ments. That in *Dawson's* case was no more a "bond" in the technical term than this is. It was a written obligation granted by the party with whom the money was deposited. It was "to be repaid on three months' notice," but that, as Lord Kinnear explained, did not make it the less heritable as regarded the widow's rights, when, as here, there was a time fixed for payment of interest, viz., half-yearly, because the arrival of that term (the principal being still left invested as before) "afforded evidence that the creditor intended from the beginning to employ his money for a term of years together at interest." Lord Kinnear founded his whole judgment on its having been determined by many decisions and "laid down as settled law by the institutional writers, that it is the payment of interest which fixes the heritable character of a personal bond." The single point of apparent distinction was that in the *Dawson* acknowledgment the rate of interest (payable half-yearly) was to be 4 per cent. But I have already explained why I cannot regard this as an essential distinction.

I am therefore confirmed in my view that the Lord Ordinary is right by there being recent and binding authority on this very question.

I would only, in conclusion, remind your Lordships that when, by section 117 of the Titles to Land Consolidation Act, all heritable securities were made moveable as regards the succession of the creditor in such security, it was provided that this legislation should not affect the reciprocal rights of husband and wife, or (for the matter of that) the claims of children to legitim; and further, that the right of the creditor to regulate the heritable or moveable character of his own estate was saved by allowing him to leave the succession to his heritable securities still heritable by the simple expedient of taking the securities expressly to his heirs or assignees or successors, excluding executors. So the recognition of the creditor's intention in such matters is no unfamiliar thing in our law, and has received statutory sanction so lately as 1868.

LORD LOW—I am of the same opinion. I agree with the grounds of judgment stated by your Lordships and by the Lord Ordinary, and I have nothing to add.

LORD ARDWALL—I consider the questions raised by this reclaiming note to be of some difficulty. In particular, I have considerable difficulty in holding that the words "we propose to pay interest on this half-yearly" can be regarded as a clause "for payment of annual rent and profit," in the sense of that phrase according to the former common law of Scotland.

But having regard to the dicta of the Judges who decided the case of *Dawson's Trustees* v. *Dawson*, 23 R. 1006, I am unable to draw a distinction in principle between that case and the present sufficient to justify me in differing from the judgment proposed by your Lordships, in which accordingly I concur.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Cooper, K.C.—A. R. Brown. Agents—Henry & Scott, W.S.

Counsel for the Defenders and Respondents—Dean of Faculty (Campbell, K.C.)—Chree. Agents—Cumming & Duff, S.S.C.

Wednesday, March 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LAMONT, NISBETT, & COMPANY *v.* HAMILTON AND OTHERS.

Principal and Agent—Insurance—Ship—Discharge of Principal by Dealings with Agent—Dealings with Managing Owners of Ship Showing Acceptance of them as Principals by Insurance Broker—Cancellation of Insurance Policies.

A firm of insurance brokers who, on the instructions of the managing owners of a steamer, had insured her and paid the insurance premiums, stipulated with the managing owners for the right, in the event of the latter's acceptances not being met at maturity, to cancel the policies and apply the return premiums thence arising in repayment of the general indebtedness to them of the managing owners, who acted for several ships separately owned and kept no separate accounts for each ship. No notice of this stipulation was given to the owners of the steamer. The managing owners subsequently became bankrupt, and the brokers cancelled the policies.

In an action at the instance of the brokers against the owners to recover the premiums paid, *held* that as it was beyond the powers of managing owners to cancel policies, the pursuers, in stipulating with them for the right to do so, unknown to the defenders, had taken the managing owners as sole debtors, and thereby released the defenders.

Xenos v. *Wickham*, 1866, L.R., 2 E. and I. App. 296, *applied*.

On 5th September 1903 Lamont, Nisbett, & Company, marine insurance brokers, Royal Exchange, Glasgow, raised an action against Daniel Hamilton, 147 West George Street, Glasgow, and others, registered owners of nineteen sixty-fourths of the s.s. "Gordon Castle" (defenders), and also against Neil M'Lean and Neil M'Lean junior, shipowners, 27 St Vincent Place, Glasgow, registered owners of thirty-three sixty-fourths of the said steamer, and Thomson M'Lintock, C.A., 88 St Vincent Street, Glasgow, trustee on the sequestrated estates of the said Neil M'Lean and Neil M'Lean junior, for their interest.

They sued for £797, 8s. 2d. This sum was arrived at by deducting £181, 11s. 11d., the amount of return premiums on cancelled insurances, from £979, 0s. 1d., the alleged amount of the premiums of insurances effected by the pursuers on the hull and machinery of the said ship and on her freight and disbursements.

The defenders were the owners of the s.s. "Gordon Castle" within the jurisdiction. Neil M'Lean and Neil M'Lean junior, as well as being owners, had been the partners of Neil M'Lean & Company, who had managed that vessel. Neil M'Lean & Company had become bankrupt in February 1897, paying the pursuers no dividend on their claim in the sequestration.

Neil M'Lean & Company, in addition to the s.s. "Gordon Castle," had managed several vessels belonging to different owners, but had kept no separate accounts for each vessel. Their business arrangements with the pursuers are shown by the following letter:—

"Glasgow, 20*th May* '95.

"Messrs Lamont, Nisbett, & Co.,
Royal Exchange.

"Dear Sirs,—With reference to our acceptances for £200, 4s. 7d. due 13th June '95, £164, 1s. 5d. due 13th July '95, £361, 3s. 11d. due 13th August '95, and £512, 7s. 0d. due 13th Sept. '95, it is hereby declared and agreed that these bills represent, in addition to other premiums, premiums on the undernoted policies per 'Straits of Dover,' 'Gordon Castle,' and 'Straits of Magellan,' and it is further declared and agreed that should such acceptances or any renewals thereof be unpaid at maturity you are authorised and entitled to intimate cancelment of risk to underwriters and companies on said undernoted policies in whole or in part and apply the return premium due in respect of such cancelling to payment of said acceptances, and this authority shall not be prejudiced or affected by the policies being held by us or others, the return premiums thereon being hereby absolutely assigned to you—

£500	on H. & M. p.	'Straits of Dover'	(Straits Coy.)	12 mos. from noon 20th
500	,,	do.	(Sea Coy.)	Feby. '95.
1500	,,	do.	(Lower Rhine Coy.),	12 mos. fr. n. 19th April '95.
3000	,,	'Gordon Castle'	(Shipowner Syndicate)	12 mos. from noon
500	,,	do.	(L'Esperance Coy.)	18th April '95.
300	,,	'Straits of Magellan'	(Devitt & Moores U/ers)	12 mos. from noon
500	,,	do.	(L'Esperance Coy.)	3rd April '95.
1000	,,	do.	(Lower Rhine Coy.)	

Yours faithfully.—Neil M'Lean & Co."

Another letter, of date 4th May 1896, in similar terms, was also produced, viz.:—"Glasgow, 4*th May* '96.—Messrs Lamont, Nisbett, & Company, insurance brokers, Royal Exchange Buildings.—Dear Sirs—With reference to our acceptances for £394, 8s. 2d. at 3 m/d due 13th June '96, £399, 8s. 8d. at 3 m/d due 14th July '96, and £394, 8s. 3d. at 6 m/d due 13th September '96 against premium on the undernoted policies, it is understood that should either of such acceptances or any renewals thereof be unpaid at maturity you are authorised and entitled to intimate cancelment of risk to underwriters and companies on these policies and apply the return premium due in respect of such cancelling to payment of such acceptances, and this authority shall not be prejudiced or affected by the policies being held by us or others, the return premiums being hereby absolutely assigned to you.—Yours faithfully, Neil M'Lean & Company." (Here followed list of insurances on s.s. "Gordon Castle" and s.s. "Straits of Magellan").

The pursuers pleaded—"(1) The defenders, as part owners of the steamship 'Gordon Castle,' being jointly and severally liable for payment of the premiums disbursed by the pursuers upon the instructions of the managing owners of said steamship, decree as concluded for should be pronounced. (2) The pursuers having, on the instructions of the managing owners of the said steamship 'Gordon Castle,' or by their authority, disbursed the premiums sued for, are entitled to decree therefor as concluded for, with expenses."

The defenders pleaded, *inter alia*—"(7) The pursuers having throughout the course of the transactions referred to elected to take the said Neil M'Lean & Company as their debtors, are not now entitled to claim payment from these defenders."

On 30th May 1905 the Lord Ordinary (Stormonth Darling), after a proof, from which it appeared that the pursuers cancelled the policies in question in or about February 1897, pronounced an interlocutor, finding that the pursuers, in the course of their transactions with reference to the policies in question, elected to take M'Lean & Company as their sole debtors, and thereby liberated the defenders from all liability for the sums concluded for, and assoilzieing the defenders with expenses.

Opinion.—"This is an action by a marine insurance broker against such of the owners of the steamship 'Gordon Castle' as are resident in this country, for reimbursement of premiums on policies of insurance over the hull, machinery, disbursements, and freight of the ship effected during the year 1896. The demand has been met with every possible defence, beginning with a plea founded on the triennial prescription, which I repelled on 21st December 1904 when I allowed a proof at large. I do not wonder at the sturdiness of the defenders' resistance, for there is a certain hardship in holding them liable, not only on account of the lapse of time, but because they lost money through the bankruptcy of Neil M'Lean & Company, the managing owners, so far back as 1897, and also because a defence fund, amounting to more than

£3000, which the solvent owners subscribed after the sequestration, was in 1901 refunded to the contributors. I do not attach the least importance to this last circumstance. It is only an illustration of the rashness which business men sometimes exhibit about their own affairs, for the subscribers divided the money after the pursuers had intimated that they intended to raise an action. Neither do I regard the mere lapse of time nor the fact that the pursuers took and renewed bills from the managing owners for the amount of the premiums as relieving the defenders from liability.

"If that had been all, I think that the cases of *Davidson*, 9 Q.B.D. 623, and the *Huntsman*, 1894, P.D. 214, would have been a sufficient answer on the part of the pursuers. But I have come to the conclusion that certain facts in the course of dealing between the pursuer and the managing owners which came out in the proof, though no explicit reference is made to them on record, are sufficient to establish the defence that the pursuers in the course of these transactions elected to take M'Lean & Company as their sole debtor. The objection that there is no explicit averment of these facts (which would otherwise be a formidable objection) is obviated, I think, by their having arisen out of the pursuers' own conduct, and being thus within their own knowledge.

"The relation of an insurance broker to the owners of a ship for which he procures insurances on the instructions of a managing owner is a peculiar one. As regards premiums, he is the debtor of the underwriters, and the assured—that is, the owners—are the debtors of the broker. No doubt this latter liability is, in the ordinary case, worked out through the instrumentality of the managing owner. It is part of the regular course of dealing that the money of the adventure should pass through his hands, and this money forms the natural source from which repayment of the premiums may, in the first instance, be expected by the broker. I do not find that when the insurances in question were made there was anything to take them out of the ordinary case. It is not disputed that they were for the ship as a whole, its hull, freight, and so on, that they were made on the instructions of the managing owners, and that, although these persons had no express authority from their co-owners to order insurance, the co-owners (including the defenders) knew perfectly well that insurances were being made from time to time, and would have considered it a breach of duty on the part of the managing owners if they had acted otherwise. Further, it is proved that the premiums of which reimbursement is asked were paid by the pursuers, and have not been repaid to them by the managing owners.

"Counsel for the defenders founded on certain passages in the text writers to the effect that a ship's husband, under his general authority, has no power to insure or to bind the owners for premiums (see 1 Bell's Com. p. 553). One can quite understand that in the early days of marine insurance the duty of insuring, though always an advantage, was not considered so absolutely necessary to the adventure constituted by the employment of the ship as, for instance, the proper outfit of the vessel and the due furnishing of provisions and stores. Whether any distinction of that kind would nowadays be drawn I greatly doubt, but it is really unnecessary to pursue that question, for I am not aware that it was ever doubted that authority to insure might be inferred from accounts rendered from time to time by the managing owner to his co-owners containing a note of such insurances, and passed by them without objection. This was the case here; and the defenders who were examined candidly admitted that they all along considered it to be the duty of M'Lean & Company to insure the 'Gordon Castle.' Accordingly I have no sort of doubt that in 1896, when these insurances were made, the defenders and the other co-owners were all liable jointly and severally in reimbursement of the premiums, and that they remained liable unless and until the pursuer did something to liberate them from their liability as principals. It is always to be remembered that the liability of a part-owner, which is originally a several liability, becomes joint and several the moment the part-owners as a body resolve on the adventure involved in the employment of the ship and employ a ship's husband or managing owner for that purpose.

"So far, my view is entirely in favour of the pursuers. But the next and vital question is whether anything in their conduct has had the effect of liberating the co-owners.

"I altogether discard the defence founded on the fact that, so far back as 1892, a sort of guarantee fund for insurance was established to which most of the owners contributed in proportion to the value of their shares. This could never have the effect of limiting their liability to the amount of their contributions, particularly in a question with one who had no knowledge of the existence of such a fund. I also, as already indicated, reject the defence founded on the fact that the pursuers, instead of obtaining payment of the premiums in cash from M'Lean & Company, took bills from them for the amount of the premiums and renewed these bills several times before the sequestration in March 1897, for the defenders' counsel admitted upon the authorities that this circumstance by itself could not be founded on as liberating the defenders from liability. I am not even prepared to say (although this is a more doubtful point) that the pursuers liberated the defenders by the mere fact that, knowing M'Lean & Company to be acting as ship's husbands of other vessels, they took bills for sums not limited to premiums for the 'Gordon Castle.' It is an unfavourable circumstance for the defenders that during the years 1895 and 1896 they made no inquiries about the earnings of their ships. The sums mentioned as standing at her credit during those years in M'Lean & Company's

books were temporary balances, subject to adjustment at the close of the voyage, and if moneys which properly belonged to the 'Gordon Castle' were misapplied by M'Lean & Company, that circumstance may be said to have been due not to anything in the conduct of the pursuers, but to the defenders' want of vigilance in supervising their agent.

"But the facts in the conduct of the pursuers which I cannot get over, and which I think must have the effect of liberating the defenders from liability, are, that they stipulated with M'Lean & Company for the right, in the event of any of their acceptances not being met at maturity, to cancel the policies and apply the return premiums thence arising in repayment of their general indebtedness, that they exercised this right with respect to the policies in question, and that they did all this without notice to the defenders or any of their co-owners. It is no answer for them to say that the consent of the managing owner was enough. They ought to have known that, although it may be within the authority of a managing owner or any other agent to effect a policy of marine insurance, it is not within their authority, unless expressly conferred, to cancel such a policy (*Xenos* v. *Wickham*, L.R., 2 Eng. & Ir. App. 296). Neither, in my opinion, is it any answer for the pursuers to say that in the event no injury actually resulted to the defenders, inasmuch as none of the risks insured against were incurred, and the defenders are getting credit for the return premiums in the pursuers' account. It seems to me that if the defenders were to be held liable for the premiums they were entitled to have an opportunity of deciding whether the policies were to be cancelled or not, and that the pursuers by cancelling them without notice elected to take M'Lean & Company as their sole debtors, and thereby liberated the defenders from all liability.

"On this ground alone I must find that the pursuers in the course of their transactions with reference to the policies in question elected to take M'Lean & Company as their sole debtors, and thereby liberated the defenders from all liability for the sums concluded for. I will therefore grant absolvitor with expenses. But I think it right to add that in my opinion the defenders entirely failed to prove that the pursuers wilfully refrained from communicating to the defenders any facts as to the financial position of M'Lean & Company, and this view, along with other allegations as to which the defenders have failed, may properly be taken into consideration by the Auditor in dealing with expenses."

The pursuers reclaimed, and argued—The defenders here were liable. The ruling factor on whether a principal was bound was the intention of parties—Bell's Prin. 224a. Now in this case Neil M'Lean & Company were not ships' husbands only. They were part owners and were dealt with as such. As part owners engaged in a joint adventure they bound all the partners—Bell's Com. ii, p. 545; Partnership Act 1890 (53 and 54 Vict. cap. 39), section 5; Lindley on Partnership, 7th ed., 35 and 36—and that for the premiums of insurance—Bell's Com., *cit. sup.*; Abbott on Merchant Shipping, 14th ed., 135, 136. The position of the pursuers on the other hand was that of a principal—Arnold on Marine Insurance, 7th ed. 170, *et seq.* This therefore was a case of dealing between principals, not a case of whether credit had been given to an agent alone or to his principal. *Paterson* v. *Gandasequi* (1812), 15 East. 62; Smith's Leading Cases, 10th ed., ii, p. 355, 13 R.R. 368, and the cases following thereon, which were relied on by the defenders, had consequently no application. The defenders being at first liable remained liable unless there had been delegation or such actings on the part of the pursuers as to mislead and prejudice them. There had been no delegation, and there was a strong presumption against it—Ersk. Inst. iii, 4, 22; *M'Intosh & Son* v. *Ainslie*, January 10, 1872, 10 Macph. 304, 9 S.L.R. 204. There had been no such actings on the part of the pursuers as to mislead the defenders to their prejudice and so discharge them; giving time or taking bills was not sufficient—*Davison* v. *Donaldson*, 1882, 9 Q.B.D. 623; *Robinson* v. *Gleadow*, 1835, 2 Bing. N. S. 155, 2 Scot's Rep. 250; "*The Huntsman*" [1894] P. 214. The pursuers had not in fact cancelled the policies seeing that the policies in February 1897 had no cancellable value. They had then practically expired—expiring as they did in March—and were worth little or nothing. Credit had been allowed for the return premiums, and no loss or damage had been incurred. *Esto*, however, that the policies had in fact been cancelled, the pursuers were entitled to cancel them. It was the regular and known practice for managing owners to cancel policies where the bills for that ship's premiums were not met at maturity—*Arnould, cit. sup.*, p. 130. The pursuers in cancelling the policies on the "Gordon Castle" acted in the belief that the defenders had got, as in fact they did get, credit for the returned premiums in Neil M'Lean & Company's books. That was the fair meaning of the letters (quoted *supra*) authorising cancellation. The letters applied distributively to each of the separate insurances. The consent of the managing owners to cancellation was equivalent to that of the whole owners. The case was ruled by *Davison* v. *Donaldson, cit. sup.*

Argued for respondents—The facts showed that the pursuers had taken M'Lean & Company as their sole debtors and so had released the defenders. The course of dealing showed this, all the different transactions with M'Lean & Company being slumped together and no separate accounts for each vessel being kept. The policies on the various vessels were not kept distinct, and the policies on the "Gordon Castle" were cancelled not only for the benefit of her owners but also for the benefit of other vessels, and to meet Neil M'Lean & Company's general indebtedness to the pursuers. The pursuers, though fully aware of Neil M'Lean & Company's financial difficulties, had financed them and in fact dealt with them as principals and sole debtors. It was

not true to say that the policies were not in fact cancelled or that they had no cancellable value. They were of value and were in fact cancelled. If the pursuers had been dealing with M'Lean & Company as managing owners only, then the managing owners were not entitled to cancel policies and leave the vessel uninsured—*Xenos* v. *Wickham*, 1866, L.R., 2 E. & I. App. 296. M'Lean & Company, however, as a firm, were not co-owners; they were merely ships' husbands and a different *persona* from Neil M'Lean and Neil M'Lean junior, who as individuals were co-owners. That being so the case of *Davison* v. *Donaldson* relied on by the pursuers was inapplicable. This was not a case of partners being sued for a partnership debt. The pursuers further had by their actings both misled and prejudiced the defenders and had therefore released them. The case was ruled by the series of cases which decided that a party having selected the agent as his debtor could not come down upon the principal—*Paterson* v. *Gandasequi*, *cit. sup.*; *Addison* v. *Gandasequi*, 4 Taunt. 574, Smith's Leading Cases 10th ed., ii, 361, 13 R.R. 689; *Hood* v. *Cochrane*, January 16, 1818, F.C.; *Young* v. *Smart*, December 14, 1831, 10 S. 130; *Stevenson* v. *Campbell*, February 25, 1836, 14 S. 562; *Carsewell* v. *Scotts & Stephenson*, July 10, 1839, 1 D. 1215; *Thomson* v. *Davenport*, 1829, 9 B. & C. 78, at p. 86.

LORD PRESIDENT—This is a case in which Lamont, Nesbitt, & Co., who are a firm of insurance brokers, sue certain persons, being such of the solvent owners of a ship called the "Gordon Castle" as are resident in Scotland and subject to the jurisdiction of the Court; and the demand is for premiums which the insurance brokers allege to be due to them in respect of policies effected over the "Gordon Castle," the said premiums being incurred by the insurance brokers to the underwriters in the months of March, May, September, and November 1896. At that time the "Gordon Castle" was managed by a firm of the name of Neil M'Lean & Company, who acted as managing owners, and there is, I think, no doubt whatsoever that in that capacity the managing owners, namely, Neil M'Lean & Company, had both a right, and indeed a duty, to keep the ship insured; and, as a matter of fact, they did take out policies on the "Gordon Castle." Neil M'Lean & Company subsequently went bankrupt, and on an accounting between Neil M'Lean & Company, and Lamont, Nisbett, & Company, it is true that these premiums have not been paid. The sums due had been paid to the underwriters by Lamont & Company.

Now in the ordinary case there would be nothing more to be said. I am, of course, not throwing any doubt on what is the A B C of the situation—that in general the managing owner has a duty to insure the ship, and that if he insures the ship he does it on behalf of the owners as principals, and that accordingly they become bound for the sum which he, the managing owner, pays to the underwriters. Nor do I think it would make any difference for the owner to say, as is said here by the owner, "Well, we, the owners, really, on an accounting with our own managing owner, put him in quite sufficient funds to pay, and if he had acted fairly to us he would have paid you."

Something more must, I think, be said than that. In other words, I quite assent to the law laid down in the case of *Davison* v. *Donaldson* (9 Q.B.D. 623), where it was held that where the principal was admittedly bound then it was not enough for him to say to the creditor, "Well, but I did not see the accounts soon enough, and you allowed time to go past; if you had not allowed that time to elapse we would never have done what we have done, viz., settled accounts with our agents." That is not enough—he would have to say something more, namely, that by the action of the creditor he had been induced to settle with the agent on the assumption that the debt was already paid, and that could not be said here. But the matter which I think distinguishes this case from *Davison* is the matter mentioned by the Lord Ordinary, and it is this—To whom was the credit originally given at all? In *Davison's* case there was no question that the credit was given to the ship. Beef was supplied to the ship, and no question was raised, so far as I can see, that that credit was given to the ship, Now here, owing to the relationship and the acting of parties, I have come clearly to the conclusion that Lamont, Nisbett & Company never gave credit to anyone apart from Neil M'Lean & Company, and that they knew that perfectly well. I think that comes out very clearly from the letters which are in process, which show how the business was conducted. Neil M'Lean & Company never seem to have been in the habit—probably they were not able—they never were in the habit at any rate of paying Lamont, Nisbett, & Company in cash. They generally paid them by means of acceptances which were discounted with the bank, and on 20th May 1895 they write to Lamont, Nisbett, & Company as follows:—"Glasgow, 20th May 1895. Dear Sirs, With reference to our acceptances for," and then comes a note of acceptances, "it is hereby declared and agreed that these bills represent, in addition to other premiums, premiums on the undernoted policies per 'Straits of Dover,' 'Gordon Castle,' and 'Straits of Magellan'" (it is to be noted that each of these vessels has no connection with the others, and the only bond of union is that Neil M'Lean & Company are managing owners, or at any rate ship's husbands of each of them). . . . [*quotes rest of letter supra*] . . . Now the result of that is perfectly clear. Supposing any acceptance was not met, under that letter Lamont, Nisbett, & Company would be entitled to cancel a policy on the "Straits of Dover," and to apply the return premiums which they would then get from the underwriters in liquidation of sums due in respect of policies on the "Gordon Castle" and "Straits of Magellan." Now it is quite clear—it has been settled by the highest

Court in *Xenos* v. *Wickham* (L.R., 2 E. and I. App. 296)—that it is beyond the power of a managing owner to cancel the policies; and accordingly when parties contract in this way, and if it is shown clearly that the policies are to be cancelled as between them, I think that shows equally clearly that they are only entering into transactions as between each other, and not looking to the credit of the owners at all. The letter I have read is a mere specimen; but a little further on, on 4th May 1896, we get another letter in which mention is made of the policies in question, that is, the policies on which the premiums sued for were paid. [*His Lordship read the letter supra.*] Accordingly I think these letters show conclusively that Lamont, Nisbett, & Company all along contracted with Neil M'Lean & Company, and did not look to the owners at all, and that this is not a case of a party having bound the principal and thereafter elected to take the agent. I think the case here turns on this, that in the inception of the bargain Lamont, Nisbett, & Company were content to take Neil M'Lean & Company as their debtors and sole debtors; and I am bound to say also that the way in which Neil M'Lean & Company kept their books entirely bears this out. There is no separate account for each ship, and the account sued for is only made up by looking through the general books of Neil M'Lean & Company, and taking out the particular items and putting them together in one account.

On the whole matter I am of opinion that the Lord Ordinary has come to a right conclusion, and that we should adhere to his interlocutor.

LORD M'LAREN—I am of the same opinion, except that I should wish it to be understood that in my view, although Neil M'Lean & Company had contracted as principals, yet from the nature of the contract it must have been known to the brokers that the insurance was for the benefit of owners whose names were undisclosed, and therefore it would have been quite open, as I think, at any time for the owners to come forward and say that they were dissatisfied with the management, and to claim the benefit of the policy. On the other hand, while matters were entire, it might have been open for the brokers to sue the owners for payment of the premiums of insurance.

But then, agreeing with your Lordship as to the authority of *Xenos* v. *Wickham* which is a very important decision in mercantile law, I agree that under that decision a managing owner would be just in the same position as a broker managing for both parties, and would have no authority to cancel his insurance policies and thus leave the ship uninsured. I also agree that the impossibility of doing such a thing must have been known to both parties, and this leads irresistibly to the conclusion that in this matter—at all events at the time when the proposal of cancellation was made—Lamont, Nisbett, & Company elected to take Neil M'Lean & Company as their sole debtors. I think no other construction can be put on their actings, and that accordingly Lamont, Nisbett, & Company are not entitled to sue the owners as principals in this action. To say that the owner can be made liable to be sued for premiums while at the same time the policy is cancelled without his consent, and that he is to pay under a contract from which he gets no benefit, is to my mind absolutely absurd, and contrary to the elementary principles of justice.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Solicitor-General (Ure, K.C.)—Spens. Agent—Frank M. H. Young, S.S.C.

Counsel for Defenders and Respondents—Clyde, K.C.—R. S. Horne. Agents—Constable & Sym, W.S.

Saturday, March 9.

FIRST DIVISION.

INCORPORATION OF CORDINERS OF EDINBURGH, PETITIONERS.

(See *Allan* v. *Incorporation of Cordiners of Edinburgh*, November 30, 1904, 42 S.L.R. 95.)

Incorporation — Trade Incorporation in Burgh — Friendly Society — Bye-Laws — New Bye-Laws where for Many Years Entry-Money Invalidly Increased—Entry at the Far Hand and at the Near Hand—Entry-Money—Facilities for Those Alleging Exclusion—Application of Funds to Charitable Purposes — Burgh Trading Act 1846 (9 *and* 10 *Vict. cap.* 17), *sec.* 3.

An incorporation, one of the old trade corporations of a city, which under section 3 of the Burgh Trading Act 1846 had had its bye-laws approved by the Court in 1850, presented for approval in 1904 a new set of bye-laws. Subsequent to 1850, in the belief that the rates of entry-money were within its own power, the incorporation had increased the rates in the bye-laws from time to time as increased the prospective benefits of membership with its financial prosperity. The increased rates, which in 1903 had reached a considerable sum, restricted the number of entrants. The Court having decided that they should have been approved, and without approval were invalid, the proposed new bye-laws fixed the rates at the figures to which they had been raised without approval. They were stated to be based for those entering at the far hand, such entry being, as was maintained, purely an act of grace on the part of the incorporation, on the actuarial value of the prospective benefits of membership, and, at the near hand, at one-fourth the far hand rate. Members of the craft objected.