forth in the joint case, in so far as regards the subject-matter of this appeal. If your Lordships concur in the view that I have expressed it may be a question whether there ought not to be a remit to the Court, because a decerniture may be required upon which proceedings may be taken. Perhaps the parties will consider that.

LORD CHELMSFORD—My Lords, I agree in the motion that has been made.

LORD COLONSAY (to the Lord Advocate)—You appear for the appellant, I think?

LORD ADVOCATE—Yes; I think it is quite proper there should be a remit.

LORD COLONSAY—Then the judgment will be in the terms I have stated. There will be a remit to the Court to do whatever is necessary.

LORD ADVOCATE—I presume your Lordships have intentionally abstained from saying anything about costs.

LORD COLONSAY—Yes.

Reversed and cause remitted.

Counsel for Appellant—Lord Advocate (Young) and Mr Asher. Agents—T. & R. B. Ranken, W.S., and Messrs Tatham & Proctor.

Counsel for Respondents—Dean of Faculty (Gordon) Q.C., and Mr Pearson, Q.C. Agents—Lindsay, Howe & Co. W.S., and Loch & Maclaurin, Westminster.

Saturday, May 17.

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

(Before Lord Chancellor Selborne and Lords Chelmsford, Colonsay, and Cairns.)

(*Ante*, vol. ix., p. 114.)

Charter-party—Construction—Advances.

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." Advances were made by the charterers at Calcutta, and the ship was lost on the homeward voyage. —*Held* (affirming judgment of Court of Session) that the charterers had given up their right to recover their advances from the owners.

This was an appeal from a decision of the First Division of the Court of Session, assisted by three Judges of the Second Division. An action was raised in the Sheriff-court of Renfrew by the appellants, the charterers of a ship, for £596 for advances made to the respondents, the owners. The ship "Janet Cowan," of Greenock, belonged to Mr Shankland and others. When it was at Bombay a charter-party was made between the master and Messrs Ralli, who afterwards transferred it to the appellants and pursuers. By this contract the ship was to proceed to Calcutta and there load and carry the cargo to a port in the United Kingdom. The clause regulating the payment of freight was as follows:—"The freight to be paid on unloading and right delivery of the cargo, in cash two months from the ship's report inwards at the Custom-house, or under discount at the rate of 5 per cent.—at freighter's option." And it was also stipulated—'Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission, and the master to endorse the amount so advanced upon his bills of lading." While the ship was preparing for her voyage from Calcutta, the charterers made advances to the master for ship's disbursements, which, with commission and interest, amounted to £596. The ship was lost in the course of the voyage. The charterers sought to recover back the above sum, and the defence was that the cash advanced was not intended as a loan, but was a prepayment of freight, and could not be recovered back. The Sheriff of Renfrew, reversing the Sheriff-Substitute's decision, held that the pursuers were entitled to recover the advance and commission. The First Division, by a majority, reversed the Sheriff's judgment, and held that the plaintiffs were not entitled to repetition, on the ground that they had contracted to secure themselves by insurance, which they had failed to do. The charterers now appealed against that decision.

Mr BUTT, Q.C., and Mr WHITE, for the appellants, contended that the Court below was wrong, for the advances were made, not as freight, but as security of or against freight, which was by the charter-party equitably assigned to the appellants in security; and, even assuming that the advances were made in prepayment of freight, such advances were by the law of Scotland repayable in the event of freight not being earned, unless the parties agreed to the contrary, and no such agreement to the contrary was come to.

The LORD ADVOCATE and Mr BENJAMIN, Q.C., for the respondents, supported the judgment of the Court below.

At advising—

The LORD CHANCELLOR said that though several cases had been cited from the English reports bearing on the general law, it was possible to decide the present case without its being governed by those authorities. The contract between the parties was contained in the charter-party, and though it was argued that the payment was not made under the charter-party at all, the parties could scarcely complain of its being treated as coming under the contract if the circumstances agreed with the conditions of the contract. Now, the charter-party contained this clause—"Sufficient cash for 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." Now, it was not necessary at all to decide any of the general questions of law that arise on contracts of this kind. The sole question may be treated as one which must be decided on the particular words here found—"Subject to interest, insurance, and commission." Now, assuming for the moment that without these words the advance would have been deemed a loan on the security of the freight, still these words must be taken to be part of the contract, and the insurance of these advances was specially provided for, and that matter was not left in any uncertainty. The charterer was to charge for the insurance, and how could he charge for the insurance unless he actually insured? In fact, it was the same thing as if the owners gave the charterers the money to insure the advances. If the charterers had given notice, which they had

time to do, that they did not intend to insure because, as it was a loan, it was no business of theirs, or if, without any fault of theirs, the insurance had become unavailable, it might be that under this charter-party the charterers could have recovered back the advances; but here the charterers made no insurance whatever, and so they have only themselves to blame if on the vessel being lost they cannot recover back their advances. This was the short view on which the Court below proceeded, and it was quite sufficient for their Lordships to acquiesce. The interlocutor of the Court below, however, contained certain findings as to the general law which were unnecessary, and which should be struck out of the order of the House. But though the judgment would be altered to this extent, inasmuch as it would be substantially approved, this appeal should make no difference as to the costs, and the appeal therefore must be dismissed with costs.

Lord Chelmsford said he quite concurred on the short ground that as it was part of the bargain that the charterers should insure any advances they made, they cannot complain of any loss suffered from their way of effecting the insurance.

Lords Colonsay and Cairns also concurred.

Counsel for Appellants—Mr Butt, Q.C., and Mr White. Agent—Wm. Archibald, S.S.C.

Counsel for Respondents—Lord Advocate, and Mr Benjamin, Q.C. Agent—Wm. Mason, S.S.C.

Monday, May 19.

GLENDONWYN *v.* GORDON.

(Before Lord Chancellor Selborne, Lords Chelmsford and Colonsay.)

(*Ante*, vol. vii. p. 695.)

Entail—Institute—Fetters—Conveyance—Intention.

By deed of entail A, in the event (which occurred) of his decease without heirs of his body, conveyed certain lands to his wife in liferent and to B in fee. The first condition of the entail was that B and the "whole heirs of entail and substitutes above written" should assume a certain name. The fetters of the entail were directed only against "the heirs of entail or substitutes above written." B, after possessing the estate, died, leaving a deed whereby she conveyed to C certain lands *nominatim*, and also generally her whole heritable and moveable estate. In several previous deeds, which B granted in security of borrowed money, she styled herself heiress of entail in possession of the said lands, and as such bound by the fetters of the entail. *Held*—(1) that B had not intended by the deed in question to convey the said entailed lands to C, for the reason that she was not aware that she possessed them as absolute fiar. (2) that the fetters of the entail did not apply to B, the conditional institute, and that she possessed the said lands as absolute fiar.

This was an appeal from a decision of the First Division. The action was raised by the appellant, to have it declared that the late Miss Xaveria Glendonwyn held the lands of Cogarth, &c., in Kirkcudbright and Dumfries, in fee simple, and free from the fetters of the entail under which her title to the said lands had been made up; and, second, that the said lands were conveyed to the appellant's father by Miss Glendonwyn's general disposition and settlement, and were now vested in the appellant as his father's heir. The late Miss Glendonwyn died seven years before the action was raised, and the respondent had meantime been in possession under the entail. The entail was executed by Miss Glendonwyn's uncle, Mr Maxwell of Milnhead, in 1821, and she was the institute under the entail. The appellant claimed under her general disposition and settlement, which was in general terms, and the main question was whether this general disposition evacuated the prior special destination in the deed of entail. The Court below held that it did not.

At advising—

Lord Colonsay said that the first ground of defence, which was that Miss Xaveria was bound by the fetters of the entail, could not be sustained. She was the institute under the entail, and it was clearly settled that when the fetters of the entail were directed against the heirs of entail, these did not, without express words, extend to the institute. It was contended that there were expressions in other parts of the deed which implied that the institute was intended to be bound by the fetters, but these expressions were too loose to alter the effect of the main clause. Miss Xaveria therefore had the power, if she had so chosen, to convey by her general disposition the estate of Cogarth. The second point was whether she had so conveyed it, and this required careful consideration, as it depended on the construction to be given to her general disposition, taken in connection with the deed of entail, which contained a special destination of this estate. The general rule undoubtedly had been in Scotland that a subsequent general disposition did not evacuate a previous special destination, unless the words were very clear to show it was so intended to operate. The authorities on this point seemed to show that the rule that a subsequent general disposition revoking a prior special destination was always subject to be qualified by the external circumstances of the case, as well as the words of the deeds themselves, and the Court must take into account those circumstances as throwing light on the intention of the disposer. Here there were various extrinsic circumstances besides the words of the general disposition. The general disposition did not mention Cogarth at all, which itself was a strong indication that it was not included in such disposition, and after executing her general disposition she still dealt with Cogarth as if it was bound by the entail. Whether or not she really believed that she had power to dispose of the estate of Cogarth absolutely is of no great importance, for in either case, if she did not intend to dispose of it, that was conclusive. It was contended that not only did the two deeds show an intention not to give away Cogarth, and that her dealings with that estate confirmed that view, but that her letters still further confirmed that view. It might be that those letters could legitimately be looked to with a view to arrive at the intention, but it was unnecessary to resort to them; for in this case he was of opinion that the other circumstances, and the deeds themselves, were sufficient to rebut the presumption that she intended to include the estate of Cogarth in her general settlement. The decision of the Court below ought therefore to be affirmed.