwithstanding his recovery of capacity he was only able to earn a less weekly wage than before his accident, the Sheriff was, I think, bound then and there to end the compensation.

The LORD PRESIDENT intimated that Lord Skerrington, who was absent at the advising, concurred in the opinion of Lord Low.

The Court pronounced this interlocutor—

"The Lords having resumed consideration of the stated case with the opinions of the consulted Judges, in conformity with the opinions of the majority of the Court of Seven Judges, answer the fourth question in the negative, and find it unnecessary to answer the other questions: Remit the case to the arbitrator to find and declare that the applicant's right to compensation has come to an end, and to dismiss the application for review accordingly: Find the appellant entitled to the expenses of the stated case," &c.

Counsel for Appellant—Constable, K.C. —Jameson. Agents—Simpson & Marwick, W.S.

Counsel for Respondent—Umpherston—Hendry. Agent—John S. Morton, W.S.

Thursday, May 26.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

MAIN AND OTHERS (OWNERS OF THE "GRATITUDE") *v.* LEASK AND OTHERS (OWNERS OF THE "COMELY").

Ship — Collision — Total Loss — Damages, Measure of — Remoteness — Prospective Profits—Fishing Vessel—Joint Adventure.

A fishing vessel became a total loss in consequence of a collision. In an action by her owners and crew, who were joint-adventurers, *held* that the claim of the pursuers was not limited to the market value of the ship at the date of her loss, but that they were entitled to recover the profits they would have earned between the date of her loss and the end of the fishing season, if relevantly averred and supported by sufficient evidence, and *proof before answer allowed.*

On 3rd June 1909 James Main and others, three of the registered owners of the steam drifter "Gratitude," and (2) Alexander Stewart and others, members of the crew, brought an action against W. H. Leask and others, owners of the steam drifter "Comely," in which they sued for £400 as the profits they would have earned during the fishing season had the vessel not been lost. The "Gratitude" had become a total loss in consequence of a collision with the "Comely" on 8th October 1908.

The pursuers averred that the collision was due entirely to the fault of the defenders, and further averred:—"The 'Gratitude' was insured for £2600, and this sum has been recovered from the insurance company. That sum, however, does not represent her full value at the time of the collision. The pursuers have in consequence of said collision suffered serious loss and damage. All the fishing gear on board . . . as well as the stores, and also the personal effects of the pursuers, have been lost. . . . In addition to the loss of these, the pursuers lost their respective interests in the profits of the fishing which they would have made but for the sinking of the 'Gratitude,' and which are moderately estimated at the sum of £400. . . . The 'Gratitude' was being worked under an agreement in terms of which the profits of the fishing (after deducting expenses) were to be allocated one-third to the owners of the boat, one-third to the owners of nets, and one-third to the crew. . . . In any event, the pursuers, or such of them as are registered owners of the 'Gratitude,' are entitled to recover said sum of £400, or proportional shares thereof, as representing the special or enhanced value of the vessel at the time of the collision. She was lost during the fishing season, and was engaged in fishing at the time of her loss. But for her loss she would have earned during the remainder of the season, in

name of profits, not less than said sum of £400, which is a fair estimate of the average profits made by similar vessels, and which in particular were made by similar vessels in 1908. It was not possible to timeously obtain a substitute vessel to replace the 'Gratitude.' . . . ."

The defenders pleaded, *inter alia*—"(4) In any event, the pursuers' averments as to loss arising from prospective fishing are irrelevant, and ought not to be remitted to probation; *et separatim* . . . ."

On 11th February 1910 the Lord Ordinary (SALVESEN) repelled the first branch of the defenders' fourth plea-in-law and continued the cause. Leave to reclaim was granted.

Opinion.—"This action arises out of a collision which took place between the steam drifter 'Gratitude' and the steam drifter 'Comely.' As the result of the collision the 'Gratitude' became a total loss, and her underwriters, who are represented by the defenders in the present case, have already paid her insured value as at the time of the collision. The defenders further practically admitted liability for the loss of fishing gear, stores, and personal effects belonging to the pursuers, and expect that they will be able to adjust the figures with them. The argument which I heard in the Procedure Roll relates entirely to a claim of £400, the estimated amount of the profits which the pursuers would have earned had they continued the fishing in which they were engaged to the end of the season. The defenders maintain that the averments as to the loss arising from prospective fishing ought not to be remitted to probation, on the ground that this is consequential loss, which cannot be recovered from the defenders. This contention raises an interesting question as to the measure of damage recoverable where a ship has been totally lost through a collision.

"If the case fell to be decided upon principles of common law, I do not think I could hold the pursuers' claim for loss of earnings as so remote and consequential as to be irrecoverable in law. It is not unlikely that the crew of a fishing vessel who have been hired either at fixed wages or on the footing of sharing the profits of the fishing adventure may suffer a real and tangible loss if the vessel on which they were employed is sunk in consequence of the wrongful act of another. On the other hand, if a different rule has been fixed and acted upon in Admiralty cases, it would be inadvisable to unsettle an established practice.

"The earliest case to which I was referred was that of the '*Columbus*,' 3 W. Rob. 158. In that case the owner of a fishing smack, who was also its master, maintained that in addition to the value of the smack at the date of her loss he was also entitled to a sum of £89, which he stated he would have earned in wages as master of the smack during twelve months after the date of the collision, and £75 which he claimed as the average profits of the smack for the same period. Both claims were rejected by Dr Lushington, who, after admitting that the principle upon which the Court proceeds in all matters of this kind is a *restitutio in integrum*, 'in other words the principle of replacing the party who has received the damage in the same position in which he would have been provided the collision had not occurred,' proceeds as follows—'Although this is the general principle of law, all courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible in all the various cases that may arise that the remedy which the law may give should always be to the precise amount of the loss or injury sustained. In many cases it will of necessity exceed, in others fall short of, the precise amount. . . . In respect to the question more immediately under consideration at the present moment, I do not recollect a case, and no case has been suggested to me, where a vessel has been considered as a total loss and, the full value of that vessel having been awarded by the Registrar and merchants, any claim has been set up for compensation beyond the value of that vessel. When I first read the papers in this case I looked with much care and attention to see whether any precedent could be found, whether any single instance had occurred in the numerous cases that have arisen not only in my own time but in that of my predecessors, but I found none; and the learned counsel who argued the case on behalf of Mr Woodward does not appear to have been more successful in his researches.' At a later stage of the same opinion he says—'If the principle to the contrary contended for by the owner of the smack in this case were once admitted, I see no limit in its application to the difficulties which would be imposed upon the Court. It would extend to almost unlimited ramifications; and in every case I might be called upon to determine not only the value of the ship but the profits to be derived on the voyage in which she might be engaged; and, indeed, to those of the return voyage, which might be said to have been defeated by the collision. Upon these considerations alone I should not, I conceive, be justified in admitting this claim.'

"The matter was again considered in the case of the '*City of Rome*,' 8 Asp. Mar. Law Cases, p. 542, where a claim was made on behalf of the owners and crew of a fishing vessel. The Registrar disallowed the claim which had reference to the value of the fish which it was estimated would have been caught between the time the smack was sunk and the termination of the fishing season, and his report was sustained by Sir James Hannen. After stating that he was at first favourably inclined to the claim, he came to be of opinion that it must be disallowed *in toto*—'There is a difficulty (he says) in arriving at a conclusion of what would adequately compensate the owner of a vessel which has been run down for the loss he has sustained; but, as has been pointed out by Dr Lushington, some definite rules must be adopted by courts as their guide; and he has laid

down with his usual clearness and force the rule which guided him, and which, as far as I can see, has continued to guide his successors in their judgments; and I cannot accept the suggestion of Dr Stubbs that two or three deliberate decisions of Dr Lushington have become obsolete because some cases, which are apparently inconsistent, have been decided in the registry; and it is remarkable that when the strongest of those cases comes to be sifted it turns out to be no authority at all, being a case not of total but of partial loss. I consider the matter is concluded by authority, that where there is a total loss the question of the value of the fishing loss at that time is what is to be taken into account, without reference to the prospect of what the vessel would have earned if she had gone on a longer or shorter voyage than the one on which she was engaged at the time.'

"The rule that may be gathered from these two cases, that where a ship is totally lost in consequence of a collision the owner can recover no more than the value of the ship as at the date of her loss, has not been followed in later cases. In the '*Kate*,' 1899, P.D. 165, Sir F. H. Jeune, after a careful review of the reported decisions, held that the owner of a vessel which was lost on a voyage to a North American port when under charter to load a cargo for the Continent was entitled to recover not merely the value of the vessel as at the date of the collision but her value as at the end of the chartered voyage, plus the profits lost under the charter-party; and in commenting on the authority of the cases just cited he said—'It is no doubt a sound principle in the case of total loss that, speaking generally, to give a sum which will replace the vessel is to give all that justice demands. It may in each case be fairly enough assumed that the substituted vessel will in the future be as profitable to her owner as that which has perished would have been, but to carry this principle so far as to say that a vessel lost at the commencement of her voyage is compensated for by her value without regard to her profits during the voyage, when the owner could not in fact replace his lost vessel and earn these profits, appears to me to press theory into conflict with fact' (p. 171). This principle was acted upon and carried further in the case of the '*Racine*,' 1906, P.D. 273. There the vessel lost was proceeding from a home port with cargo to a foreign port, thence to proceed under charter to another port and home under charter from that port, and the Court held that the owner was entitled to recover her value as at the date when she would have accomplished the last of the three voyages, together with such a sum as would represent the profit which would have been realised under the three successive charters, less a reasonable percentage for contingencies. The same rule was applied by Lord Stormonth Darling in the case of *Parker*, 7 S.L.T. 304, where the ship at the time of the accident was under charter to sail with cargo from Swansea to Portland with the object of getting a freight there to the United Kingdom, which would compensate for the relatively unprofitable outward freight which she had agreed to take. No charter had in fact been concluded for the return voyage, but the Lord Ordinary held that a highly remunerative freight could in fact have been secured, and he assessed the damage on the footing that the owner was entitled to loss of profit on the contemplated round voyage. The defenders maintained that the latter case had no application, because it was not a case of total loss, and that a different principle in assessing damage had always been followed in the case of a vessel partially damaged through collision. It is true that no such artificial rule as that laid down by Sir James Hannen in the '*City of Rome*' has ever been applied to cases of partial damage, but I confess that I can see no reason for the distinction. In the '*Risoluto*,' 8 P.D. 109, a French fishing brig came into collision with an Italian barque and was compelled to put into a port for repairs. On her repairs being completed she returned to the fishing ground before the close of the fishing season. Her owners and crew were allowed £880 as the loss sustained by the interruption of the fishing, and I apprehend that if owing to the length of time the repairs took to execute the whole fishing had been lost an additional sum would have been allowed. Why in the present case should the owner and crew not receive compensation for the loss of the season's fishing which they apparently sustained by the loss of the 'Gratitude'? Of course if it can be shown that they secured or could have secured other employment, the claim for loss of profits would fall to be abated to the extent that similar profits could have been or actually were made, but I think it highly improbable that the owner could in fact have replaced his lost vessel so as to earn the profits which he anticipated by the employment of the 'Gratitude' during the particular fishing season, which is of comparatively short duration, and it may well be that his crew would have found it impossible to secure any employment.

"I agree with Sir Francis Jeune that in very many cases the owner of a vessel which is lost on a trading voyage is sufficiently remunerated by getting the full value of his vessel, with interest at 5 per cent. from the date of the collision, but there must be cases where compensation arrived at on these lines would, even in the case of the owner, not repay him for his loss. In the '*Argentino*,' 14 A.C. 519, the case was figured of a whaling vessel fitted out for a particular cruise being lost by a collision, and so losing the season's fishing. To give the owner back his capital would not compensate him for the loss he suffered, unless it could be shown that another vessel equally suitable could have been obtained in time to despatch her to the whaling grounds during the season when that fishing can be prosecuted. So in the case of a vessel built for a particular trade, and which cannot be replaced except by

building another, it may often happen that interest at 5 per cent. on her value would fall far short of the profit which the owner had earned in previous years and might reasonably have expected to have earned in the year in which the casualty occurred. In the House of Lords it was stated by Lord Herschell that there is no special rule of the Admiralty Court governing the question as to the damages recoverable as the result of a collision, and that 'the law there administered in relation to such a matter is the same as prevails at common law.' I hold, therefore, that there is no rule which excludes the owners of a vessel lost by collision from recovering against the wrongdoer such loss, whether actual or prospective, as they can show that they have suffered through the wrongful act.

"If this be so as regards the owner, still more is it the case with regard to the other pursuers. The owner would at least get compensation to the extent of the value of his ship, with interest at 5 per cent. from the date when she was lost, but the fishermen whom he employed on the footing that they were to share the profits of the fishing would not participate in that compensation, and would, if the defenders' contention were well founded, get nothing at all except compensation for the loss of their personal effects. I think there might be many cases where such a rule would operate serious injustice, and this case may be one of them. The ordinary crew of a trading vessel may have no difficulty in obtaining employment in other ships when the one in which they were engaged is sunk in a collision, but even here there may be cases of great hardship if such a rule as the defenders contend for were to be rigidly applied. It is not always easy for a master to get an equally good berth with that which he held on the vessel which was lost, and although Dr Lushington disallowed the claim of the master in the case of the '*Columbus*,' it must be kept in view that he was also the owner of the smack, and that there were special circumstances which indicated that he need have suffered little or no loss if he had accepted the offer of the defenders to take back his smack, which they had raised and offered to repair. At all events it seems to me that the pursuers here may have just as good a claim as the master and crew of the 'Risoluto,' and I think they are entitled to prove it if they can. I shall accordingly repel the first branch of the defenders' fourth plea-in-law and continue the cause; and as the defenders desire an opportunity of submitting my judgment to the Inner House I shall grant leave to reclaim."

The defenders reclaimed, and argued—(1) The claim of the crew for loss of profits, or rather wages, could not be admitted. Their loss was *damnum absque injuria*. A wrongdoer, though liable in damages to the owner of property destroyed by him, was not liable to any third party who by reason of contract or otherwise with the owner of the property destroyed had suffered loss through its destruction—Mayne on Damages, 8th ed. p. 97; *Simpson* v. *Thomson*, (1877) L.R., 3 A.C. 279; *Anglo-Algerian Steamship Company, Limited* v. *Houlder Line, Limited*, [1908] 1 K.B. 659. The crew were not joint adventurers; they were employees of the owners, though paid for their labour by a share of the profits. (2) The claim on the part of the owners for loss of profits was also bad. Where a collision resulted in total loss the owner of the vessel lost could not recover in name of damages anything more than the full value of the vessel at the time of the loss—the "*Columbus*," 1849, 3 W. Rob. 158; the "*Clyde*," 1856, Swaby 23; the "*City of Rome*," (1887) 8 Asp.Mar.Cas. 542, *note*. The only exception to that rule was where the vessel was at the time of the collision running under a charter-party with a definite fixed freight. In that case the chartered freight could be recovered. To that exception the cases relied on by the pursuers, viz., the "*Kate*," [1899] P. 165; the "*Racine*," [1906] P. 273, were referable. In *Parker* v. *North British Railway Company*, December 23, 1899, 7 S.L.T. 304, the circumstances were very special, because it was there held proved as a fact that the vessel which had been lost could have got a charter-party at a very profitable rate if she had arrived at a certain port. Further, that was a case of partial loss, and the claim made there was not of the highly speculative nature of the claim put forward in the present case. The very speculative nature of the present claim was illustrated by the fact that the pursuers did not and could not aver the duration of the herring-fishing season, as it was subject to great variation. *Esto* that the pursuers were entitled to be placed in the same position as they would have been had there been no collision, they would be so placed if they got the full value of the vessel at the time of her loss, with interest therefrom till payment.

Argued for the pursuers (respondents)—(1) The claim of the crew was clearly valid. They were not the employees of the owners, but were joint-adventurers with them, and that gave them an interest in the vessel requisite to entitle them to sue — Marsden on Collisions, 5th ed., p. 96. Their position was in fact more analogous to that of charterers than of employees. The cases of *Simpson* v. *Thomson*, *cit.*, and *Anglo Algerian Steamship Company, Ltd.* had therefore no application. (2) The claim of the owners for loss of profit was equally valid. There was no distinction in regard to the measure of damages between cases of partial and cases of total loss, for the so called rule of the "*Columbus*" and the "*Clyde*" had been departed from — the "*Harmonides*," [1903] P. 1, *per* Gorrell Barnes, J., at p. 6; the "*Kate*," *cit.*; the "*Racine*," *cit.*; *Parker* v. *North British Railway Company*, *cit.* In all cases the owner of the vessel lost was entitled to be placed in the position he would have been but for the collision—the "*Amalia*," 1864, 34 L.J. Ad. 21; the "*Harmonides*," *cit.*; and it made no difference whether the vessel was under charter-party or not. A charter-party was merely one mode of proving the loss that had been sustained

but that loss might be proved in other ways. The sole question was whether the claim was one for a sum which was definitely ascertainable and which could be easily ascertained, or was a claim for a random sum such as was disallowed in the "*Columbus*," *cit.*—the "*Clarence*," 1850, 3 W. Rob. 283; the "*Argentino*," [1888] L.R., 13 P.D. 191, *per* Bowen, L.J., at p. 202, *aff.* L.R., 14 A.C. 519. In this case the pursuers' claim for loss of fishings could be easily ascertained, and such claims had been allowed — the "*Risoluto*," (1883) L.R., 8 P.D. 109.

At advising—

LORD ARDWALL—This action arises out of a collision between the steam drifter "Gratitude" and the steam drifter "Comely." As a result of the collision the "Gratitude" became a total loss, and her underwriters, who are represented by the defenders in the present case, have already paid the owners her assured value as at the time of the collision. The discussion on the reclaiming note was concerned entirely with a claim for £400, the estimated amount of the profits which the pursuers it is alleged would have earned had they continued the fishing in which they were engaged till the end of the season. Separate arguments were submitted for the defenders, first, as regards the portion of this claim made upon behalf of the crew of the "Gratitude," and second, with regard to the part of the claim made by the owners of the "Gratitude."

With regard to the claim made on behalf of the crew, it was maintained that it was excluded in respect that it was remote and consequential. It was argued that what was destroyed or lost through the collision was the drifter, which was not the property of the crew, and that these fishermen could not competently make a claim in respect of the destruction of another person's property; that their claim, such as it was, arose entirely out of a contract with the owners of the "Gratitude," and that it was contrary to the principles of the law of damages that liabilities should attach to a wrongdoer, not only at the instance of the person to whose property the wrong was done, but also at the instance of any person who, under contract with the owner of the thing destroyed or otherwise, might have suffered loss through its destruction, and the case of the *Anglo Algerian Steamship Company, Limited* v. *The Houlder Line, Limited*, [1908] 1 K.B. 659, was referred to as an authority. That case was in its circumstances very different from the present, but was referred to for observations regarding the remoteness of damage.

While undoubtedly care must be taken not to extend liability for fault beyond the circle of persons directly injured by the fault, yet, on the other hand, it by no means follows that the loss of an article of property, be it a building or a ship or machinery or anything else, only gives rise to an action at the instance of the owner or proprietor. On the contrary, I think it is the law that if anyone is directly interested in the property of goods, houses, or ships, he may be entitled to sue in respect of damage to such interest if it is not too remote.

Now in the present case the fishermen or crew were, along with the owners of the "Gratitude," engaged in what I think may be fairly viewed as a joint adventure, to which the owners contributed the vessel, and the crew contributed their services and in some cases fishing gear towards the prosecution of this adventure, the owners of the boat being entitled to one-third of the profits of the fishing, the owners of the nets to one-third, and the crew to one-third.

In this state of matters, it seems to me that the members of the crew each suffered a direct and immediate loss through the sinking of the "Gratitude," that loss being the share of the profits of the joint adventure in which they were engaged, and which loss was directly caused by the fault of the defenders. I am accordingly unable to adopt the view that before the facts are ascertained it ought to be held that the claim of the crew is barred by reason of its remoteness or consequential nature.

With regard to the claim on behalf of the owners, the defenders maintained that that was barred by the fact of their having recovered the full market value of the "Gratitude" as from the date of her being sunk, and certain dicta in the case of the "*Columbus*," 3 Rob. 158, and "*The City of Rome*," 8 Asp. Mar. Law Cases, p. 542, were referred to as establishing the rule that where a ship is totally lost in consequence of a collision the owner can recover no more than the value of the ship as at the date of her loss. This it was argued was treated in these cases as a rule of Admiralty law, and it was suggested that that was different from the rules of common law applicable to damage, but I think an examination of the opinions of Lord Esher, M.R., in the case of the "*Argentino*," 13 P.D. 195, and of Lord Herschell in the same case, 14 A.C. 521, show very clearly that the dicta of Dr Lushington in the above-mentioned cases were not inconsistent with the common law rules, and that the rule both in the Admiralty Courts and the Common Law Courts with regard to damage caused by fault is that the person damaged is entitled to *restitutio in integrum*. But then Dr Lushington goes on to say that "although that is the general principle of law, all courts have found it necessary to adopt certain rules for the application of it," and one of these rules is the rule as to the remoteness of damage. Accordingly both Lord Esher and Lord Herschell in their opinions in the case of the "*Argentino*" lay down that there is no special rule of the Admiralty Court governing the question, and that the law there administered in such matters is the same as prevails at common law. While therefore it may be that in the cases of the "*Columbus*" and the "*City of Rome*" certain items of damage were excluded as being too remote or not susceptible of legal proof in the opinion of the Registrar and merchants and of the President of the

Admiralty Court on Appeal, yet in view of the dicta above referred to as to the applicability of the common law rules to cases of this sort and to what has been actually decided in the cases of the "*Kate*,' [1899] P. 165, the "*Racine*," [1906] P. 273, and *Parker*, 7 S.L.T. 304, I think it cannot be successfully maintained that in the case of the total loss of a ship through the fault of another, the claim of the owners of the ship so lost is according to the present state of the authorities limited to its market value.

But it was argued with some force that the only damage which it has actually been decided in cases of total loss should be allowed in addition to the value of the vessel was where, as in the cases of the "*Kate*" and the "*Racine*," charters had been actually entered into at the time of the loss. While this is true as regards these cases, I see no good ground in principle for not going further as was done by Lord Stormonth Darling in the case of *Parker*. It is certainly true that where there is a charter, the proof of such damage is much more easy and complete—indeed, to use a common expression, the damage may be almost said to be liquidated by the terms of the charters. But while undoubtedly this is so, I see no reason in principle for excluding a claim of damage for loss sustained by the owners of the vessel in consequence of its being sunk at a particular date, provided only that such claims are not too extended in time, or do not rest upon mere probabilities as contrasted with reasonable certainty.

Now in the present case the allegation is that at the time she was lost the "Gratitude" was engaged in the English herring fishing, that it was not possible to timeously obtain a substitute vessel to replace the "Gratitude," and that but for her loss she would have earned during the remainder of the season profits of not less than the sum of £400. It seems to me that these statements if satisfactorily proved may substantiate a claim of damages in addition to the mere market value of the vessel, and that such damages may be viewed as the natural and direct consequences of the collision.

I may refer to the remarks of Mr Justice Gorell Barnes in the case of the "*Harmonides*," [1903] P. 1, where he says that in estimating the value of a vessel at the time of a collision, the test, in the absence of a market value, is what the vessel was fairly worth to her owners from a business point of view. If this is correct, it clearly includes not only what may be said to be the value of the vessel, but also the damage which the owners actually suffered by losing her at the time they did.

There is no doubt that in cases of partial damage such as occurred in the case of the "*Resoluto*," 8 P.D. 109, and the "*Argentino*,' such damages have been allowed, and there seems no reason in principle for making a distinction between cases of partial damage or loss and cases of total loss, although it is true that in cases of partial loss it is easier to aver and prove the claim for damages than in a case where the vessel is totally lost, because in the former all that has to be proved is, first, the cost of repairs, and second, the loss caused by the want of the use of the vessel during a definite period, whereas where a vessel is totally lost, the only proof of damage may rest upon mere probabilities, and in such a case I think it may well be argued that the limitations laid down by Dr Lushington in the case of the "*Columbus*" and by Sir J. Hannen in the case of the "*City of Rome*" ought to be applied. This, however, depends upon the amount and quality of the proof in support of the claim.

I am of opinion that in the state of the authorities which I have referred to, a proof of the pursuers' claim for £400 should be allowed, but as that claim is somewhat indefinitely stated on record and may be supported by insufficient proof, I am not disposed *hoc statu* to decide finally on the relevancy or irrelevancy of the pursuers' averments, and I would therefore propose that the Lord Ordinary's interlocutor should be recalled *hoc statu*, and that we should remit the case to the Lord Ordinary to allow a proof before answer of the pursuers' averments as to the alleged damage arising from the loss of their prospective fishing during the season in which the "Gratitude" was lost. Of course, if damage is proved by competent and sufficient evidence, interest upon the sum paid for the loss of the "Gratitude" will fall to be deducted from any amount of damage that may be found due.

LORD LOW and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was presiding at a jury trial.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to allow proof before answer.

Counsel for Pursuers (Respondents)—Murray, K.C.—Kemp. Agent—Alex. Mustard, S.S.C.

Counsel for Defenders (Reclaimers)—Horne, K.C.—Lippe. Agents—Alex. Morison & Co., W.S.