realise, and convert into money the whole residue and remainder of my means and estate, heritable and moveable, real and personal, and divide the proceeds equally among my lawful children; and in the event of any of my children dying before the said period for payment leaving lawful children, such issue shall receive equally among them the share to which the parent would have been entitled if in life." But here it will be observed that the language of the testator points merely to payment and final distribution of his estate, and does not necessarily denote that there had been till then any postponement of the vesting of the rights themselves of his children. His language is indicative rather—and I think strongly indicative—of there having been vesting previous to the ultimate payment and division—that is to say, vesting on his own death; and this is the only view, as it appears to me, which can be taken of the matter consistently with the testator's other directions to his trustees, to which I have already referred. If there had been anything of the nature of a survivorship in the destination, that might have led to a different result, but there is nothing of that nature.

The point, however, relied on by the first parties to the Special Case arises from the words used by the testator, that "in the event of any of my children dying before the said period of payment leaving lawful issue, such issue shall receive equally among them the share to which the parent would have been entitled if in life." This, it was argued, amounts to a destination-over—or at anyrate is a contingency upon which vesting is made to depend. But I am not satisfied that this argument is sound. The words relied upon, although peculiar and not quite free from ambiguity as to their true object, may, I think, be perfectly well satisfied by holding that they are referable, not to the time when the testator's youngest surviving child should be twenty-one, but to his own death, and that their true object was to provide against the lapsing of the share or shares of any of his children who might die before himself leaving lawful issue. This, I think, is, in the circumstances, a more reasonable construction or application of the testator's language in the fifth purpose of his settlement than that relied on by the first parties to the Special Case—a construction or application certainly more consistent with the other provisions and directions of the testator.

The authorities also appear to me to support the conclusion that vesting took place *a morte testatoris*. Thus, in the case of *Marchbanks* v. *Brockie and Others*, Feb. 18, 1836, 14 S. 521, where part of a testator's estate was left on the death of a liferenter to particular individuals named, "and to their respective heirs in case of their death," it was held that there was vesting *a morte testatoris*, and this although, as here, there had been no direct destination to the favoured parties, and although the indications otherwise were not so strong in favour of vesting *a morte testatoris* as those in the present case. It is true, however, that the destination-over, if it can be called so, was, in the case referred to, to the heirs in place of to the lawful issue of the parties primarily favoured, but that can make no difference, for the lawful issue of the favoured parties in the present case must necessarily be their heirs. Nor do I, for the reasons I have already stated, think that it makes any substantial difference that in the present case it is said in so many words that the failure in respect of which the heirs should succeed is the attainment of twenty-one years of age of the youngest surviving of the testator's children. And that I am right in this is clear from the case of *Wallace* (Mor. App. clause 6), referred to with approbation by Lord Glenlee in the case of *Marchbanks*, for in that case of *Wallace*, besides a general resemblance to the present, in other respects there was a clause more strongly indicative, I think, of postponed vesting than that founded on by the first parties in the present case, to the effect that "in the event of the decease of any of the said Alexander Wallace's children before their share of the sums hereby bequeathed to them becomes payable, the share of the child or children so deceasing, or the balance thereof remaining unpaid, shall fall equally among the survivors of said children, share and share alike"—and yet it was held that vesting took place *a morte testatoris*. The cases of *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667, (H. of L. 2 Macq. 276) and *Foulis* v. *Foulis*, February 3, 1857, 19 D. 362, although peculiar in some respects, are in their general bearing calculated to support the same conclusion; and in the former the destination failing the parents was to their children, and in the latter to their issue, as in the present case.

Upon the whole matter, and especially keeping in view what I must hold to be the clearly manifested intention of the testator—and that is the governing rule for our guidance—I have come to be of opinion, without much difficulty, that both of the questions in the Special Case ought to be answered in the affirmative.

Lord Gifford and Lord Adam (who had been called in to this Division in the absence of the Lord Justice-Clerk) concurred.

The Court answered the questions in the affirmative.

Counsel for First Parties—Trayner—Kennedy. Agent—J. Carment, S.S.C.

Counsel for Second Party—Asher—Jameson. Agent—J. Martin, W.S.

Friday, March 1.

SECOND DIVISION.

[Sheriff of Aberdeen and Kincardine.

DAVIDSON *v.* BISSET & SON.

Ship—Charter-Party—Bill of Lading—Where they varied as to Ports of Call.

A charter-party bore that a vessel was to proceed to each of two ports of call to deliver cargo. The order in which the ports were to be visited was reversed in the bills of lading, and it appeared that both the owner and master of the vessel had been desirous of the alteration which had been made

with consent of the charterers. It was found impossible, from different causes, to discharge the ship at the time she reached the first port. She then proceeded to the second, where the whole cargo was landed. In an action for the freight at the first port — *held* that, in the circumstances, the bill of lading must be held to have so far varied the charter-party, and that the shipowner was entitled to the freight as for the whole voyage.

This was an appeal from the Sheriff Court of Aberdeenshire in an action raised by John Davidson, shipowner, Cullen, against Peter Bisset & Son, contractors, Aberdeen. The summons concluded for payment of £83, being the amount of freight earned by the schooner "Mary," of which John Hay was master, from London to Cruden and Aberdeen, conform to charter-party and bills of lading, dated respectively 27th July and 4th August 1875, under deduction of £27, 10s. paid by the defenders, leaving £56, 11s. alleged to be due.

The charter-party contained, besides the usual clauses, the following: — The vessel was to load "a full and complete cargo of cement in bags, say not less than 100 tons, for Aberdeen. The cargo to be brought alongside and taken from alongside, at merchants' risk and expense—not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded shall therewith proceed to Aberdeen and Cruden, or so near thereunto as she may safely get, and deliver the same on being paid freight—five shillings and sixpence per ton for Aberdeen, twelve shillings per ton for Cruden, with one guinea gratuity."

On the other hand, the bill of lading certified the shipment of 1900 sacks on board the "Mary" for Cruden and Aberdeen, and proceeded to narrate that these "are to be delivered in the like good order and well conditioned at the aforesaid ports of Cruden and Aberdeen."

The defence to the action was a denial of liability, in respect the contract contained in the charter-party had not been fulfilled by the pursuer or the ship's captain. By it the defender averred the captain undertook to proceed in the vessel "Mary" with a cargo of cement for Aberdeen and Cruden, not less than 100 tons of which were to be left in Aberdeen, and the rest taken to Cruden. Instead of doing this, however, the pursuer or master proceeded to Cruden, in the first place, with the whole cargo, where there was not depth of water for a vessel so heavily laden to get near the shore to land the cargo. The vessel afterwards returned to Aberdeen, but the pursuer or master landed the whole cargo there, and refused to return to Cruden with any part of it, in terms of his contract, though he was asked to do so in writing. The defenders stated that they were willing to pay freight at the rate of 5s. 6d. per ton on the whole cargo, being the freight agreed on for the part to be delivered in Aberdeen, under deduction of the sums paid to account, reserving their claim for damage for part of the cargo which was delivered in a damaged state.

After a proof, the result of which sufficiently appears from the judgments in the cause, the Sheriff-Substitute (Comrie Thomson), on 21st July 1877, pronounced the following interlocutor:—"Having considered the cause, Finds that, on a sound construction of the charter-party and bills of lading founded on, the pursuer was entitled to take his vessel in the first place to Cruden: Finds that he did so; that it was impossible for him to enter the creek, and that the defenders had made no provision for the pursuer discharging into barges or boats; that he was in consequence ordered by the defenders immediately to proceed south to Aberdeen, which he did, and there commenced to discharge his cargo; that the defenders wished him, when there still remained on board from 90 to 100 tons of cement, to return to Cruden with that quantity; that the pursuer declined to do so, on the ground that he had already implemented his contract: Finds, as matter of law, that the pursuer was justified in the said refusal, and that, having discharged the whole cargo at Aberdeen, the defenders are bound to pay the freight as stipulated: Therefore decerns in terms of the conclusions of the libel: Finds the pursuer entitled to expenses, &c.

"*Note.*—The pursuer is the owner of a vessel which sometime ago was lying in the Thames. He wished to get a cargo to the north-east coast of Scotland, and the result of his negotiations with certain shipbrokers in London was that the charter-party was entered into. By this it was agreed that the vessel was to load 190 tons of cement in bags. These words were added—'Say not less than 100 tons for Aberdeen.' The charter-party then proceeded to state the ports of discharge to be Aberdeen and Cruden. In MS. there is added—The Cruden parcel to be 'discharged or received immediately ship arrives.' The pursuer depones that when the charter-party was being written out he objected to Aberdeen being entered first as the place to which he was to proceed, but that he was told that it did not matter, as he might go either to Aberdeen or Cruden as he thought best; and also that the matter would be put right in the bills of lading. There is no direct corroboration of this conversation, but the bills of lading themselves show that the order of the ports of discharge was altered, it being there set forth that the ship was bound for Cruden and Aberdeen; and in the clause which specifies the ports of delivery they are mentioned in the same order.

"The vessel arrived at Cruden Bay; she was drawing too much water for her to get into the harbour creek; she lay to as far as she could the greater part of the day. The master went on shore and put himself in communication with those who represented the defenders. There was no means of discharging into boats, and there were no men, even if there had been boats, because it was the herring-fishing season. It seems that one of the defenders appeared in the course of the day, and he sent out to the ship the note containing these words, "On to Aberdeen." Further, the pilot, the defender, and apparently some of his men, waved a flag or handkerchief as a signal to the pursuer to go on to Aberdeen. The pursuer did so, and discharged his cargo in that port; the defenders asked him to return to Cruden with that part of the cargo which they wished to use there, but this the pursuer declined to do.

"These being the facts of the case, I am of opinion (1) that although, strictly speaking, the

charter-party and the bill of lading ought to agree, yet there is a well understood practice which among shippers must be recognised as the law on the point, to the effect that when these documents differ on such a matter as the destination of the vessel, the bill of lading overrides and controls the charter-party.

"I suppose that the basis upon which underwriters go is the bill of lading, although probably it is more correct to say that the underwriter is only bound according to the contract which is represented to him. (2) In the present case it is proved that the pursuer complied with the order of destination prescribed by what I hold to be the ruling document. He did everything that was in his power to discharge at Cruden, and it was the business of the consignees, as was expressly stipulated, to receive immediately on arrival, which they failed to do. The little port of Cruden, now greatly improved, is not, I think, mentioned in the sailing directions, and the four things which the captain knew were his own draught of water, the depth of water in the bay, the order of destination in the bill of lading, and that his merchant ordered him away on the ground that he could not discharge. I do not see he could have done otherwise than go to Aberdeen and refuse to return to Cruden."

The Sheriff (GUTHRIE SMITH) on appeal recalled this interlocutor, and found on 19th October 1877:—"That through the fault of the pursuer no part of the cement in question was discharged at Cruden, but that the whole cargo, amounting to 192½ tons, was delivered at Aberdeen: That in these circumstances, under the charter-party founded on, the pursuer is only entitled to freight at the rate of 5s. 6d. per ton, and that, deducting £27, 10s. paid to account, the sum due, including £1, 1s. of gratuity, is £26, 9s. 9d.

"*Note.*—By the charter-party produced the pursuer's vessel was to bring a cargo of cement from London to Aberdeen and Cruden, 'say not less than 100 tons for Aberdeen,' meaning thereby that having discharged that quantity in Aberdeen she should proceed with the balance to Cruden, where the depth of water is limited. But the captain, thinking no doubt that this involved his returning from Cruden empty, and that there was a better chance of getting a return cargo at Aberdeen, proceeded direct to Cruden, and finding that his ship with the entire cargo on board was too deep for the harbour, never got in at all, and brought the cement all on to Aberdeen, where the whole was delivered. The Sheriff considers that in these circumstances he is only entitled to the Aberdeen freight, 5s. 6d. per ton. The Cruden freight, 12s. per ton, was never landed, and it was entirely the fault of the master himself that it was not earned. The charter-party provides that he should first go to Aberdeen. The captain himself so read it, and says he objected at the time, and the expression was altered in the bill of lading to 'Cruden and Aberdeen.' This is denied on the other side, but it is enough to observe that the bill of lading was not the proper document on which to make the alteration. 'It is usual for the master to sign and give bills of lading in like manner if there were no charter-party; but nevertheless, as far as the charterer is concerned, they are little more than evidence of the delivery and receipt and shipping of the merchandise, for the charter-party is the controlling contract as to all the terms and provisions which it expresses' (Parson's on Shipping, 287). It is the writing which proves what the contract is as to the employment of the ship, and when an alteration comes to be needed, it is quite easy to have an indorsement made on the margin. Further, even although the point had been left ambiguous, he was bound to come to Aberdeen first, if, as plainly appears from the evidence, that was the only practicable way of executing his contract. The freight to Cruden has thus been never earned, and he has rendered himself liable in damages to the charterers, namely, the cost of conveying the Cruden cement overland; but as that claim was not insisted on at the debate, he has been allowed the freight of the entire cargo calculated at the Aberdeen rate."

The pursuer appealed to the Court of Session.

At advising—

LORD JUSTICE-CLERK—We have in this case able judgments from the Sheriff Court, and after mature consideration I feel disposed to agree with the view adopted by the Sheriff-Substitute. Had the question arisen on the terms of the charter-party, and on that alone, the respondents would have been in the right, for the captain would have been under an obligation to proceed first to Aberdeen, and there to discharge 100 tons of the cement. But the captain signs this bill of lading, and when we examine it we find a reversal of the order in which the ports of discharge are enumerated. The question comes to be—Whether the captain under these circumstances was entitled to take his ship first to Cruden, for in that case he was not bound to return there? No general rule as to the effect of discrepancies between the charter-party and the bills of lading needs to be laid down, but I am inclined to think that in all questions which have reference to the manner in which the contract of carriage is to be fulfilled, a charter-party may be varied by a bill of lading, although the charter-party is to be looked at for the substance of the contract of affreightment.

Suppose goods be delivered to the master of a ship, and he receives in a bill of lading signed by himself directions to carry them to a certain port and to land them in some particular manner, then I think he must fulfil those directions. But here we have something beyond that, and if the order in which the ports are named in the bill of lading means something different from the order in the charter-party, then the alteration may be inquired into. Now, here Davidson and Hay both say they objected to the terms of the charter-party, and that accordingly a change was made in the bill of lading, all parties consenting. This evidence being, I think, competent, and not contradicted, appears to me conclusive.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Find it proved that the terms of the bill of lading were varied from those of the charter-party in regard to the order in which the ports of discharge were to be reached, with the express consent of those acting for the respondents (defenders): Find that the

appellant (pursuer) duly complied with the contract by going first to Cruden and tendering delivery there: Find that those acting for the defenders declined to take delivery at Cruden, and desired that the vessel should proceed to Aberdeen: Find that the vessel did proceed to Aberdeen, and there delivered the whole cargo: Find that the appellant was entitled to require the respondents (defenders) to take delivery at Aberdeen of the whole cargo, and that the appellant (pursuer) was not bound to send the vessel back to Cruden, or to deliver any part of the cargo there: Therefore sustain the appeal, recal the judgment appealed against, and decern in terms of the conclusions of the libel: Find the appellant (pursuer) entitled to expenses in both Courts, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer (Appellant)—Millie. Agent—W. Spink, S.S.C.

Counsel for Defenders (Respondents)—Lang. Agents—W. & J. Burness, W.S.

Saturday, March 2.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HOPE *v.* THE GOVERNORS OF HERIOT'S HOSPITAL AND METHVEN.

Property—Upper and Lower Heritors on a Stream—Obstruction—Right to Enter upon Neighbouring Lands.

Where a sediment from sewage had accumulated in the water-course of a burn, *held* that no action for removal thereof lay at the instance of an upper against a lower heritor, but that the lower heritor is not entitled to raise the bed of the stream by an *opus manufactum*, and that where the upper heritor illegally entered upon the lower heritor's lands and cleared out the burn, the presumption of fact, where there was a dispute about the level of the bank, was against him.

Process—Summons—Circumstances where a Proposed Amendment of Summons was disallowed.

A summons concluded for declarator that the defenders were bound to execute on their land at their expense certain works for the efficient drainage of the pursuer's land.—*Held* that a proposed amendment of the summons, to the effect that the expense should be borne jointly by the parties or by the pursuer alone was, incompetent, as the nature of the action would thereby be wholly changed.

This was an action raised by John Hope, W.S., against the Governors of Heriot's Hospital, and Thomas Methven, nurseryman, Edinburgh, their tenant. The summons was in the form of a declarator, on which it was subsequently proposed to make amendments (here indicated by italics). The pursuer claimed to be "entitled, *at the expense of the defenders, or otherwise of the pursuer and defenders, or otherwise of the pursuer*, to have the channel of the Broughton Burn, where the same flows through the lands and barony of Broughton, belonging to the first-named defenders, *deepened and, if necessary, widened to such an extent as to afford sufficient and proper drainage for the pursuer's lands of Broughton and Gayfield; or otherwise, to have the channel of the said burn* made and kept by the defenders free and unimpeded for the passage of the water of the Broughton Burn, and feeders thereof, according to the natural levels, to the effect of having the water of the said burn, and of Gayfield Square sewer and other feeders thereof, and the drainage of the pursuer's *said* lands of Broughton and Gayfield, carried freely down the channel of the said burn, and that the defenders are not entitled to impede or obstruct the flow of the said burn so as to dam or force back the water thereof on the said lands of the pursuer, either by neglecting to make and keep the bed of the said burn free from accumulations of silt and deposit, or by placing dams or weirs in the channel thereof, or by laying down in the said channel earth or stones or other similar materials: And the defenders ought and should be decerned and ordained, by decree of our said Lords, to remove all such dams or weirs, and earth or stones, and silt and other obstructions, as aforesaid, and to restore the channel of the said burn to its natural level, or to such levels as will afford sufficient and proper drainage for the pursuer's said lands, or otherwise to such levels as will clear the sill of the Gayfield Square sewer at the outlet of the covered part thereof; *or otherwise to restore the channel to the level at which it stood prior to May* 1876: And in the event of the defenders' failure to do this, the pursuer claimed £200, or such other sum as shall be ascertained to be the expense of the removal and restoration; *or otherwise, to allow the pursuer to remove the said dams or weirs and other obstructions, and to restore the channel as aforesaid, at the joint expense of the pursuer and defenders, or otherwise at the expense of the pursuer.*"

The nature of the case sufficiently appears from the note to the Lord Ordinary's interlocutor quoted below.

The pursuer pleaded—"(1) The pursuer, as an upper heritor, is entitled to have the free and unimpeded use of the levels of the burn for the drainage of his lands, and the defenders are bound to receive the said drainage. (2) The water of the Broughton Burn being charged with sewage and other solid matter, the defenders are bound from time to time to clear out the channel thereof, to the effect of preserving the natural fall, or at least of preventing the stoppage of the pursuer's drainage. (3) The defenders are not entitled to impede or obstruct the course of the burn, or to alter the levels thereof to the disadvantage of the pursuer, either by neglecting to clear out the channel and allowing accumulations of deposit therein, or by constructing dams or weirs, or forming ponds, or by placing earth or stones or other similar materials in the bed of the burn; and the pursuer is entitled to have decree to that effect, and to have the existing obstructions removed, as concluded for. (4) The pursuer, as an upper heritor, is entitled to have the burn so deepened, and the water or sewage made to run in such an incline as will effectually carry it away. (5) The defenders having illegally and unwarrantably dammed back the water of the burn upon the pursuer's lands, he is entitled to