stipulation is not so clear as it is here, that the feu being made for the purpose of building, with an obligation to maintain buildings upon the property feued, the working must be consistent with that purpose, I do not see in a case like this, where the stipulation is express, that it is possible to get over it. I may say as to the obligation to rebuild, which seems to have been in the view of both parties, that I am not disposed to express any opinion upon the point. I am not quite prepared to say, that the obligation to rebuild in a contract of this kind could be enforceable. That is not a question which it is necessary for us to decide, and I give no opinion upon it.

I therefore concur in the judgment.

Interlocutors reversed.

The following was the order :—

"That the appellants be assoilzied from the conclusions of the action, with expenses in the Court of Session and the Sheriff Court; and that the expenses ordered to be paid by the Court below be repaid to them."

Appellants' Agents, Dewar and Deas, W.S.; Grahames and Wardlaw, Westminster.—*Respondent's Agents*, J. and R. D. Ross, W.S.; W. Robertson, Westminster.

MAY 16, 1873.

WILLIAM N. WATSON & CO., Merchants, Calcutta, and Mandatory, *Appellants*, *v.* ROBERT SHANKLAND, Merchant, Greenock, and Others, *Respondents.*

Ship—Charter Party—Freight—Advance by Charterer—Loss of Ship—*W. chartered a ship to proceed to Calcutta and load, and then proceed to a port in the United Kingdom, the charter party containing this clause: "Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission." W. at Calcutta advanced to the master £441, but did not insure the ship, and she was totally lost during the voyage.*

HELD (affirming judgment), *That the charter party implied, that W. was to secure his advances by insurance, and as he failed to insure, he was not entitled to repayment by the owners of the sum he advanced.*[1]

This was an appeal from a decision of the First Division of the Court of Session, assisted by three Judges of the Second Division. An action was raised in the Sheriff Court of Renfrew by the appellants, the charterers of a ship, for £596 for advances, commission, interest, etc., due by the respondents, the owners. The ship "Janet Cowan," of Greenock, belonged to Mr. Shankland and others. When it was at Bombay a charter party was made between the master and Messrs. Ralli, who afterwards transferred it to the appellants and pursuers. By this contract the ship was to proceed to Calcutta, and there load and carry the cargo to a port in the United Kingdom. The clause regulating the payment of freight was as follows :—"The freight to be paid on unloading and right delivery of the cargo in cash, two months from the ship's report inwards at the Custom House, or under discount at the rate of 5 per cent. at freighter's option."

And it was also stipulated—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission, and the master to endorse the amount so advanced upon his bills of lading."

While the ship was preparing for her voyage from Calcutta, the charterers made advances to the master for ship's disbursements, which, with commission and interest, amounted to £596. The ship was lost in the course of the voyage. The charterers sought to recover back the above sum, and the defence was, that the cash advanced was not intended as a loan, but was a prepayment of freight, and could not be recovered back. The Sheriff of Renfrew, reversing the Sheriff substitute's decision, held, that the pursuers were entitled to recover the advance and commission. The First Division, by a majority, reversed the Sheriff's judgment, and held, that the plaintiffs were not entitled to repetition, on the ground, that they had contracted to secure themselves by insurance, which they had failed to do. The charterers now appealed against that decision.

Butt, Q.C., and *White*, for the appellants.—The judgment of the Court below was wrong. It was admitted by the Judges, that by the law of Scotland a sum advanced by way of prepayment of freight was repayable in the event of the ship being lost. This was also the law of England,

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[1] See previous report 10 Macph. 142; 44 Sc. Jur. 87. S. C. L. R. 2 Sc. Ap. 304: 11 Macph. H. L. 51: 45 Sc. Jur. 179.

at least according to the earlier cases, before the case of *Saunders* v. *Drew*, 3 B. & Ad. 445. It is true, that the later cases of *Hicks* v. *Shield*, 7 E. & B. 633, and *Byrne* v. *Schiller*, L. R. 6 Exch. 20, 319, assume, that a prepayment of freight could not be recovered, though the Judges regretted they could not hold otherwise. As these cases have not been recognized by the House of Lords, they should be overruled, and the law made the same as in America and all European countries.

If the general rule in Scotland is, that prepayment of freight is recoverable back in the event of the ship being lost, there is nothing in the charter party to alter that rule. The real contract here is, that advances were to be made against and not by way of prepayment of freight. The stipulation about insurance was entirely optional to the charterer, and was merely given him as an additional security, inasmuch as he had an insurable interest in the ship by virtue of such advance like a mortgagee of the ship—1 Arnould Ins. 50 (4 ed.); *Wilson* v. *Martin*, 11 Exch. 684; 1 Parsons, Mar. Ins. 190. The freight had in effect been equitably assigned by the owners to the charterer *pro tanto*. The Judges below had erroneously assumed, that the charterer had no insurable interest, whereas if they had not erred in that point, they would not have placed the importance they did on the clause about insurance.

Lord Advocate (Young), and *Benjamin* Q.C., for the respondents.—The judgment of the Court below was right. It is enough to take the charter party by itself as a special contract, and the very fact of there being a power given to insure, implied, that the charterer was to be at the risk if the vessel was lost. *Thompson* v. *Gillespie*, 5 E. & B. 209; *Hicks* v. *Shield*, 7 E. & B. 633; *Jackson* v. *Isaacs*, 3 H. & N. 405. "*The Salacia*," 32 L. J. Adm. 43; *Droege* v. *Simpson*, L. R. 2 Privy C. 505; *Trayes* v. *Worms*, 34 L. J. 274, C. P.

LORD CHANCELLOR SELBORNE.—My Lords, without saying that the authorities which have been cited at the bar contain nothing useful for the assistance of your Lordships in the determination of this or any similar case, it does not appear to me, that it is a case which is necessarily governed by any of those authorities.

The facts are shortly these: A bill of exchange was granted by the master of a ship at Calcutta for the purpose of covering certain advances made at that port in respect of disbursements of the ship by the charterers or their agents. It is clearly admitted with great candour at the bar, that the parties did not themselves look upon this transaction as a transaction upon the footing of the charter party. It may very well be, according to the argument of Mr. Butt, that if, when the transaction is examined, it is found in fact to fulfil all the conditions of a transaction according to the charter party, the appellants would not suffer by reason of their having given to it a different form, in consequence of their having in the first instance taken a different view of its nature and effect. At the same time no one can be very much surprised, if, they having intended to operate in a particular manner and not under the charter party, it should turn out, that the transaction, when compared with the conditions of the charter party, does not accurately fulfil those conditions.

The contract is contained in these words: "Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, assurance, and 2½ per cent. commission." In my view it is not necessary to decide any of the questions that arise upon the contract made in that form, except this—what is the effect of the words "subject to interest, insurance, and 2½ per cent. commission," with reference to the fact, that no insurance was made. It may very well be,—certainly, as far as I am concerned, I will deal with the case upon the hypothesis that it may be,—that, according to the true construction of this contract, it was to be a loan upon the security of the freight and not a prepayment of freight. It is not necessary, that your Lordships should decide that question, and I should not advise your Lordships to put your decision in such a form as to affect the determination of such a question in any future contract upon which it may arise. But assuming that to be the true construction of the contract, and that this was to be a loan upon the security of the freight, and not a prepayment of the freight, or a part payment of the freight, or a payment on account of the freight, within the principle of the authorities which have been referred to, still the question is, whether, according to the true and sound construction of this contract, it was not understood and agreed between the two parties, that the insurance, which it was for their common interest, for the interest of both of them, to have made in the most proper and convenient manner, should be made by the charterers.

I cannot but think that, apart from any evidence as to usage and practice, it is a sound view of this mercantile contract to hold, that it provides for insurance and does not leave the subject of insurance uncertain and indeterminate. Insurance is mentioned, as your Lordships will observe, in direct connection with two other things which were not uncertain, and which were not indeterminate, namely, interest and commission. Interest was to be charged at all events; commission was to be charged at all events. It appears to me, that the sound and reasonable view, looking to the nature of the contract, is, that there is nothing to lead us to suppose, that insurance was not to be as much a fixed term of the contract as interest and commission, and that not the less because all these terms are primarily in favour of and for the protection of the person advancing the

money. The owner subjects himself to the burden, but both have an interest in diminishing that burden, at least the man upon whom the burden would fall has an interest in diminishing it as far as it can be diminished for his own security; and therefore, as either one or the other ought for that purpose to make an insurance, it was reasonable, that they should make a contract between themselves as to how the insurance was to be made.

One of your Lordships put to Mr. Butt in the course of his reply this observation, in which Mr. Butt expressed his concurrence: "These are all things as to which the charterer was to be the creditor of the other party." But if he was to be the creditor of the other party for all these things, then that was a part of the contract. He was to advance the money; he was to charge interest, he was to charge commission, and he was to charge insurance, and how could he charge insurance unless insurance was made?

It appears to me, that the good sense of the matter concurs with that view, because he would not be satisfied unless the insurance was under his own control. He would not have the security for which it was reasonable that he should stipulate, and it would be only by him, when the advances were made, that the precise amount for which the insurance was to be effected would be known. I take it, therefore, that as between these parties it is a contract in substance to this effect: I, the borrower, give you, the lender, a right to charge me with the premium of insurance, —which is very much the same thing in principle as if he had put the money into his hands for the purpose of effecting that insurance. I by no means think it necessary to say what the result might have been, if for any reasonable cause he had determined not to avail himself of the right to insure, and to charge the premiums of insurance, and he had given notice of that to the other party in reasonable time. He did not in fact do so, although according to the evidence there was abundance of time for it to have been done. Still less do I desire to say anything which would affect the question which might have arisen if, having effected an insurance, that insurance had through some cause not imputable to his fault become unavailable. I proceed upon the assumption, that it may be the construction of this contract, that in either of these events, he, acting reasonably and according to good faith and right understanding, would be held entitled to recover in the event of the loss of the ship.

But in point of fact no insurance was made, and the question is, whether, under this contract, the shipowner had not a right to rely upon that insurance being made in the actual circumstances of the case by the person, who here stipulated for and received the right to charge the premiums of insurance against him, the shipowner. I think that he had. It is manifest, that the charterers neglected to do so, and to give notice that it was not done. What must be the consequence of a loss of the ship, the charterers knowing that the insurance was not made? Upon one or the other of these two parties that loss must fall. If the insurance had been made and the money paid by the shipowner, then the benefit of the insurance would have accrued to the shipowner. It is very much like an ordinary case put in the course of the argument of the right of a man who gives several securities, when he pays off the mortgage to have all the securities delivered up into his own hands, unless a reason which is a sound and good one, and consistent with the duty of the mortgagee, and which is not imputable to his own fault, can be given for the failure of any one of them. This seems to have been really the view which prevailed on the whole in the minds of the learned Judges in the Court below. I think the soundest course for your Lordships to take would be to found your judgment entirely upon that view.

I perceive, that in the interlocutor under appeal there are certain findings which your Lordships will probably think go beyond that, which, taking the view of the case which I have submitted to your Lordships, if your Lordships should concur in that view, it is necessary to put upon the face of this interlocutor. There is a finding as to the general law upon the subject. Now, it appears to me, that it is not expedient, that that finding should be made in the interlocutor; first of all, because it does not appear to me to be at all clear, that upon this occasion we ought to decide any question as general law at all; and secondly, because if we did, it would be necessary to consider, how far that law ought to be the English or the Scotch law, and finally, if it ought to be the English, whether it would be a safe thing to lay down the rule in the terms which are here stated, which certainly do not appear to agree altogether with the rule lately stated in England in the case of *Byrne* v. *Schiller*, reported amongst our cases. I should, therefore, propose to your Lordships to vary the interlocutor by omitting the words beginning with the words "find in law," and the words "the amount of the said advance from the owners." Then further, the Inner House propose to place a construction upon the contract, going, I think, beyond the view which I have submitted to your Lordships, and involving this, that by the form and terms of this contract the charterers "must be held to have limited their security for repayment of the advances to the right of set-off in settling with the owners if the freight should be earned, and to the amount of the said insurance if ship and cargo should be lost, and to have relinquished or discharged the personal obligation of the owners for repayment in the latter events." I cannot think, that we are called upon to place upon the face of the interlocutor any such interpretation of the contract. One of your Lordships has suggested words to be substituted for the words

which I have read, and which would make the finding run thus: "Find, that in the present case the charterers, having stipulated, that they should be entitled to insure freight at the owner's expense to an amount corresponding to the amount of their advances, must be held to have made such insurance a part of their security, and, not having effected any such insurance, must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment." I would submit to your Lordships, that these words should be adopted, and that the interlocutor should be varied in the manner which has been explained.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend with regard to the short ground upon which he has rested his decision in this case. By the contract between the parties the insurance upon the advances was to be effected by the charterer. There was no obligation upon him to insure, except in the sense of its being for his own protection that he should be insured, but as he chose not to insure he took the risk upon himself, and therefore he must bear the loss.

LORD COLONSAY.—My Lords, I concur in the result which has been arrived at, and I think the grounds which have been stated are quite sufficient for the determining of this case.

LORD CAIRNS.—My Lords, I also concur,

Interlocutor of the 2d December 1871 *varied, and, subject thereto, affirmed, together with the interlocutor of the* 31*st January* 1872*; and appeal dismissed with costs; cause remitted.*

Appellants' Agents, W. Mason, S.S.C.; Hillyer, Fenwick, and Stibbard, Fenchurch Street, London. — *Respondents' Agents*, W. Archibald, S.S.C.; Simson, Wakeford, and Simson, Westminster.

MAY 19, 1873.

JAMES MACKINTOSH, Esq., *Appellant*, *v.* MISS EMILY MARIA MACKINTOSH and Others, *Respondents*.

Entail—Heir—Burden—Marriage Contract—Annuity—Relief—*M. in* 1857 *made a deed of entail, and bound himself and his heirs and executors to free and relieve his lands (the entailed estate) of all his debts and obligations. In* 1867 *he executed an antenuptial contract of marriage, providing annuities to his third wife, and in security bound himself to infeft her in the entailed estate, which was done, and the deed reserved an option to him and his heirs to get rid of the burden by purchasing like annuities from an insurance office. M. having died:*

HELD (reversing judgment), *That the heir of entail was entitled to be relieved of the annuities, these being debts and obligations within the meaning of the clause.*[1]

This was an appeal from a judgment of the First Division on a Special Case. The late James Mackintosh of Lamancha executed in 1857 a deed of entail of the estate of Lamancha, binding himself and his heirs, etc. "to free and relieve my lands before disponed of all my debts and obligations." By his last disposition and settlement dated 1857 he confirmed this deed. In 1867 he married a third wife, and settled upon her two annuities, in security of which he bound himself and his heirs to infeft her in the estate of Lamancha, but reserved an option to purchase from an insurance office like annuities, in which case the widow was to give a discharge. James Mackintosh died in 1869, and the First Division held, that the heir of entail was not entitled to be relieved of these annuities. The heir then appealed.

The *Lord Advocate*, and *Asher*, for the appellant.—The judgment was wrong. It is not denied, that the appellant must take the estate, subject to such burdens as existed at the testator's death. But here there was an express clause, that the entailed estate was to be relieved of all debts and obligations, and which must have included future debts.

The annuities were both debts and obligations, and therefore must be paid by the general estate, so as to relieve the heir. The provision as to buying like annuities from an insurance office must have been for the benefit of the trustees, as parties entitled to the general estate, for the interest of the heir of entail would be not to pay off such annuities.

The *Dean of Faculty*, and *Pearson*, Q.C., for the respondents.—The Court below was right. It is well settled, that if debts are imposed on a particular estate, then they are the proper debts of the heir succeeding to that estate—Ersk. iii. 8, 52; 1 Bell's Lect. 237; *Robertson* v. *Robertson*,

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[1] See previous reports 8 Macph. 628: 41 Sc. Jur. 344. S. C. L. R. 2 Sc. Ap. 310: 11 Macph. H. L. 28: 45 Sc. Jur. 180.