The LORD JUSTICE-CLERK entirely concurred. Even had the trustee under Mr Kippen's settlement appeared his contention would have been fruitless. The principle underlying the cases of *Gordon* and *Tod's Trustees* was that where there was no conflicting or further interest the beneficiary was entitled to the trust-estate unrestrictedly. The case of *Tod* had no doubt another element in it, but the decision rested on this ground, and in this case the question was raised very fairly.

LORD COWAN wished to say that had the trust-deed made the daughter's interest purely alimentary the case might have been different.

Agents for Miss Kippen—Dalmahoy & Cowan, W.S.
Agents for Trustees—Ronald & Ritchie, S.S.C.

Saturday, November 25.

BLAIKIE *v.* PEDDIE.

Bankrupt—Alimentary Fund. A bankrupt who was in the enjoyment of an alimentary provision of about 30s. a-week, *held*, in the circumstances, not bound to pay any part to his creditors.

Andrew Blaikie was sequestrated, and presented a petition in the Sheriff Court of Edinburgh for discharge. The Sheriff-Substitute (HAMILTON) granted the discharge. The facts of the case, and the contentions of the trustee, Mr Peddie, C.A., sufficiently appear from the following note appended to the interlocutor of the Sheriff-Substitute:—

"*Note.*—The application is not opposed by any of the creditors in the sequestration, but the trustee maintains that as a condition of his discharge the petitioner, who carried on business as a merchant in London, should secure him in one-half of an alimentary provision, which he the petitioner enjoys under the trust-settlement of his father, consisting of rents drawn from the estate of St Helens, near Melrose. The gross amount of these rents is about £140 a-year, but the petitioner states, and the accuracy of the statement is not disputed, that the free proceeds actually paid to him by his father's trustees do not exceed 30s. a-week—a sum which he maintains is not more than sufficient for the maintenance of himself and his wife. Having regard to the position in life of the petitioner, to his age, and to the fact, which is sufficiently instructed by the medical certificate of Dr Anderson, produced with the present proceedings, that he is disabled by a complication of maladies from working for his livelihood, it does not appear to the Sheriff-Substitute that he would be justified in refusing the petitioner his discharge merely because he declines to make over any part of the provision referred to for behoof of his creditors."

The trustee appealed.

ORR PATERSON for him.

MAIR and RHIND for respondent.

At advising—

LORD JUSTICE-CLERK—The appellant has not been able to point out any case in which the Court found that a bankrupt was bound to make payment to his creditors out of an alimentary fund. We must be satisfied that the bankrupt has done all he can for the creditors. In this case I do not think that the course he has taken is at all unreasonable. It is beyond our power to attach the alimentary provision.

LORD COWAN—This is a case for the exercise of the discretion of the Court. We must refuse or grant a discharge according to the circumstances of the case. Had the alimentary fund been an income of £1000 a-year I cannot say that the Court would not have taken that into consideration in judging whether the discharge ought to be granted. We must consider all the circumstances of the bankrupt. Other sums of money came to the bankrupt from his father besides this alimentary provision of £130 per annum, and these have come into the hands of the trustee. It is not the fault of the bankrupt that these have been taken to meet the claims of creditors whose debts were preferably secured. The report by the trustee is favourable to the bankrupt. We have it certified that he is in a bad state of health. The case now is in a different position from what it was when before the Lord Ordinary in 1870. Time is an important consideration, as we held in the case of *Campbell*. I concur that in the special circumstances of this case we should grant the discharge.

LORD BENHOLME—I concur. No precedent has been given for the course recommended to us. I find no case in which a discharge has been refused because the bankrupt has been in the enjoyment of an alimentary fund. It would require a very strong case to induce us to begin to make such an exception. We have not a strong case here. Bad health is a very important element in the case. I think we should adhere.

LORD NEAVES—I am of the same opinion. A mere declaration that a fund is alimentary will not make it so. We have to consider whether, looking to the rank and circumstances of the bankrupt, this could reasonably be held to be a proper provision. This is by no means an extravagant one. The bankrupt is a married man, and has been accustomed to live as a gentleman. It would have been different if any of his debts had been incurred by his own misconduct, for in such a case he would not be entitled to his discharge. But we cannot make a resolutive condition that unless he pays a part of this alimentary fund to his creditors he is not to get his discharge.

Agents for Petitioner—Lawson & Hogg, S.S.C.
Agents for Respondent—J. & A. Peddie, W.S.

Monday, November 27.

FIRST DIVISION.

(Before Seven Judges.)

WATSON & CO. *v.* SHANKLAND AND OTHERS.

Ship—Charter-Party—Advance by Charterer for Ship's Disbursements—Repetition—Insurance. A ship was chartered to proceed to Calcutta, and there load a cargo from the charterers for the United Kingdom, "the freight to be paid on unloading and right delivery of the cargo." The charter-party contained the following clause—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission." The ship reached Calcutta, and whilst there money was advanced by the charterers for the ship's disbursements. The ship was lost with her cargo on her homeward voyage.

Held, in an action by the charterers for recovery of their advances from the shipowners

(in accordance with the law of America, France, &c., and contrary to the rule established in the English Common Law Courts), that an advance of freight by the charterers for ship's disbursements at the port of loading, in terms of an obligation to that effect in the charter-party, is, in the event of the loss of the ship and cargo, recoverable by the charterers from the owners, *unless the parties contract expressly or by clear implication that it shall not be recoverable.*

Held, by a majority, under the special terms of the charter-party (*diss.* Lord Justice-Clerk and Lord Kinloch), that the clause empowering the charterers to insure the freight to the amount of their advance at the owner's expense could only be explained on the footing that both parties understood that the charterers acquired an insurable interest in the freight to the extent of their advances, or, in other words, had given up the right, which they would otherwise have had, to recover their advances from the owners in any event.

A charter-party was entered into at Bombay, on 20th August 1863, by James M'Kirdy, master and part owner of the ship "Janet Cowan," of which the defenders were the owners, then lying at Bombay, and by Ralli Brothers, of that port, according to which the ship was to proceed to Calcutta, and there load from the charterers or their agents a cargo for the United Kingdom. The freight was to be paid on unloading and right delivery of the cargo. The charter-party contained the following clause:—"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." The right in the charter-party was ultimately transferred to the pursuers W. N. Watson & Co., of Calcutta.

The ship proceeded to Calcutta, and loaded a cargo from the pursuers. While the ship was at Calcutta, between 7th November and 17th December 1863, the pursuers made advances in cash to or on the order of the master for the ship's ordinary disbursements, amounting to £441, 4s. The pursuers also, as they alleged, acted as shipping agents for the vessel, and in that capacity claimed 2½ commission on the total amount of the freight.

For £500 of the balance said to be due to the pursuers the master granted a bill on Robert Shankland, the managing owner of the vessel, "value on account of expenses of the ship 'Janet Cowan.'" The bill was presented for acceptance to Mr Shankland on 17th December 1863, who refused to accept it, on the ground that the master had no power to grant such a document, and that it was in violation of the terms of the charter-party for the pursuers to take it. The bill was not stamped, and accordingly the present action was not brought on it; it was referred to as evidence of the views and intentions of the parties in making the advances.

The ship having been loaded with a cargo, proceeded on her voyage to the United Kingdom, but was, with her cargo, totally lost on 7th April 1864, on the island of St Kilda. The owners had previously insured the freight, less the probable amount of advances to be made by the charterers for the ship's disbursements at Calcutta. Though there was time for Watson & Co., after Shankland's refusal to accept the bill had been intimated to them, to have insured their advances, they did not effect any such insurance.

On the 27th October 1865 Watson & Co. raised the present action against the owners of the "Janet Cowan," and against James M'Kirdy, as master, for £596, 0s. 8d., being the amount of their advances, agency charges, and interest. The pursuers pleaded that the advances were a loan, and therefore recoverable in any case. The defenders pleaded that the advances were not a loan, but a prepayment of freight. It seemed to be conceded by the pursuers that if it were proved that the money advanced was an advance against freight in terms of the charter-party, the charterers lost their money in case the ship was wrecked.

There was much delay in the case from the absence at sea of the defender M'Kirdy, who was a material witness.

On 19th December 1870 the Sheriff-Substitute (TENNENT) pronounced an interlocutor, in which, after findings in fact, he finds, "in point of law, that the money thus paid by the pursuers was not a loan made by them to or for behoof of the defenders, or of the master of the 'Janet Cowan,' but that it is to be held as having been made in terms of the clause of the charter-party in regard to cash for ship's disbursements to which the pursuers were parties: Finds that by the terms of said clause the pursuers were bound to furnish sufficient cash for ship's ordinary disbursements as an advance against the freight which it was expected would be earned at the conclusion of the voyage; and that the defenders are not bound to repay to the pursuers the sum thus advanced to them in terms of the charter-party: Finds that the pursuers are entitled to receive interest, the premium of insurance, and a commission of 2½ per centum upon the advances made by them, and of consent of parties decerns for the same, amounting to the sum of : Finds that it has not been proved that the pursuers were agents for the ship at Calcutta, and therefore finds that they are not entitled to the commission charged by them in the account appended to the summons: With the exception of the sum of above mentioned, assoilzies the defenders from the conclusions of the summons; finds the defenders entitled to expenses."

On appeal the Sheriff (FRASER) allowed the pursuers to add an additional plea-in-law—"(6) The sums sued for having in any view been made as an advance against freight, and no freight having been earned, the defenders are obliged to repay the same, and commission thereon, to the pursuers, with interest as libelled."

On 18th February 1871 the Sheriff pronounced an interlocutor recalling the interlocutor of the Sheriff-Substitute:—"Finds that the money thus paid by the pursuers to the captain was not a loan made by them to or for behoof of the defenders, or of the master of the 'Janet Cowan,' as representing the defenders, but was an advance as against freight for ship's ordinary disbursements, subject to interest, insurance, and 2½ per cent. commission: Finds, in law, that the defenders are bound to repay to the pursuers the sum of £441, 4s. thus advanced to the captain, with interest thereon at the rate of 5 per cent. from the last date of the advance, together with commission of 2½ per cent. upon the advances: Finds that as the pursuers did not effect insurance upon the advances so made by them they are not entitled to recover

from the defenders any sum under this head: Finds that the pursuers were not agents for the ship at Calcutta, and that they are not entitled to charge commission as such; decerns against the defenders for the said sum of £441, 4s., together with interest thereon at the rate of 5 per cent. from the 17th day of December 1863 till payment, and also for the sum of £11, 0s. 6d. sterling, being commission of 2½ per cent. upon the said advances, together with interest on said sum of £11, 0s. 6d., at 5 per cent. from the said 17th day of December 1863 and till payment: Finds no expenses due to either party, and decerns."

In his note the Sheriff states that he has arrived at a different conclusion from the Sheriff-Substitute on grounds which were not pleaded before the Sheriff-Substitute; that while he concurs with him in holding that the advance must be considered an advance against freight, and not as a separate loan, still he is of opinion that the shipowners are bound to pay back to the charterers the money advanced to the master, no freight ever having been earned.

"The question thus raised is one that never has been decided in the Supreme Courts of Scotland. It has frequently been raised in England, and it is admitted that although the decisions of the English Courts are difficult to be reconciled with each other, yet those more directly applicable to the present case, and to a charter-party couched in terms like this one, are contrary to the view which the Sheriff has adopted. On the other hand, the decisions of the Courts of America are all, without exception, against those of the Courts of England, and these American decisions were given after consideration of the grounds upon which the English decisions went. In like manner, both the older and modern law of France concur with the doctrine of the American Courts—both the law as laid down by Pothier and the law of the Code de Commerce. It is in these circumstances that the Sheriff is compelled to decide the case without the authority of Scottish precedent. The judgments of an English Court not carried to the House of Lords are no more binding upon a Scottish Court than the judgments of any foreign court; and while giving his opinion with the utmost diffidence upon the question here raised, the Sheriff is constrained to say that the reasons upon which the American decisions rest are to his mind more satisfactory and more consistent with legal principle than those assigned by the English Judges.

"The clause in the charter-party in question is one of old standing—at all events the practice of the freighter or charterer making advances as against freight in a foreign port is so. The reason of it is very obvious—the shipowner very seldom has an agent at the foreign port to supply advances to the captain for the ship's disbursements there, but the charterer or freighter always has. Instead of putting £200 or £300 in the captain's possession when the ship leaves the United Kingdom, which during the outward voyage would be bearing no fruit, the shipowner very naturally stipulates that the charterer shall make an advance to the captain against the freight, which the charterer is ultimately to pay if the ship arrive safe home. This advance is for the convenience of the shipowner, but it is an advance of freight; and the question simply is, Whether the general rule that freight is not due unless the cargo be delivered is in this case to have an exception, and that the loss of an uninsured advance for freight is to fall, not upon the shipowner, for whose convenience it was made, but upon the freighter or charterer who made it?"

The Sheriff then proceeds to examine the English cases in which the point had been more or less directly raised—*Mashiter* v. *Buller*, Dec. 15, 1807, 1 Camp. 83; *De Silvale* v. *Kendall*, 4 Maule and Selwyn, p. 36; *Manfield* v. *Maitland*, June 23, 1821, 4 Barn. and Ald. p. 582; *Saunders* v. *Drew*, 3 Barn. and Adolphus, p. 445; *Hicks* v. *Shield*, May 1, 1857. 26 L.J. Q.B. p. 205.

"The decisions of the English Courts are all traceable to this short note of an anonymous case, reported by Sir Bartholomew Shower, and decided by the King's Bench in England in the time of Charles II.—"Advance paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it came to a delivering port, yet wages are due, according to the proportion of freight paid before, for the freighters cannot have their money.'"

The Sheriff examines the cases in detail, and points out that while the earlier cases appear to have been decided on specialities, in the later cases —*Saunders* v. *Drew* and *Hicks* v. *Shield*—the law was assumed to be settled by the anonymous case in Shower without much argument as to whether it was consistent with principle—that advances of freight by the charterer cannot be recovered if the vessel is lost.

The Sheriff then adverted to the American authorities—Kent's Commentaries, vol. iii. p. 314, and cases there cited; *Watson* v. *Duykuick*, 3 Johnson's Rep. 335 (judgment by Chancellor Kent when Chief-Justice of the State of New York); *Griggs* v. *Austin*, 3 Pick. p. 20; Story's Edition of Abbott, p. 408, note. The American doctrine is shortly stated by Parsons—"It is now quite certain that if the payment be merely a payment of freight in advance it must be repaid if the freight is not earned." —Parsons on Shipping, vol. i. p. 210.

"The authorities of writers on maritime jurisprudence, and the rules of foreign codes, are all contrary to the English rule. The lawyers of all other countries have given an opposite opinion. In the well known ordinance of 1681 regarding the marine, issued by the King of France, there is this law in cap. 26, No. 18—"Freight is not due for goods lost by wreck or stranding, pillage by pirates, or capture by enemies; *and the master will in that case be bound to restore what shall have been advanced to him if there be no agreement to the contrary.*" (Pardessus' Colln. de Lois Maritimes, vol. iv. p. 363.) In a note to this article Pardessus states the source from which it was borrowed, and carries it up to a high antiquity. The article itself has been embodied verbatim in the Code de Commerce (No. 302), and now is law in France.

"Pothier approves of the doctrine, and states it as the law in his time (Traité des Contrâts des Louages Maritimes, No. 63). It is sanctioned by the authority of Valin, in his Commentary on the Ordinance of 1681, vol. i. p. 627; by Francis Roccus, a Florentine lawyer, in his Treatise de Maribus et Nauto, published in 1655, and republished at Amsterdam in 1708 (note 80, p. 79 of the Amsterdam edition); by Cleirac, an advocate at Bordeaux, in his Treatise on the Usage and Custom of the Sea, published in 1647 (see the edition of 1671, p. 42); and by John Loccencius, a Swedish lawyer, in his Treatise on Maritime Law, published in 1652, p. 274, No. 11. It is needless giving the citations from these books, the import of them is as stated, and they are thus summarised by Eme-

rigon in his Treatise on Insurance, p. 179—'No freight,' says the Ordonnance, 'is due for merchandise lost by shipwreck or stranding, pillaged by pirates, or taken by enemies. In such case the shipper is dispensed from payment of the freight, and if he has paid it in advance he has a right to reclaim it.' This article, after having decided that no freight is due on merchandise lost, and that the master is bound in this case to restore the freight paid to him in advance, adds, 'if there is no agreement to the contrary.' Some writers even go so far as to say that a special agreement to the contrary will not be valid on account of the temptation to malversation on the part of the master if the freight was to be paid in any case.

"Such being the state of authority and precedent, the Sheriff must find in law for the pursuers. The question is referred to by Professor Bell, and if he had given a decided opinion on it, this would have amounted in the Sheriff's estimation almost to the authority of a judgment of the Supreme Court. But it is quite evident from the mode in which he has expressed himself that he had not made the point the subject of any particular consideration, relying merely on the case of *De Silvale*, and drawing from it simply the conclusion that if there be no special agreement to that effect the freighter cannot recover his advance —1 Bell's Com. p. 573. The point is also cursorily noticed by Brodie (Brodie's Stair, p. 1001)."

The defenders appealed to the First Division.

Their Lordships, on account of the importance of the case, appointed it to be debated before seven Judges.

The SOLICITOR-GENERAL and BALFOUR, for the defenders, argued—It has been firmly fixed in the law of England that a prepayment of freight cannot be demanded back even though the voyage be not performed. The rule has been approved of by Mr Bell in his Commentaries, and applied by the Second Division in the case of *Leitch* v. *Wilson*. It is sufficient, then, to show that the rule is not unreasonable; it is not necessary to show that it is abstractedly the best. The payment made by the charterers is not one without consideration. The master has done something to earn the freight in clearing the vessel. The subsequent perishing of the vessel is not his fault. The case of wages in other contracts is analogous, *e.g.*, the case of a ship burnt while being built, the work being paid for by instalments. The difference between the English and American rules appears to be one of presumption. Given the absence of stipulation, the English law will decide for the ship-owner, and the American law for the charterer. According to the law of both countries, parties may stipulate that an advance against freight shall not be demanded back in case the ship is lost. That such was the meaning of this contract is clearly to be gathered from the clause about insurance. There was a certain risk about this prepayment in case the ship was lost. How was the charterer to avoid it? By insurance, which he is authorised to effect at the expense of the owner. If the charterer had been entitled to recover the advance from the owner in any case, he could have had no insurable interest in the advance. Lastly, even supposing no stipulation that the money should not be repaid in case of the freight not being earned, the charterers cannot, in the circumstances of the case, enforce their demand. It was the meaning of the contract that they should insure the freight to the extent of the advance. Suppose the insurance had been effected they would have recovered the advance from the underwriters. They failed in performing a part of what they undertook, and therefore they cannot now recover the advance from the ship-owners.

Authorities—English cases cited by the Sheriff, also *Andrew* v. *Moorhouse*, 4 Taunton, 435; *The Salacia*, 32 L.J. (N.S.), Prob. Mat. and Adm. Causes, p. 43; Bell's Com. i, 569, 573 (5th ed.); *Leitch* v. *Wilson*, Nov. 20, 1868, 7 Macph. 150.

WATSON and BURNET, for the pursuers—By the law of every civilised country in the world except England an advance against freight is recoverable by the charterer in case the freight is not earned, except where the contrary is stipulated. The English Courts have regretted the rule which has become fixed there — See L. C.-J. Cockburn's opinion in *Byrne* v. *Schiller*, 40 L.J., p. 177, Exchequer Chamber. The advance is made entirely for the convenience of the ship-owner, and it is reasonable that if any loss arises it should fall on the party who is benefitted by the arrangement—Digest, book xix., tit. 2, c. 15, sec. 6.

At advising—

LORD PRESIDENT—The decision of this case depends on the construction of a charter-party made between the master of the ship "Janet Cowan," of Greenock, and Messrs Ralli Brothers, at Bombay on the 20th August 1863.

By this contract the master undertook and agreed that the ship should proceed to Calcutta, and there load a cargo of general merchandise from the charterers or their agents, and carry the same to a port in the United Kingdom, and deliver the same on being paid freight at the rate of 85s. per ton.

The clause regulating the payment of freight is in the following terms:—"The freight to be paid on unloading and right delivery of the cargo in cash, two month's from the ship's report inwards at the Custom House, or under discount at the rate of 5 per cent., at freighter's option."

After various other clauses the following occurs:—"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."

This charter-party was transferred by Ralli Brothers to Grant, Smith, & Co. on the 2d October, and by Grant, Smith, & Co. to the pursuers on the 13th October of the same year.

Between the 7th November and the 17th December, while the ship was preparing for her voyage from Calcutta to the United Kingdom, the pursuers made advance in cash to her master for ship's disbursements, to the extent, as they allege, of 4532 rupees, in terms of the undertaking of the charterers in the charter-party.

The said advances were not, in terms of the clause of the charter-party, endorsed on the bills of lading by the master. But in place thereof the master drew a bill of exchange for £500 on his owners in favour of the charterers. This bill the owners refused to accept, and it may be thrown aside as of no importance in the case, as the master had plainly no power to make such a draft on his owners. The case must be taken as if the master had in terms of the charter-party endorsed the amount of the advances on the bills of lading.

The ship sailed from Calcutta on her homeward voyage, but was with her cargo totally lost in course of the said voyage.

The charterers have raised this action to recover the amount of the advances made to the master at Calcutta in terms of the charter-party, which, with interest and 2½ per cent. commission, they state at the aggregate sum of £596. They charge nothing for expense of insurance (though they were entitled to recover at the owners' expense), because they did not effect any insurance.

The defence is in substance that by the terms of the charter-party the cash advanced by the charterers was not intended to constitute a loan, but was a prepayment of freight, which, according to the intention of the parties and the true construction of the contract, was not to be repaid though the vessel was lost and the freight never earned.

In the proper freight clause of this charter-party it is stipulated that the freight is to be paid on the unloading and right delivery of the cargo, which, in the absence of any other clause, means that no freight is to be paid except in consideration of, and in return for, the right delivery of the cargo. But the other clause which I have quoted binds the charterers to advance against freight sufficient cash for disbursements at the port of loading. It is, in my opinion, of no consequence whether such advances are called advances against freight or advances on account of freight or advances of freight. But I think the term "prepayment of freight" used by the defenders is unjustified by the phraseology of the clause, and calculated to mislead, as being equivocal. A stipulation for payment of freight at the port of loading, as at a time necessarily antecedent to the completion of the voyage and the earning of the freight, may be safely construed into an agreement to dispense with the rule of maritime law that no freight is due unless earned by the right delivery of the cargo. Of this kind of special contract good examples are to be found in a recent judgment of the Second Division of the Court—*Leitch* v. *Wilson*, 7 Macph. 150; and in the well-known American case, *Watson* v. *Duycuick*, 3 Johnson's Reports, 335. But in the present case there is no stipulation for payment of the freight, or in any part of it, before the term stipulated in the proper freight clause, viz., the right delivery of the cargo at the port of discharge. All that the charter-party contains qualifying the principal and proper freight clause is a provision that sufficient cash for ship's disbursements at the port of loading shall be advanced by her charterers against freight. It is needless to insist on the material and clear distinction between advance and payment or prepayment. An argument on the construction of a contract of affreightment, or any other contract of *locatio rei* or *locatio operarum*, which assumes that an advance of a portion of the *merces* or contract price is a payment or prepayment, is based on an obvious fallacy.

The general principles of law applicable to the contract of affreightment are not essentially different from those applicable to other similar contracts, such as contracts of land carriage, or building contracts, or any others, in which one party agrees to pay a certain price as the return for materials furnished, or work done, or services rendered by the other party. No doubt maritime contracts are *juris gentium*, and if the custom of the mercantile community of nations has impressed on certain words or phrases in a contract of affreightment a special meaning and effect different from what they would bear if construed according to the ordinary legal rules of construction the consuetudinary rule of the maritime law must prevail. But to establish such a rule of maritime law there must be the general consent of the maritime nations of the world expressed in the prevailing practice and understanding of the traders of these nations.

There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this, that if money is advanced by one party to a mutual contract on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts.

If one contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground or to perform any part of the work the money so advanced may certainly be recovered back if he never perform any part or any available part of his contract. No doubt if he perform a part, and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been.

There seems no ground in reason or general legal principle why the rule should not apply to an advance made by a charterer to the master of a ship of a part of the stipulated freight, the consideration of the advance being the performance of the contract work of carrying and right delivery of the cargo. If the consideration on which the advance is made fail by the non-completion of the voyage, the advance is *pari ratione*, repayable to the charterer. I speak of the case of a total failure, as here, where there is no claim for freight *pro rata itineris*, or for right delivery of a part of the cargo. The voyage indeed has been begun, and a part performed, but there is no claim for freight, because no benefit has accrued to the charterer from the voyage having been begun and in part accomplished till interrupted and terminated by shipwreck and total loss.

Does then the maritime law attach a meaning and effect to an advance of freight different from that which according to ordinary legal principle is the true meaning and effect of a stipulation for an advance of a portion of the contract price in any ordinary contract of *locatio operarum*?

On this question we have had the benefit of a very able and exhaustive argument, in the course of which all the authorities—Scottish, English, Continental, and American—have been brought under notice. It would be a mere waste of time to examine these in detail, for the result of them may be stated in a very few sentences. All the nations of the trading world, with the exception of England, concur in holding that an advance of

freight by the charterers for ship's disbursements at the port of loading, in terms of an obligation to that effect in a charter-party, is, in the event of the loss of the ship and cargo, recoverable by the charterers from the owners, unless the parties contract expressly or by clear implication that it shall not be recoverable. By a series of judgments of the common law courts of England it has been, on the contrary, settled that an advance of money by the charterers to the shipmaster at the port of loading, in terms of an obligation in the charter, is not recoverable if it be an advance of freight, but only in the event of the parties contracting expressly or by clear implication that it shall be treated as a loan independent of freight.

Such a state of the authorities places the Judges of this Court in a position of embarrassment. For it is, on the one hand, in the highest degree expedient that the mercantile law of the United Kingdom should be harmonious, and if possible identical; for which reason, in ordinary circumstances, we always pay the greatest deference and respect in such questions to the rules which have been settled in the courts of England, unless they are in conflict with our own authorities and precedents. And it cannot be said that the broad question under consideration has been directly determined in the courts of Scotland. But, on the other hand, in proper maritime questions there is almost as great an expediency, and indeed necessity, that trading nations should be at one, as that the citizens of different parts of the United Kingdom should be at one. And we must not forget that in such questions the decisions of English courts and the practice of England are no more binding on us than the laws and customs of France, Germany, Italy, and America. I feel therefore bound to say that the law and practice of the other nations of the great trading community is, in my judgment, in accordance with sound legal principle, and that the English rule is not.

If indeed it were true that an advance of cash by the charterers to the master at the port of loading must be either a payment of freight or a separate and independent loan of money, the reasoning of the English judgments would be more satisfactory. But I apprehend that an advance against freight, or an advance on account of freight, or an advance of freight without further condition or stipulation, is neither a payment of freight nor an independent loan. It is an advance made on the faith of the master and owners performing their contract, and in consideration of their subsequent performance. If it were a separate and independent loan, it could be recovered from the owners immediately, and the charterers would be entitled, contemporaneously with the advance, to draw on the owners for the amount. If it were a payment of freight made in terms of the contract at the port of loading, it could never be recovered back at all. But an advance of freight, or against freight, stands in a different position from either of these two. It cannot be recovered immediately as a loan, but must be allowed to remain in the hands of the owners or master till the termination of the voyage. But being an advance on the credit of the owners, it creates a debt due by them, though with a postponed term of payment. If the freight be earned by delivery of the cargo, the advance, with interest, will form a deduction from the gross amount of freight. But if the freight were payable in part at the port of loading, no interest ought to run on the amount so paid in the interval between that partial payment and the final settlement of freight. And yet by this and other similar contracts of affreightment the freight is declared to be payable at the port of discharge on delivery of the cargo. It follows that the money given to the master at the port of loading as an advance against freight bears interest (without any express stipulation) from the date of advance till the date of payment, and therefore cannot in any proper sense be called a payment, but is simply an advance, repayable with interest.

I arrive at the conclusion already stated with the less reluctance, because it appears from the recent case of *Byrne* v. *Schiller*, in the Exchequer Chamber, that the English Judges are fully alive to the inconvenience produced by the departure of their law and practice from the rules observed by other maritime nations. In these circumstances, it cannot be doubtful that the error will be redressed either by a judgment of the House of Lords or by legislation.

But the question still remains, whether there are any specialities in this charter-party, or in the circumstances of the case, to prevent the application of the general rule.

The cash advanced to the master by the charterers is declared to be "subject to interest, insurance, and 2½ per cent. commission." The stipulation for interest indicates nothing inconsistent with the nature of a proper advance against freight. On the contrary, the advance would have borne interest without this express stipulation. The commission is the usual charge for negotiating any loan or advance at the port of loading. But what is the meaning of the provision that the advance shall be subject to insurance, and what is its effect on the nature of the transaction and the construction of the contract?

The meaning of the words is not doubtful, and was not made the subject of controversy. The charterers are to be entitled to deduct from the advance not only interest and 2½ per cent. commission, but also so much money as is necessary to effect an insurance on freight for the amount of the total advance, counting the money actually received by the master, interest, commission, and premiums of insurance.

But if the advance was repayable with interest by the owners whether the freight was earned or not, it is difficult to see how the charterers could have an insurable interest in so much of the freight as corresponded to the amount of the advance. The charterers had no assignment to the freight, or any part of it, and they held no security over it for the amount of their advance in any proper sense of the term security. No doubt, if the freight was earned they would be entitled to set-off the amount of their advance *pro tanto* against the amount of freight payable to the owners. But so they could if they had been ordinary creditors of the owners on some other account, or if the money advanced to the master had been distinctly stated in the charter-party to be a loan of money, the charterers would, just as much as in the present case, have been entitled to a set-off in settling for the freight at the termination of the voyage. But in this latter case it is manifest, and indeed has been adjudged (*Manfield* v. *Maitland*, 4 B. and Ald. 582) that the charterer has no insurable interest, "because," as it has been well expressed, "he runs no risk of losing his debt by the perils insured against;" Arnould on Inst. i, 261. But the

charterer who makes an advance against freight repayable with interest, whether the freight be earned or not, in like manner runs no such risk, and has therefore in like manner no insurable interest. By the loss of the ship and the non-earning of the freight, both the one creditor and the other loses the opportunity he would otherwise have had of setting-off the amount of his advance against the freight. They are thus precisely *in pari casu* as regards security, and if one has no insurable interest in respect thereof, just as little has the other.

If, then, by the operation of the charter-party, the insurable interest, in so much of the freight as corresponds to the amount of the advances, is transferred from the owners to the charterers, it would seem to follow of necessity that the advance cannot be repayable in the event of ship and cargo being lost. In short, it seems impossible to reconcile those words of the charter-party which describe the cash given to the master as an advance against freight, with the provision that the charterers shall be entitled to receive the interest thereby created to them at the expense of the owners.

It was suggested in the course of the argument that the insurance to be made by the charterers might be for the benefit of the owners. But this is in the highest degree improbable. The owners would, of course, insure the freight in this country, or so much of it as they retained interest in, and there could be no object in dividing the insurance on freight, unless the insurable interest in the freight was also divided.

In point of fact, the owners did not insure the gross freight, but deducted the probable amount of ship's disbursements at Calcutta, thus indicating by their conduct in a matter of serious importance to themselves their understanding of the meaning of the charter-party.

On the other hand, the charterers did not effect the insurance which they were entitled to make at the expense of the owners. But this omission is not of much significance, for they were not (on the assumption that they had an insurable interest) bound to insure. They might choose to be their own insurers, and still charge the premium against the owners, and that they have not charged it in the account sued for may be easily explained by the exigency of their case, as they now maintain it, in consequence of the loss of the ship and cargo.

On the whole, I think it is impossible satisfactorily to explain this contract, or reconcile it with itself, except on the footing that both parties understood that the charterers thereby acquired an insurable interest in the freight to the amount of their advances, and consequently could have no claim for repayment in the event of the freight not being earned, or in other words, that the charterers were content with the double or alternative securities afforded to them by the right of set-off if the freight should be earned, and by the stipulated insurance if ship and cargo should be lost, and in respect of their securities gave up the right they would otherwise have had to recover their advances in any event.

I feel, in common I believe with all your Lordships, that this is a somewhat narrow ground on which to determine the construction of the charter-party. But the result is all the more likely to be consistent with the truth and justice of the case, from the inevitable prevalence in Indian ports of ideas regarding the effect of such clauses derived from the judgments pronounced by English courts.

I am for altering the Sheriff's judgment and assoilzing the defenders.

Lord Justice-Clerk—As I entirely concur in the exposition from the chair of the general principles of the law merchant on this subject, I shall not detain the Court with many observations on the English authorities. The earlier decisions in the English courts would probably not have ruled the present case. They appear to establish only the doctrine, that if in a charter-party it is covenanted that the freight shall be payable at a period antecedent to the completion of the voyage, the Court may presume from the terms employed that the payment was not intended to be repaid if the vessel should be lost. Such was the case of *De Silvale*, the leading one on this subject, in which the Court inferred, from the fact that the advance was to be free of interest and commission, that it was intended, not as the constitution of a debt, but as an absolute payment of freight. On the same principle the case of *Leitch* v. *Smith*, in the other Division of this Court, may be fairly defended. But the later English decisions have gone much farther, and it must now be held as settled in the English courts that any advance against freight stipulated for in the charter-party is paid absolutely, and cannot be recovered back. If, therefore, this case were to be ruled by the English precedents, our judgment must be for the defender. But I concur with your Lordship, and, indeed, with the latest English authorities, in thinking that they proceed on a principle which is artificial and unsound.

I cannot, however, coincide in the result at which your Lordship has arrived; and I shall shortly state the terms which I think our judgment should be for the pursuer, assuming that the presumption of law is, that an advance against freight is to be repaid if the voyage be not performed.

On the face of this charter-party there is no doubt whatever as to the period at which the freight is to be paid. That is fixed in the appropriate clause which deals with the obligations of the charterer as the hirer of the vessel. It is to be paid on the completion of the voyage, and on the terms which are there expressed. The subsequent clause in relation to advances, out of which the present action has arisen, does not deal with the period at which the freight is payable, or with the conditions under which it is to become due. So far as it refers to freight at all, it refers to the charterer's obligation to pay at the time, and on the conditions previously expressed. Neither does it relate to the charterer's obligations as hirer of the vessel. It is a contract for an advance of money for the benefit of the owner, to enable him to fulfil the obligations which he has undertaken by his contract of affreightment. The owner undertakes, provided the charterer will disburse at the port of loading the sums necessary to enable his vessel to fulfil her engagement, that he will not only deduct the amount advanced in settling for the freight, if freight should be earned, but will be responsible also for interest and commission, and will allow the cost of insurance to cover the risk of the voyage. He engaged also that the master should indorse these sums on the bills of lading, and so to that extent relieve the cargo. He agreed that the freight should stand pledged for all those things as first charges on it. We have therefore no question here as to a mere loan. That was the substance of what the charter-

party expressed, and I can find nothing more in its terms. It was a very reasonable and convenient arrangement, but one entirely for the owner's benefit, under which the charterer did not act as the hirer of the vessel, but as the hand or banker of the owner, stipulating only for indemnity, and having no farther interest in the transaction.

The money was advanced, and the vessel sailed, and was lost on the voyage; and it is now contended by the owner, in defence to an action for repayment, that the consequences of his nonfulfilment of his contract of carriage, and of the loss by the charterer of the security over the freight, is, that although he received the money and applied it exclusively to his own purposes, he is entitled to retain principal, interest, commission, and premium of insurance. What inducement or advantage the charterer had in entering into such a contract, or what equivalent the owner gave for this money, the owner has not been able even to suggest; but he says such is the legal interpretation of the words used.

I can find nothing in the words used which is even consistent with such an interpretation. They seem to me to express only a loan of money advanced on an impignoration of the freight, with such a stipulation for indemnity as the owner had it in his power to give; and I find nothing to suggest that the charterer took any risk beyond that. Two or three tests may be suggested, any one of which appears to be conclusive. In the first place, For whose benefit was the contract concluded? for the law will infer that the risk lay with the party who has the benefit. Now, it is certain that the owner had the whole benefit, and the charterer had none. The owner had an equivalent for his risk, while it is not said that the charterer had any. In the second place, if this were a loan of money, its fundamental and essential characteristic is the borrower's personal obligation to repay. But the advance was to bear interest until paid, which, as was found in *De Silvale's* case, is a criterion which distinguishes the constitution from the payment of a debt. In the third place, the very stipulation in regard to premium of insurance proves the same thing, for as this was manifestly a contract for indemnity, unless the premium was to be repaid in any event, the charterer could not have been kept safe.

It seems to be thought that the words "subject to insurance" of themselves imply that the charterer, without any equivalent, undertook the risk of the voyage. This seems rather a violent inference from very simple words. The words, I think, mean no more than this, that as the owner had nothing but a contingent security to offer, he was willing to be at the cost of insuring the freight to the amount advanced, if the charterer thought it necessary to insure for his own protection. Beyond this I do not think that their meaning can be stretched. As the security would be unavailing if the vessel was lost, the borrower undertakes to put the lender in funds to insure against that contingency, just as any other borrower who raises money on an expectancy may keep his creditor in funds to insure his life in case his expectancy should be defeated. In neither case can the acceptance by the creditor of the intermediate security operate a conditional discharge of the debt.

It has, however, been maintained that a specific meaning has been attached to these words, and that it has been fixed in the case of *Hicks* v. *Shield*, and confirmed in the recent case of *Byrne* in the English courts, that these words necessarily imply an undertaking by the charterer of the risk of the voyage. I think this view proceeds on a misconception of what these cases decided. *Hicks* v. *Shield* decided two points—first, that an advance in anticipation of freight could not be recovered back. Secondly, that a stipulation that the charterer might insure at the owner's expense implied an advance in anticipation of freight, because otherwise it would have been an ordinary loan, and the charterer would have had no insurable interest in the voyage. This result, although refined, is thoroughly logical. But the moment it is conceded that this advance, although in anticipation of freight, might be recovered back, the logic entirely fails. There is no authority for holding that an advance made on the security of expected freight does not give an insurable interest, if it can be recovered back on the loss of the vessel. In my opinion, the reverse is clear law. An advance against freight stipulated in the charter-party constitutes an impledging of the freight by the owner to the extent of the advance. It is as complete an assignment of that amount of freight to the charterer as if it had been contained in a separate instrument; and, along with the assignment of the freight, it carries, of course, the insurable interest. It is true the debt is not discharged. Neither is the debt of a mortgagee discharged; yet he has unquestionably an insurable interest. Freight is assignable, and may be assigned in security as well as absolutely, and it is matter of decision that an assignee of freight has an insurable interest. It has been said by some of the English Judges that according to their rule such a clause as this would operate a conveyance or a purchase of so much of the freight as the advance amounted to. But, according to the law which your Lordship proposes we should adopt, it only amounted to an assignment in security.

I find the views which I have suggested very clearly stated in a judgment by Chief-Justice Jones in the American Courts, which I take from a note to Mr Parson's book. It is in the case of *Robins* v. *The New York Insurance Company*. It was an action on an insurance effected by the plaintiff, who was an assignee to a charter-party, under which he was to advance part of the freight. He made the advance, and insured the freight, and the question was whether he had an interest to insure. The Chief-Justice says, "The advance of the freight gives no right to insure beyond the amount of the advance; and where the owner of the vessel is liable to refund in case of loss resulting, the lien the charterer has upon the freight for his security requires that proof should be made of the actual payment of the money alleged to be advanced. In most cases the charterer will have a lien upon the freight for the advances he makes the ship-owners as his security against their inability to refund. That lien gives him an interest under the charter-party as, or in the nature of, a mortgage, which he may insure; and the better opinion seems to be that he may insure it in general terms under the name of freight, without describing it as a mortgage interest." I take this to be a sound statement of the law, and in conformity with the whole current of American decision. There are some ambiguous passages in Mr Parson's book, but they seem to apply only to cases where there has been no such stipulation in the charter-party. This last sentence of his chapter on this subject puts the matter beyond doubt.

"So, too, money lent to the master, payable out of freight, creates no insurable interest in the freight, unless it is payable only out of freight, and would therefore be lost if the freight were lost, or unless the freight is assigned or pledged as a security for it. In that case we should say that the lender has the same insurable interest in the freight that he has in any interest as property held by him as security for a debt." That the freight in this case was pledged by the charter-party in security of this advance appears to me to admit of no doubt whatever, and therefore, as the charterer had an insurable interest either way, the words "subject to insurance" give no support to the defence.

I am therefore of opinion that the lender of the money ought to be repaid, and should prevail in this suit. I was much impressed by the consideration that the pursuer neglected to insure, the only one of the pleas of the defender that had any show of justice. I have found that question by far the most difficult of those raised by this case. But I am satisfied that the provision on this subject was a privilege in the lender's favour, not an obligation laid on him; and there was nothing to have prevented the defender from protecting himself by an insurance to the full amount.

LORD COWAN based his opinion on the special terms of the contract. The charterers were bound either to insure their advance or to stand their own insurers. They did not insure, and the loss must therefore fall upon them. His Lordship observed that his opinion in the case of *Leitch* v. *Wilson* was also founded on the special terms of the contract in that case. From the stipulation that the freight was to be paid before the ship could possibly arrive at the port of delivery, it was inferred that the payment was absolute, and not recoverable in case of loss of the ship and cargo.

LORD DEAS—On the general question, whether the rule adopted in England or that adopted in America and the Continent, is consistent with the law of Scotland, I entirely concur with your Lordship in the chair. In America they hold that, in order to prevent the charterer from having a claim to repayment of an advance against freight, there must be express stipulation, or implication so clear as to be equivalent to express stipulation, that the advance is not to be recoverable in case the ship is lost. In England the rule is quite different. The general question has never been decided in Scotland, for the ground of decision in the case of *Leitch* v. *Wilson* was that there was a stipulation that the freight would be paid one month after the ship had sailed, whereas the ship would not reach the port of delivery under six weeks. That was held to be clear implication that the freight was not to be demanded back again. Whether the decision was sound or not, it did not decide the general question as to whether the English or the American rule should be adopted. On that question I am of opinion that the sound rule is that so clearly stated by your Lordship. A great principle lies in the expediency of giving to ship-owners the deepest possible interest in the preservation of ship and cargo. This important principle is much better given effect to by the American rule than by the English. On this I so entirely concur that I need say no more.

With respect to the construction of this charter-party, I also arrive at the same result as your Lordship. It appears to me that if the Lord Justice-Clerk is right in thinking that the charterer had an insurable interest in the portion of freight corresponding to the advance, it is so much easier to arrive at the result that he was bound either to insure or to stand his own insurer. According to the view of the Lord Justice-Clerk, either the ship-owner or the charterer might have insured the freight to this extent. The only question is, Which of them undertook to insure? The insurance was to be made at the expense of the ship-owner, who is to be debited with the sum necessary to effect the insurance, just as he is to be debited with the interest and commission. They are coupled together. Does not that imply that the charterer was either to insure or take the consequences? I have only one additional observation. If there had been any difficulty about the charterer having an insurable interest, he might, under this contract, have insured in the name of the owner. The security would not perhaps have been quite so good as an insurance in his own name, still it would have created a security available to both parties. That this is the fair and reasonable construction of the contract is confirmed by what follows—The shipowner insures to the extent of £4000 of the freight, leaving the other £500 to be insured by the charterer.

LORDS NEAVES and ARDMILLAN concurred with the LORD PRESIDENT, both as to the general doctrine and the construction of the stipulation in the charter-party respecting insurance.

LORD KINLOCH—I am of opinion that in this case the Sheriff has arrived at a right conclusion, though I am not prepared to adopt all the views expressed by him.

The action is not one for repayment of freight. It is an action for reimbursement of advances made by the pursuers at Calcutta, on account of the owners of the 'Janet Cowan,' and for their accommodation. In ordinary circumstances there would be no doubt of the pursuers being entitled to this reimbursement. But the defenders maintain that by the contract of parties the advance was to be put on the footing of a prepayment of freight, and a prepayment of which no recovery was to be had if the vessel was lost and no freight earned. Their conclusion is, that the vessel having been lost, the advance is lost to the pursuers. The question thus arises on the defence, and the *onus* lies on the defenders to establish their case.

I conceive that this question is to be determined by a sound interpretation of the charter-party, which constitutes the contract between the parties. This is a maritime contract, to be interpreted according to the general maritime law as administered in the Scottish Courts. The vessel was further of Scottish nationality—a circumstance often thought important, if not conclusive. The case is not to be decided by the application of rules recognised in other Courts, except in so far as these quadrate with our own, or are sound deductions from our own recognised principles of maritime jurisprudence.

I am of opinion that the charter-party in the present case forms in no sound sense a contract for prepayment of freight; unquestionably not a contract for prepayment of freight in the sense of an advance which was to be lost to the party making it in the event of the vessel being lost. I consider it to be simply a contract for an advance of money to the owners, with the charterers secured in repay-

ment by the power of setting the amount against the counter claim for freight, when freight should come to be payable. The advance was a loan with a security. Such, and such only, I consider to be the meaning of the words "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." I cannot interpret this stipulation into one for a repayment of freight, to be lost to the charterers if the vessel should be lost. If this meaning has been put on such words by the courts of England, I cannot adopt the construction. I interpret the contract for myself according to my own best lights; and I view it as a contract for an advance of money, to be repaid by the ship-owners in all circumstances, with the further security to the charterers that they were entitled to deduct the sum from the freight due by them when that freight came to be payable. The inference at once holds, that if by the loss of the vessel no freight ever became due, the charterers lost the security which the right of retention gave them; but the ship-owners remained not the less personally liable for the sum advanced on their behalf.

There would not, so far as I can understand, be much difference of opinion as to this being the true result if the word "insurance had not occurred in the charter-party, in the part where it is said that the advance was "subject to interest, insurance, and 2½ per cent. commission." It is said that the introduction of this word infers that the charterers were to insure the advance, the ship-owners paying the premium of insurance; that there was no insurable interest except on the supposition that the advance was to be lost if the ship was lost; and that the contract must therefore be held to have been engaged in by both parties on the understanding that such should take place.

I cannot adopt this view. If, independently of this single word, the contract is such as I have assumed it, I cannot hold its construction altered merely because I find this word in it, without any further explanation of the meaning of the parties in introducing it. I think it fairly to be inferred, from the occurrence of the word in the charter-party, that the charterers had the option given them of insuring the advance, and that if they did so the ship-owners were to pay the premium. But I think it is a wide step to make to deduce that in the understanding of the parties the ship-owners were not to be personally liable for the advance if the ship happened to be lost. I am not prepared to hold that there was no insurable interest in the charterers except on the assumption of the loss of the ship inferring the loss of the advance. The loss of the ship was beyond all doubt the loss to the charterers of a security; the security, namely, that they held over the retained freight. But there is nothing incompetent in insuring a security which is exposed to loss through the perils of the seas; and this appears to be in substance that which was contemplated. At all events (and this is the true point at issue) I see nothing to convince me that the parties to this contract mutually understood that there was no insurable interest unless the advance was lost if the vessel was lost, and that therefore in the event of the loss of the vessel the advance was irrecoverable. I think it far easier to infer that they proceeded on the assumption that the security might be insured by the creditor if he chose to do so without his recovery of his advance being affected one way or other. In point of fact no insurance was made, which would scarcely have happened if the creditor's whole reimbursement knowingly depended on the safe arrival of the ship. I cannot safely put on this word any further meaning than that it bound the ship-owners to bear the expense of the premium if insurance should be made—that is, if insurance was competent, and should be actually effected. In short, I think the introduction of the word merely infers a provision as to expense, namely, that the ship-owners became bound for the expense of any competent insurance. Beyond this I cannot go. I do not find myself warranted in drawing from the introduction of this word into the charter-party a conclusion altogether at variance, as it appears to me, with the plain words of the rest of the document. This would be to give an inference from a single unexplained word occurring in a contract, an effect in overruling the general terms of the contract which I consider quite inadmissible.

I may perhaps be permitted to add that I could not arrive at an opposite conclusion without, as I think, indirectly sanctioning those decisions in the English Courts which I cannot apply directly. I think it scarcely open to doubt that it is because of its being found by these Courts that such an advance is a proper prepayment of freight, of which repayment is not recoverable if the ship be lost, that insurance has come to be thought a precaution appropriate to the case. What I am asked to hold in the present case amounts in substance to this, that the parties to the charter-party, adopting the English rule of law that the advance was irrecoverable if the vessel was lost, inserted the stipulation about insurance for the purpose of meeting that case, and on the express ground that such was the understanding betwixt them. I cannot proceed on such a footing. Nothing, as I think, would be more perilous than to deduce the meaning of a contract from a speculation about the particular legal views of the parties, or a question whether they proceeded on a mutually admitted doctrine, or merely introduced a word by way of greater caution on either side. It would require very clear evidence to warrant its being held, contrary to the general meaning of the document, that the parties proceeded on a mutual adoption of the rules of the English Courts, more particularly where these Courts did not necessarily or naturally form the tribunal in which any dispute between them was to be decided. I cannot infer such an adoption from the unexplained insertion of the word "insurance" into the charter-party, all the rest of that document leading, as I think, to an entirely opposite conclusion.

After what I have said, it is scarcely necessary for me to observe that I give no concurrence to the position that by this charter-party the charterers undertook to effect insurance on the freight for behoof of the ship-owners as well as of themselves, and in consequence of a breach of duty in not insuring must be held to lose the amount of their advance. To lay such an obligation on the charterers would, I think, require something much more distinct and unambiguous to be inserted in the contract. The sound inference, as it appears to me, is that it was left optional to the charterers to insure or not, as they thought best for their security, the effect of the clause simply being that if they did insure the ship-owners were to bear

the expense. To infer a forfeiture of the advance because insurance was not made would be to insert a penalty in the contract which its terms do not contain, and this I consider to be at variance with established principle. This option to the charterers to insure this special advance for their own security did not in the least preclude an insurance by the owners for the full amount of the freight. It would only do so on the assumption of the advance being out and out payment of the freight *pro tanto*, leaving no interest in the owners but for the balance, to make which assumption would be to beg the question at issue. A policy on the whole freight effected by the owners, and a policy, if otherwise competent, on the special advance effected by the charterers for their own security would quite well stand together. This would no doubt be double policies on what in some sense was the same risk, but there is nothing incompetent in this. It is quite consistent that there should be multiplicity of policies, but only one recovery.

I would only in conclusion say one or two words regarding the decision in this Court of the case of *Leitch* v. *Wilson*, as supposed in some quarters to have adopted the rule of English law, that a prepayment of freight by a charterer is always irrecoverable in the event of the vessel being lost. In deciding that case as Lord Ordinary I did not proceed on any contrast between English and American authorities, or adopt either one or other of these. I proceeded simply on the ground that by the terms of the charter-party, which made the freight of a voyage to Demerara, which usually took six weeks, payable in Glasgow within a month after the vessel sailing, there was a contract created for out and out payment of the freight whether the vessel reached her destination or not, or, in the ordinary maritime phrase, "lost or not lost." I do not find that in affirming my judgment the Court adopted any other ground. I entertain no doubt that parties may so contract as to make payment of the freight by anticipation an absolute and irrecoverable payment whether the vessel be lost or not, and any judgment, whether in England or here, which proceeds on the footing that such a contract has been made proceeds on a sound principle of equity, whatever difference of opinion there may be as to the precise construction of the agreement. The same result may be arrived at as to a partial advance on account of freight—that is to say, parties may contract that such an advance shall not be repayable if the vessel be lost, though I think very clear words would be required to operate such a result. I do not think that a mere partial payment, made for the accommodation of the owners, without any stipulation on the subject, express or implied, is *eo ipso* irrecoverable; on the contrary, I think that this will just stand in the category of an advance for the creditor's accommodation towards a contingent debt to be recovered back if the debt does not become due through the non-emergence of the contingency. The rule which is said to be now settled in the English Courts that every partial payment of freight is *eo ipso* irrecoverable I cannot sanction or adopt; and I would consider it a most unsuitable season for its adoption when the English Courts are expressing their regret for its now irretrievable establishment. We are here in no such predicament. We are not tied down to any such rule, but may decide the case on the principles which legitimately apply to it. The case is not to be determined by the application of any arbitrary or artificial principle. The true rule of decision is a sound regard to the terms of the individual contract. What I consider these to be in the present case I have already explained.

The parties having come to an agreement that the pursuers should obtain decree for £20 odds of premium and commission, with interest from the 7th July 1864, the Court, of consent, decerned for that amount, and *quoad ultra* assoilzied the defenders, with expenses.

Agent for the Pursuers—William Mason, S.S.C.
Agent for the Defenders—William Archibald, S.S.C.

Thursday, November 30.

BIRKETT, SPERLING, & CO. *v.* ENGHOLM & CO.

Insurance—Sale—Contract—War Risk. A cargo of oats to be shipped by a German vessel at Archangel was sold at so much per quarter, "cost, freight, and insurance" to this country, "payment to be made by cash in London on handing invoice, and in exchange for shipping documents." After the contract was completed, but before the vessel arrived at Archangel, war was declared between France and Germany, and the vessel became liable to capture. The purchasers maintained that the insurance which the sellers had undertaken to effect must include war risk. The sellers denied this, and when notice had arrived that the cargo had been shipped they in effect tendered to the purchasers a policy in which war risk was excluded. The purchasers declined to accept this, and declared the contract at an end; and although the vessel subsequently arrived safely in this country they refused to take delivery of the cargo.

Held that the sellers were bound to effect an insurance covering war risk, and to tender the same along with the shipping documents, and that on their wrongful refusal to implement the contract the purchasers were entitled to rescind the contract.

Observed that the proper implement of the contract by the sellers was not delivery of the cargo, but delivery of the shipping documents.

On the 23d June 1870 the pursuers Birkett, Sperling, & Co., merchants in London, and the defenders Engholm & Co., merchants in Leith, entered into a contract, embodied in bought and sold notes, as follows:—

"*Leith*, 23*d June* 1870.

"Bought through Birkett, Sperling, & Co., of London, selling by order and for account of their principals—A cargo of about 1100 quarters, or whatever the ship may carry, of Archangel oats, of fair average quality of the season, to be shipped by the 'Ems,' 3/3 1.1. 110 tons register, on her arrival at Archangel, at the price of 23s. (say twenty-three shillings) cost, freight, and insurance to London, or the east coast of Great Britain, according to charter-party, for every 304 lb. weighed out, sound or damaged, at the port of discharge.

"Payment to be made by cash in London on handing invoice, and in exchange for shipping documents, less interest at 5 per cent. per annum