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.

The LORD CHANCELLOR said that if the rule of the law of Scotland was to be taken to be the same as the law of England, then it was well settled that in construing a will or testamentary writing it was not competent to refer to extrinsic circumstances, except merely for purposes of identifying persons or property dealt with; and he should be reluctant to think the rule of the law of Scotland could be different in a matter of this kind. Still there had been several cases, some as old as Lord Hardwicke's time, which showed it had been the practice in Scotland to take into account these extrinsic circumstances, and upon the whole he was disposed to agree with the conclusion indicated by his noble and learned friend.

LORD CHELMSFORD also concurred.

Affirmed with costs.

Counsel for the Appellant — Solicitor-General, Jessel, and Pearson, Q.C. Agents—Messrs Mackenzie & Kermack, W.S.; Messrs Loch & Maclaurin, Westminster.

Counsel for the Respondent — Lord Advocate (Young) and Asher. Agents—Messrs H. & H. Tod, W.S.; Messrs Valpy & Co., Westminster.

Tuesday, May 27.

GEORGE BARNET AND OTHERS *v.* ALEXANDER BARNET AND OTHERS.

Pedigree—Proof—Construction.

Held, affirming judgment of Second Division of Court of Session, that certain evidence was sufficient to support the pedigree of the respondent.

This was an appeal from a decision of the Second Division. Certain conjoined actions were raised relating to the succession of the late James Barnet, innkeeper, of Old Meldrum, and owner of the estate of Hillhead of Pitfodels. The heritable estate was worth about £350 a-year, and there was a sum of about £11,000 of personal estate. Mr Barnet left a trust disposition and settlement in favour of Alexander Burness, Esq., of Mastrick, Dr Paul of Banchory, and another, conveying to them his whole heritable and moveable estate, and directing them to dispose of the estate according to instructions which he would leave. He did not leave any instructions, and the result was that he died intestate. Various parties soon appeared, claiming propinquity to the truster, and the representatives of the Crown claimed the estate on the ground that he left no relatives. The whole of these parties were brought into the field by an action of multiplepoinding. Ultimately there were two parties. One set of relatives were headed by Alexander Barnet, and others, the respondents; a second party was headed by George Barnet, and others. The appellants' evidence at great length was taken, and the Lord Ordinary held that the evidence preponderated in favour of Alexander Barnet's party. The Second Division in substance affirmed this judgment; thereupon the present appeal was brought.

At advising:—

LORD CHANCELLOR—My Lords, in this case the appeal brought to your Lordships is upon a question of fact, upon which there have been two adverse judgments against the Appellants. Your Lordships, of course, are bound to entertain and to consider all appeals which the law permits to be brought to this House, but it is a principle upon which your Lordships, I believe, as well as other Courts, have acted, and rightly acted, to require very clear grounds to be given, or at least very satisfactory grounds to be shown for departing from the judgments of the Courts below, where they agree, as in this case two Courts do, upon that which is after all only a question of the effect of evidence with regard to a matter of fact. In this case the fact in question is of a kind which undoubtedly does not suggest, at least to my mind, the probability of making any exception to the application of that principle. When a pedigree has to be proved, going back for a considerable period of time, and the claimants are related rather remotely to the person whose estate they claim; there are many reasons for applying with some strictness the rules which, generally speaking, govern Courts in dealing either with questions of law or questions of fact. It is not a kind of case in which there should be any relaxation, I think, of principles which are generally found sound.

In this case the claim is by persons who have to trace back their pedigree through three successive earlier generations to the common ancestor of themselves, as they allege, and the person whose inheritance they claim. And it appears that there are in the part of the country where this question has arisen a very considerable number of persons of the name of Barnet (which is not in other parts of Scotland so common a name as it appears to be there), of various stocks or branches, if they come from one common origin, which is possible though not proved. Of those parties it appears that a not very small number were actually called in the process as being persons who had advanced, or were thought likely to advance, claims to this succession. Of those all have now retired from the controversy except the respondent, Alexander, who was successful in the Court below, and the present appellants, who were not the only persons claiming in the same right in which they claimed; for in the Court below they claimed concurrently with three other persons, named George, James, and Ann, who stood in an exactly equal degree of relationship, if their relationship be established, to the common ancestor, but who have retired from the controversy for reasons, I think it is suggested, which they may have found convenient for acquiescing in the decision, rather than because they acknowledge the soundness and justice of it. However that may be, they have acquiesced in the decision, whether in the soundness and justice of it, or not, and we have now to consider whether these persons who have appealed have made out their own case, because after all that is the thing which it is their business as appellants to do. Even if they had succeeded in throwing more doubt than in my judgment they have succeeded in throwing, upon the title of their opponents, who succeeded in the Court below, Alexander Barnet, and the others in the same position with him, still it will not necessarily follow from that, that they had established their right as appellants before your Lordships. Except so far as the destruction of the respondent's case would tend to establish their own, I apprehend that in strictness they have no right to come here to destroy their opponents' case they must come here to establish their own.