has happened, there arises a demand on the Company's servants to provide against its consequences. If the ground is such that it is not safe to get out except at the platform, they should bring the train up to the platform, or if they do not think it worth while to take that trouble, then they ought to see that the passengers are warned or helped in getting out. Now the place where the pursuer had to get out was undoubtedly a place of some danger, and he had no alternative but to get out. He took it for granted, and rightly, that the passengers for Heriot were meant to get out there, and so he had to do that or be carried on. As for the doctrine suggested on behalf of the defenders, that he ought to have done so, and then sought for his remedy in an action for damages, it is utterly unreasonable. I think he had no alternative. The place, as I have said, was one of some danger, for it is proved that the descent was considerable, and even if he had known where he was, it was not very safe. The porter plainly confirms this, for he says that he saw no one coming out, and that if he had he would have helped or warned them, so it is plain that he thought this necessary, and the other evidence confirms this. The place where the pursuer got out was even a longer step down than at the level crossing, and there, as is proved by the station master's evidence, it was customary to give help, so we may assume that the place was dangerous, and one where the railway company's servants ought to have given help or warning. Nothing of the kind was done, and there was no good light. There were lights in various places, but none of them were very available; the light in the shed was of no use, for it was intercepted by the end wall; and there was also a light in the carriage, but it does not seem to have done much good. It is also said that the porter's light was placed on the footboard of the van, but even if that be so, it is not at all clear that it would have helped the pursuer, and the light on the van itself was of no use, being a bull's-eye, which threw its light straight forward, and being besides too high. On the whole matter, I think that the place where the pursuer had to get out was a dangerous one, and that the railway company's servants should have provided another or warned him, and that their failure to do so was negligence.

But then comes the question, Did not the pursuer by his own negligence contribute to the accident? He certainly got out in a way that seems rather rash, for he did not look before him, and he took for granted that all was right. His own experience of the station taught him that it was not uncommon for the carriages to overshoot the platform, and he might have known that it was just as possible for them to be short of it. He did not apparently look out, and it is a question whether, if he had done so, he could have seen—but anyhow he got out and could not see what he was going to step on. I cannot say that I think he was very prudent, but the question was one very suitable for a jury, and I certainly cannot say that the evidence of his negligence was so strong as to compel a jury to find against him.

The only question remaining is as to the excess of damages. We had occasion to consider this matter recently in the case of *Cooper*, and we make it a rule never to interfere unless the excess is plainly extravagant. That the jury have given more than the Court might have given is no reason for disturbing their verdict. The injury to the pursuer was a serious one; he sustained a good deal of loss pecuniarily, and the medical evidence shews that there was concussion of the spine, an injury the ultimate consequences of which it is difficult to foresee, and all the doctors admit that in this case the consequences may be serious. The injury being of such a kind, and its effects being still uncertain, I think the jury were quite entitled to allow a margin, and on the whole matter I am for discharging the rule.

The other Judges concurred.

Counsel for Pursuers—Scott and Rhind. Agent—William Officer, S.S.C.

Counsel for Defender—Solicitor-General (Clark), Marshall, and Moncreiff. Agents—Dalmahoy & Cowan, W.S.

HOUSE OF LORDS.

Monday, May 19.

SPECIAL CASE—JAMES MACKINTOSH AND MISS EMILY MARIA MACKINTOSH, ALEXANDER HAY MILN AND OTHERS.

Ante, vol. vii. p. 340.

Heir of entail—Relief—Annuity—Real burden—Drainage.

In an entail of one of his estates a party bound himself and his heirs and executors to relieve the lands of his debts and obligations. Subsequently, in an antenuptial contract of marriage he burdened the entailed estate with an annuity to his widow. *Held* (reversing judgment of the First Division) that the heir of entail was entitled, out of the general estate, to relief of this annuity.

This was an appeal from a decision of the First Division on a special case. The question was whether the respondents, the trustees and executors nominate of the late James Mackintosh of Lamancha, in the county of Peebles, were bound to relieve the appellant, who was the eldest son and heir of entail under a deed of entail executed by his father, of two annuities of £150 and £70 respectively, which were settled by the late Mr Mackintosh upon his third wife, now his widow. These annuities had been provided by an antenuptial contract of marriage, executed after the deed of entail, and were made burthens on the estate of Lamancha. The deed of entail contained this clause:—"I oblige myself and my heirs, executors, and representatives whomsoever to free and relieve my lands of Lamancha of all my debts and obligations." The contract of marriage reserved power to the testator's heirs, executors, and representatives whomsoever to relieve the lands of Lamancha of the annuities by purchasing annuities from an Insurance Company to the satisfaction of the widow, which she was taken bound to accept as in lieu of the security over the estate. The appellant had contended that under the terms of the two deeds the executors were bound to relieve the heir of entail of these annuities, as they were debts and obligations within the meaning of the clause in the

deed of the entail. The First Division unanimously held that the entailer did not intend these annuities to be considered as debts to be paid out of the general estate, they were expressly made burthens on the entailed estate. The heir of entail appealed.

At advising—

Lord Colonsay—My Lords, This is an appeal from a part of a judgment of the First Division of the Court of Session, pronounced on a Special Case stated by the parties. Two questions were submitted to the Court for decision. They are printed at page 9. The first is that to which the present appeal relates. The Court of Session found that the heir of entail was not entitled to the relief he asked.

That judgment was rested mainly on two grounds—1st, That by the law of Scotland, as a rule, a liferent annuity, or a debt secured on heritable estate, is to be borne by the heir succeeding to the heritage in the case of intestate succession; and that the same rule holds in the case of testate succession, unless a contrary intention is made to appear. 2d, That the clause in the entail on which the heir founds cannot in the circumstances be understood as applying to the particular annuities in question. The first of these propositions is admitted, but the appellant contends that a contrary intention is made to appear. The second proposition is disputed.

The late James Mackintosh, of Lamancha, left three deeds, which are referred to in the Special Case, viz.:—1st, Deed of entail of the estate of Lamancha, dated in 1857; 2d, Last will and settlement, dated in 1865; 3d, Contract of marriage with his third wife, dated in 1867.

The first of these deeds contains the clause on which the heir of entail mainly founds, and which is thus expressed:—"I oblige myself, my heirs, executors, and representatives whatsoever, to free and relieve my lands before disponed of all my debts and obligations." The second of the said deeds conveyed his whole estates, heritable and moveable, other than the estate of Lamancha, to certain trustees, and directed them to pay "the whole debts which may be due by me at the period of my death," and also to pay certain legacies and bequests, and to divide the residue into six shares, to be distributed in certain proportions among his four children, all of whom were by his first wife. It also contained a clause revoking "all wills and settlements executed by me at any time heretofore, excepting a disposition and deed of entail of my lands and estate of Lamancha, which shall stand and subsist in full force and effect."

The third of the said deeds made certain provisions in favour of his third wife, including the two annuities of £150 and £70 now in question, and for "her further security and more sure payment" of the said annuities he bound and obliged himself to infeft her in the estate of Lamancha. This deed also contains the following clause, on which the heir of entail founds:—"But declaring that it shall be in the option and power of the said James Mackintosh, and his heirs, executors, and successors, to secure the said annuity of £150 and yearly sum of £70 to the said Mary Ann Burn by purchasing at his and their own expense from any respectable insurance company, to be selected and approved of by her, an annuity payable to the said Mary Ann Burn in the terms before provided, equal in amount to the said annuity of £150 and yearly sum of £70 hereinbefore provided to her; and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects and others before mentioned and described of the said provision secured over them as aforesaid."

In January 1867 Mrs Mackintosh was infeft in the estate of Lamancha on the contract of marriage. In February 1869 Mr Mackintosh died without having exercised the said option.

It appears from the Special Case that the rental of the entailed estate was about £700 per annum, and that the public, parochial, and other burdens payable by the proprietor amounted to £100 per annum. It also appears that the general trust-estate comprehended a house in Charlotte Square, Edinburgh, heritable and personal estate in Calcutta of considerable amount, and personal estate in Britain exceeding £27,000; and that the two-sixths of his estate falling to the share of each of his daughters will be "more than £10,000, and less than £20,000."

The heir of entail now claims to be relieved of the annuities by the general trust-estate. I am of opinion that he is entitled to be so relieved.

The clause in the entail was certainly intended to impose an obligation somewhere to free and relieve the estate of Lamancha of all Mr Mackintosh's debts and obligations, and I have no doubt that it was meant to extend to future debts and obligations. The words are quite general, and the judges in the Court below appear not to have attached importance to the circumstance that the obligation in question was contracted at a date subsequent to the entail. Indeed it does not appear, and is not alleged, that at the date of the entail there existed any debt or obligation, and if there was none the clause must have been intended to apply to future debts and obligations. The purpose of it appears to have been that the estate of Lamancha should be launched under the entail free from debt; and the conception of the clause appears to have been, not with the view of effect being given to the ordinary rule of law as between heir and executor, but with the view of making a special arrangement because of the entail. The ordinary rule of law as between heir and executor in regard to the incidence of debt is founded on the presumption that the heritage is capable of bearing all the burdens incident to it. The heir who succeeds to it, if he is not fettered, can deal with it as he pleases, and turn it to the best account for his own relief. But if he is only to be put into possession under the fetters of an entail, his condition will be materially different, and if the entailer intends that the estate he is entailing should be started free from debt, it is quite reasonable that he should make provision for doing so out of his other means, and the more so if his other means are ample, as in this case they are said to be.

The obligation to free and relieve Lamancha was imposed by the entailer on himself, his heirs, executors, and representatives whatsoever. That appears to have been with him a primary or leading object. If he had himself redeemed the obligation he must have done so out of his general

estate, which would have been to that extent diminished. Not having done so, on what part of his estate did he intend that the obligation to relieve should devolve. It could not be on the estate of Lamancha, because that was the estate to be relieved. His only other estate was the general estate; therefore, if the relief was to be given by him or by his estate, it was to be given out of his general estate.

It appears to me that this view is supported by the terms of the trust-settlement. It is true that in the general case a direction to trustees in a *mortis causa* trust-deed to pay the debts of the deceased does not of itself imply any deviation from the general rule of law as to the incidence of heritable and moveable debts. But an expressed intention to start an incipient entail, or to add other lands to an existing entail, introduces another element, and gives rise to other considerations, leading to the inference that the testator intended the lands so dealt with to be cleared of debt, even if there was no express declaration to that effect, as the continued existence of debt on these lands might result in defeating the object of the entail.

Here there is the declaration, or rather the obligation, of the testator himself in the deed of entail, which is referred to in the trust-deed as forming part of his settlement, and he directs his trustees to pay all his debts, to record the entail, and to put the heir into possession of Lamancha under and in virtue of the deed of entail.

Taking these two deeds together, I do not doubt that Mr Mackintosh's intention was that the estate of Lamancha should be freed and relieved out of his general estate, unless there are special grounds for holding that the particular annuities in question are not within the range of the debts and obligations to which the clause in the entail has reference.

Up to the time when the trust-settlement was executed, there did not, so far as we see, exist any debt that would have affected Lamancha according to the ordinary rule of law as between heir and executor. But then came the marriage-contract, by which a security over Lamancha was given to the lady for the annuities in question, and by the same deed Mr Mackintosh reserved to himself, his heirs, executors, and successors the option and power to purchase for the lady from any respectable insurance company, to be approved of by her, an annuity equal to those in question, and she bound herself thereupon to discharge the security over Lamancha, and disburden that estate thereof.

Upon this deed several observations have been made. First, it has been observed that the burden it imposed was subsequent to the date of the entail. I have already shown that this circumstance is immaterial and may be dismissed. Secondly, an observation to which some importance appears to have been attached in the Court below was, that as Mr Mackintosh was wealthy and could have provided for his widow otherwise, it is difficult to understand why he should have imposed the burden on the entailed estate if he intended it to be borne by his general estate. I am not much moved by that observation. It may be that Mr Mackintosh could have provided for his widow by placing funds in the hands of trustees for that purpose, or by coming under obligation to do so, or to provide her with a jointure. But we do not know how his funds were employed at that time. He may not have been disposed to disturb his investments, or to lock up funds in the hands of trustees. The lady or her advisers may have preferred immediate substantial security over Lamancha to an obligation *de futuro* to be implemented out of floating capital. Thirdly, it was contended, and that appears to have been the main ground of judgment in the Court below, that the annuities secured over Lamancha are not a debt, or at least are not a debt in the sense of the clause in the entail; that they are not a capital sum due which might be at once paid off, but are a continuous security over the rents for the termly annuities as they fall due, and similar to the right which the present or future heirs of entail would have to make provision for their widows under the Aberdeen Act, or under the powers given by the entail, which are similar to those of the Aberdeen Act. I am not satisfied with that view. The clause of relief in the entail applies to "all my debts and obligations." I am of opinion that these annuities constitute a debt in the ordinary sense of the word. They are a debt in which the widow is the creditor, and the representatives of Mr Mackintosh are the debtors, and for payment of which the estate of Lamancha may be attached unless the relief sought be given. But whatever ingenious criticism may be made on the word "debts," it is impossible to escape the generality of the word "obligations." Neither can the obligation be assimilated to a provision under the Aberdeen Act. It does not profess to be anything of the kind. It has none of the requisite conditions or limitations as to amount or liability or mode of recovery. The only similarity is that it is a provision for a widow. Nor does the circumstance that it is an obligation for an annuity, and not for a capital sum, appear to me to raise any practical difficulty. The clause in the marriage-contract provided for and sufficiently meets any difficulty of that kind that might have been raised. It reserves the power to relieve the lands, and prescribes the mode. The only question is as to the incidence of the obligation, and I would here again observe that at the very moment of imposing the burden on Lamancha Mr Mackintosh had in contemplation the removal of it by himself or his representatives, and must have intended the relief to come, not out of Lamancha, but out of his other means—that is to say, out of the general estate. The respondents say that they cannot purchase an annuity, as no direct power to do so is conferred on them by the trust-deed. But if I am right in holding that the clause of relief in the entail was intended to attach to the general estate, it follows that the power reserved in the marriage-contract may be exercised by the respondent as the trustees of that estate. They also say that they have no interest in purchasing an annuity, which would be an expensive proceeding. The same observation would apply to the appellant. But if the obligation to relieve Lamancha has devolved on the general estate, the respondents must give the relief in the mode provided, unless they can find a less expensive and equally effectual mode of doing so.

For these reasons, I am of opinion that the interlocutor of the Court of Session, of date 2d March 1870, in so far as appealed from, should be reversed, and that judgment should be pronounced in terms of the third of the alternative forms set

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