could not have added one jot or tittle to the decreet-arbitral pronounced. It could only give executorials to carry it out *tantum et tale* as it was.

How, then, was this money to be ever got by any party? Was a multiplepoinding to be raised in name of the bank in which Paul and Henderson were to compete as to the reserved right? That would be a new litigation about a matter that might and ought to have been decided by the arbiter, and which, therefore, would all the more prove that the submission was not exhausted.

But, further, how could a Court decide upon right to a fund under a deposit-receipt which defined the disposal of the fund to depend on the order of this very arbiter. No doubt, if the consignation had been rejected and thrown aside, Henderson might have got back his money. But it was not so treated. The arbiter recognised it and held it to be in his control, and yet he refuses to give the order required, and leaves to another tribunal to determine the rights of parties in the fund. It was as arbiter that he was to say, and not otherwise, to whom the money belonged, just as if the order of the Lord Ordinary had been mentioned in the receipt. He who ought to have decided that refuses to do so, and says he will give an order or give the money, not according to his own views, but in obedience to some other tribunal to which he was to defer, but which tribunal could never arrive at the means of so deciding. Execution may lie over, but the rights of parties must be fixed.

It appears to me, therefore, that this fund, though made a part of the submission, was left *in medio* and in suspense, and consequently that the decreet-arbitral is objectionable for thus leaving that question undisposed of.

The Lord Justice-Clerk concurred with Lord Neaves.

In accordance with the opinions of the majority, the Court found that the reference was exhausted, and therefore adhered to the Lord Ordinary's interlocutor.

Agent for Pursuer—Thomson Paul, W.S.
Agents for Defender—J. & A. Peddie, W.S.

Wednesday, Feb. 20.

FIRST DIVISION.

CONNELL *v.* GRIERSON.

Entail—Destination—Heirs-Female—Nearest of Kindred. 1. Held that heirs-female in a deed of entail meant heirs-female general, unless it was obvious from the deed that the entailer meant the expression to have a more limited meaning. 2. Circumstances in which held that it meant heirs-female of the body. 3. Held that under a destination to an entailer's nearest of kindred the person entitled to succeed was his heir in heritage.

These are two actions in regard to the right to succeed as heir of entail to the two estates of Over-Kirkcudbright and Auchenchain, under deeds of entail executed by William Collow in the year 1779. The defender, Miss Grierson, has made up her title as heir of entail, and the pursuer challenges her right on the ground that he is the nearer heir. The defender objected to the pursuer's title to sue, on the ground that she is the true heir. This preliminary defence raised the question, which under the entail is the nearest heir?

The destination of the entail of Over-Kirkcudbright is in these terms—viz., "to my grandson John Collow, and the heirs-male descending of his body; whom failing, to Gilbert Collow my grandson, and the heirs-male descending of his body; whom failing, to any other heir-male which shall be procreate betwixt my son Thomas Collow and Helen Grierson his spouse; and, in default of all these, to the heirs-female of the said John Collow, my said grandson; and failing of his heirs-female, to the heirs-female of the said Gilbert Collow; and in default of such, to the heirs-female of the male heirs to be procreated hereafter betwixt my son Thomas Collow and his said spouse; and failing of all such heirs male and female, to and in favours of William Collow, my grandson, and the heirs whomsoever, male or female, descending of his body; and in default of all such issue, to and in favours of William Collow, eldest son of the deceased Mr John Collow, late minister of the gospel at Penpont, my brother-german, and the heirs-male descending of his body; whom failing, to Thomas Collow, second son of the said Mr John Collow, and the heirs-male descending of his body; whom failing, to John Collow, third son of my said brother, and the heirs-male descending of his body; whom failing, to James Collow, youngest son of my said brother-german, and the heirs-male descending of his body; whom failing, to Mr William Grierson, present minister of the gospel in Glencairn, and the heirs-male descending of his body (he is the lawful son of Jean Collow, my sister, deceased, and James Grierson her husband, also deceased); whom all failing, to any person or persons as shall be called and nominated to the succession of the lands and others aftermentioned, by a writing under my hand, at any time hereafter; and in case of no such nomination, to my own nearest of kindred, and their heirs and assignees and disponees whomsoever, absolutely and irredeemably."

The pursuer contended that he was entitled to succeed as heir-female of John Collow, the grandson of the entailer, under the second branch of the destination. The defender conceded this, provided the destination was to be read as meaning heirs-female in general; but she maintained that the destination, rightly construed, meant heirs-female of the body of John Collow. If this were so, the pursuer could not succeed under this branch of the destination because John Collow left no issue.

The pursuer, however, contended, in the second place, that, assuming the estates to have now devolved on the entailer's "own nearest of kindred," he was entitled to succeed, because he was the entailer's heir-at-law in heritage. But the defender contended, on the other hand, that she was the entailer's nearest of kindred, because she was nearest to him in blood. She is the entailer's grandniece, while the pursuer is his great great grandnephew.

The Auchenchain entail was somewhat different in its earlier branches and the first question did not arise under it; but it also contained an ultimate destination to the entailer's nearest of kindred, and therefore raised the second question which was raised in regard to the Over-Kirkcudbright entail.

The Lord Ordinary (Kinloch) held (1) that heirs-female meant heirs-female of the body; and (2) that the pursuer was not the nearest of kindred to the entailer or one of his nearest of kindred. He therefore sustained the defence that the pursuer had no title to sue, and dismissed the action with expenses. In his note he observed—

I. The Lord Ordinary is of opinion that the destination to the heirs-female of John Collow must be held to be limited to heirs-female of the body.

The Lord Ordinary considers it to be settled that a destination to heirs-male, or heirs-female, expressed indefinitely, is to be limited to heirs male or female of the body, if it appears from the context of the deed that no other than this limited destination was intended by the granter. This was one of the points authoritatively fixed in the well-known Roxburgh case, Ker *v.* Innes, House of Lords, 20th June 1810; "Paton's Appeals," v., 320. In that case it was found that a destination "to the eldest daughter of umquhile Harry, Lord Ker, without division, and their heirs-male" carried the estate to the daughters of Lord Ker successively, and the heirs-male of their body, not their heirs-male general.

It appears to the Lord Ordinary that the terms of the entail in the present case afford conclusive evidence that by the term "heirs-female of John Collow," heirs-female of the body were alone intended.

The first circumstance to be attended to is, that the granter of the deed was intending to make a proper entail in favour of a series of heirs specifically called. Whatever may be said as to the last devolution on "my own nearest of kindred and their heirs and assignees and disponees whomsoever," as to which also the present case raises a question, it is undoubted that down to this devolution a proper entail was intended in favour of the parties specifically set forth. There would otherwise be little or no meaning in the series of specific substitutions. It would be running contrary to this general intendment, to hold an intermediate destination to devolve the estate on heirs-female general; for this would be to introduce a destination of wholly indefinite comprehensiveness, carrying the estate to a variety of possible individuals, unnamed and unknown, and making the after *nominatim* substitutions of scarcely appreciable value. If the heirs-female general required to be exhausted before the succession came to the next substitute, it would be somewhat difficult to predict when that event would happen.

In its usual application, a destination to heirs-female general is, in substance and effect, a destination to heirs whatsoever. If, as commonly happens, there is a prior destination to heirs-male, these must of course be exhausted before the destination to heirs-female takes effect. But so soon as it takes effect by that exhaustion, the destination is simply one to heirs whatsoever, whether male or female. All heirs, taking through a female, whether themselves male or female, are heirs-female in the eye of law. That a destination to heirs-female is simply a destination to heirs whatsoever, failing heirs-male, was decided in the well-known case of Bargany, in which, on that ground, the daughter of an eldest son (who was heir whatsoever) was found entitled to exclude the entailer's own daughter and her issue. Dalrymple *v.* Dalrymple, House of Lords, 27th March 1739; "Paton's Appeals," i. 237. The legal rule is well and briefly expressed by Mr Bell ("Principles," sec. 1699), "Heirs-female applies to the heirs at law, male or female, failing heirs-male."

Starting with a presumption in the present case against a destination so comprehensive as that of heirs-female general of John Collow, it is found that the entailer frames his deed on the specific plan of calling a certain series of substitutes, with the heirs of their bodies respectively called in their place; in other words, a series of substitutes, followed each by his issue or descendants. His first destination is to his grandson, John Collow, "and the heirs-male descending of his body." The next is to John's brother, Gilbert Collow, "and the heirs-male descending of his body." The next is to "any other heir-male which shall be procreate betwixt my son, Thomas Collow and Helen Grierson." There then intervenes the destination to the heirs-female of John Collow, now in question; and a similar destination to the heirs-female of Gilbert Collow, and of any other brother still to be procreated. The next destination is to the eldest brother of the same family, William Collow (to whom another estate, Auchenchain, was primarily given), and the heirs of his body, male or female. The deed then bears that "in default of all such issue," the estate should go successively to the sons of a brother of the entailer, John by name, and the heirs-male of their body; and afterwards to William Grierson, a nephew of the entailer by a sister, and the heirs-male of his body. Failing these, the last devolution takes effect on the nominees of the entailer, "and in case of no such nomination, to my own nearest of kindred, their heirs and assignees and disponees whomsoever."

The whole framework of the deed thus implies a succession of specific substitutes, and the heirs of their bodies—in other words, their issue or descendants. And with this accords the remarkable expression already quoted, which gives the estate to the family of the brother, "in default of all such issue:" evidently importing that it was descendants who were called under the previous destinations to heirs. The same meaning, though with less of strength, may be brought out of some after clauses, as where it is declared "that the eldest heir-female called to succeed in default of heirs-male, so often as such case happens, shall always succeed without division, and seclude all the rest of the issue-female throughout the whole course of succession; and also that the said John Collow, my grandson, and the hail heirs of tailzie before mentioned, as well male as female, and the descendants of their bodies, who shall happen to succeed to the foresaid lands and estate, shall be obliged to assume and constantly retain only my surname of Collow and the designation of Blackstoun," &c. With this prevalent limitation to heirs of the body, the Lord Ordinary finds it difficult to suppose that the heirs-female of John Collow were intended to be anything else than heirs-female of the body—issue or descendants—as throughout the deed generally.

This being so, it seems to the Lord Ordinary a conclusive consideration that, except on the supposition of the heirs-female of John Collow being limited to heirs-female of the body, not only would the entailer's presumable intention be frustrated, but the whole of his destination of the estate be made a mass of inconsistencies and self-contradictions. The Lord Ordinary has already alluded to the improbability of a destination so indefinitely comprehensive as heirs-female general being interposed between the succession of one specific substitute and that of another. It is impossible to believe that the entailer intended to interrupt a specific and express series by a devolution on unnamed and unknown individuals of a general class. But, besides this, it is to be noticed that the substitutions posterior to the heirs-female of John Collow are not to strangers in blood, but are all to members of the entailer's

family ; and on the supposition of the destination being to heirs-female general, there would arise a confusion in the substitutions, altogether alien from any fair or even possible interpretation of the deed. At present, for instance, there stands a substitution "to the heirs-female of the said John Collow, my grandson, and failing of his heirs-female, to the heirs-female of the said Gilbert Collow (his brother), and in default of such, to the heirs-female of the male heirs to be procreated hereafter betwixt my said son Thomas Collow and his said spouse" (father and mother of John and Gilbert). But the destination to heirs-female of John Collow, if interpreted to be a destination to heirs-female general, would comprehend within it the heirs-female of his brothers, who would all be, in their order, John Collow's heirs-female as well. The one destination would thus comprehend the other, contrary to the plain intendment of the deed, which contemplates a series of substitutions, all different from and successive to each other. Not only so. The destination to the heirs-female of John Collow, if interpreted to mean heirs-female general, would, in default of there being any issue of John or Gilbert Collow, or their younger brothers, carry the estate to the daughter of William Collow, the eldest brother of all, who would in that case be the heir-female general of John Collow. But the effect of this would be to make the destination come into direct conflict with the next destination "to and in favour of William Collow, my grandson, and the heirs whomsoever, male or female, descending of his body." Under this destination the sons and daughters of William Collow are not intended to come in till after William Collow himself. But according to the construction contended for by the pursuers, William Collow's daughter would come in before her father, as heir-female general of her uncle John. At least this result could only be avoided by William Collow being brought in as an heir-female general of John, which is absurd. And what, in that case, is to be made of the specific destination to William Collow, contained in the next clause of the deed ?

So in regard to the other two families favoured by the deed after the failure of the issue of the marriage between Thomas Collow and Helen Grierson—viz., the family of John Collow, minister at Penpont, the entailer's brother, and of Jean Grierson his sister. The members of both these families were all more or less within the scope of heirs-female general of John Collow. To give effect to the destination to heirs-female of John Collow as being to heirs-female general, would, or might, create a similar confusion with that already noticed in regard to Thomas Collow's family. It would, or might, dislocate and disjoint the whole express substitutions of the members of these families, and bring in to the succession individuals expressly postponed, before those as expressly preferred. There is no stronger illustration of this than is afforded by the present claim of the pursuer. As heir-female of John Collow, the pupil is supposed to come in anterior to all the subsequent substitutions. Now the pupil derives his right as such from Mary Collow, the eldest daughter of John Collow, minister at Penpont, brother of the entailer. See what results : That the eldest daughter of this John Collow comes in before her brother William and the heirs-male of his body, and before her brother Thomas and the heirs-male of his body, and before her brothers John and James and the heirs-male of their bodies ; and also before the Rev. William Grierson and the heirs-male of his body ; in short, before every one of the ulterior most specific substitutions. The entailer is most anxious, in the case of these two last-mentioned families, to limit the succession to the sons and their male issue. Yet, upon the pursuer's hypothesis, a daughter of the Rev. John Collow and her heirs whatsoever come in and sweep them all away. It is ludicrously impossible that this should be the entailer's meaning.

On these considerations, the Lord Ordinary has arrived at the conclusion that the destination to heirs-female of John Collow must be taken as importing a destination to heirs-female of the body, and none other. The deed is in this way made clear and consistent, and accordant with the entailer's presumable intentions ; but not otherwise. If the deed is so read, all claim by the pupil under this destination fails. There is no one possessed of the character of heir-female of the body of John Collow ; for John Collow died without issue.

II. A second question, however, is raised between the parties. Assuming the destination to the heirs-female of John Collow to be read as the Lord Ordinary reads it, the estate has now, by the admission of the parties, devolved on the persons last called—viz., "my own nearest of kindred, and their heirs and assignees and disponees whatsoever, absolutely and irredeemably." For the pursuer it is contended that this is simply a destination to the entailer's heir-at-law in heritage, which character, it is said, belongs to the pupil James Walter Ferrier Connell. For the defender it is contended, that the destination in question carries the estate to those who, at the time of the succession opening, are the entailer's nearest in blood, be they more or fewer ; and as such the defender says she is entitled to the estate, and has accordingly served heir on that footing.

The pursuer's theory, that the destination in question carries the estate to the entailer's heir-at-law, recommends itself at first by its simplicity, and by a not unnatural impression that this is by no means unlikely to have been the intention of the entailer. But, on full consideration, the Lord Ordinary has come to the opinion that this theory could not be sanctioned consistently with giving effect to the words of the deed, and involves the substitution of a mere guess or surmise for the language actually employed. The words "nearest of kindred" have a defined and well-known meaning in Scottish law, signifying simply the nearest in blood, or those standing in the nearest degree of relationship. For, notwithstanding the ingenious philological argument of the pursuer, the Lord Ordinary cannot regard the phrase "nearest of kindred" as meaning anything else than the better known and more common phrase, "next of kin." What the pursuer pleads is that the "nearest of kindred" must be considered as signifying "the nearest of kindred according to the rules of legal succession in heritage." But besides that this implies the interpolation of words not used by the entailer, it is obvious to remark that there is no such thing as a difference in nearness of kin according as the subject is heritage or moveables. The nearest of kin are always the same—never vary. The heir is different according as the subject is the one or the other—that is to say, the relation who is to succeed is, or may be, different in the one case and in the other. But he does not by his succession in the least vary his nearness of relationship to the predecessor. When the entailer uses the words "nearest of kindred," he uses

words which have in themselves a fixed and definite signification, altogether irrespective of the subject of succession. The words so used must be satisfied; and the Lord Ordinary has come to the conclusion that they cannot be so unless taken in their fixed and well-known meaning—that is, as signifying those who stand in the nearest degree of blood relationship to the entailer.

In giving to the words this construction, the Lord Ordinary considers them as meaning the next of kin to the entailer at the time the succession opens, by this devolution taking effect. Any other meaning—as, for instance, to hold them to signify the next of kin at the time of the entailer's death, and their heirs in heritage—would involve difficulties and absurdities inextricable. The case, it must be remembered, is not one of intestacy. In a case of intestacy, whether originally so left or supervening by after contingencies, it is the time of the predecessor's death which must be looked to, from the very nature of the case. But it is altogether different when it is not a case of intestacy, but of express destination. When this is to a person or persons called designatively, it is the natural as well as legal inference that the destination is to the person or persons who answer the description at the time of the destination taking effect. The "nearest of kindred" is just a resignative destination, calling those who at the time can show themselves to be comprehended under that designation.

It was remarked that the "nearest of kindred," considered as meaning the same with the "next of kin," is a phrase which, in common use, indicates successors in moveables, not heritage. But there was nothing to prevent the entailer, if he so pleased, from calling to his succession, *eo nomine*, those who at the time might be entitled to succeed to his moveable estate. What effect this might have on the entail is not now the question. The question regards the destination, which was entirely in the entailer's power. There was nothing to prevent a devolution on a plurality of persons, all taking at once. Such plurality of disponees or substitutes is not uncommon in the case of settlements of landed estates. A familiar illustration arises in the destination to "children" in a marriage-contract, as contrasted with that to "heirs," or "heirs and children;" the children in the former case being held all equally heirs of provision. On this point the only question is what the entailer intended—taking, as a Court must always do, the words employed by him as the evidence of his intention. The Lord Ordinary cannot answer this question except by giving the words employed what he thinks the only admissible signification.

It was pertinently asked by the defender, why, if the entailer merely meant his heir-at-law in heritage, he did not plainly say so? Why did he not simply say, "to my own heirs and assignees whomsoever?" He has not said so, but said something very different, and something which no stretch of construction can make harmonise with the assumed interpretation. If "nearest of kindred" simply means "heirs whatsoever," the devolution then runs, "to my own heirs whatsoever, and their heirs and assignees and disponees whomsoever"—certainly a very awkward form of destination. But the Lord Ordinary does not proceed on any mere awkwardness of expression. His ground of judgment is that the entailer has not said what he ought to have said had he intended the devolution to be on his lawful heir in heritage; on the contrary, has said something which cannot fairly or legitimately be construed to mean only this.

It was argued for the pursuer that the phrase "nearest of kindred," construed without reference to the laws of succession in heritage, would embrace relations by the mother's as well as father's side, the half-blood as well as the full-blood, and the like, contrary to all that is presumable regarding the entailer's intentions. And reference was made to a class of cases in regard to legacies, of which Scott *v.* Scott, House of Lords, 10th May 1855, 2 M'Queen, 281, was presented as an example. But it appeared to the Lord Ordinary that these cases were inapplicable to the present. They were cases of intention as to a legacy, gathered not merely from the legal meaning of words, but from all the evidence supplied by the rest of the deed and the surrounding circumstances. The question was—In what sense, popular or legal, did the testator use the expression? In the present case there is nothing presented but the dry legal phrase "nearest of kindred" or "next of kin." It is open to say that the phrase might have been construed by the context of the deed. But the context supplies no construction in this instance. The Lord Ordinary can therefore give the phrase no other than its fixed legal meaning, which excludes affinity and half-blood. He gives the phrase the meaning which it has when applied to moveable succession; and he sees no inconsistency in the entailer declaring that those on whom his estate should ultimately devolve should be those known in moveable succession by the name of the next of kin. If the Lord Ordinary in this misinterpret the entailer, the entailer has himself to blame.

An alternative view was presented by the pursuer. It was admitted that the defender, Miss Grierson, was nearer in degree to the entailer than the pupil pursuer. She is the entailer's grandniece, whilst the pupil is his great-great-grandnephew. But it was contended that if Miss Grierson took as nearest of kin, the pupil was entitled to share with her, by virtue of the representation introduced by the Moveable Succession Act, 18 Vict., cap. 23. The Lord Ordinary could give no weight to this argument. The Moveable Succession Act makes no alteration in the meaning of the legal phrase "next of kin." On the contrary, it maintains that meaning; and preserves to the next of kin, legally so called, the office of executor. Undoubtedly it gives a right of representation to those who are not in law the next of kin, but successors of some who were. But this right of succession is made applicable, by the express terms of the Act, only "in cases of intestate moveable succession." There is none such involved here. The case is a case of heritage, and of heritage ruled by a deed. If the pupil pursuer cannot succeed as being legally "next of kin," he can as little do so through any representation introduced by the Moveable Succession Act.

The Lord Ordinary cannot fail to perceive that to sustain, as he does, the contention of the defender, Miss Grierson, will leave behind a number of questions arising out of this entail. It has been questioned, for instance, whether the clause excluding heirs-portioners, and preferring the eldest heir-female, applies in the case of devolution on the "nearest of kindred." Another question has been started, whether the "nearest of kindred" are heirs of entail in such a sense as to apply the fetters of the entail to the heir immediately prior, or whether such heir did not stand towards them in the position of a fee-simple

proprietor, equally as in the case of a destination to heirs and assignees whatsoever. But these, and other questions which may be figured, are apart from the present discussion. However these questions may affect Miss Grierson, the pursuer has no concern with them, unless he establish that he is now the true heir to the estate. The only question now raised is, whether the pupil pursuer has a title to challenge Miss Grierson's service, either as being heir-female general of John Collow, or as being nearest of kindred to the entailer. The Lord Ordinary has come to the conclusion that this question must be decided unfavourably for the pursuer. W. P.

The pursuer reclaimed, and after an oral debate, the questions raised were ordered to be argued in writing.

MILLAR and MARSHALL, for the pursuer, argued on the first branch of the case—

"I. That the defender cannot tear from the words 'heirs-female of John Collow' in the entail of Over-Kirkcudbright their technical and ordinary signification of 'heirs-female general, without adducing cogent evidence of declaration plain' by the entailer, or of 'necessary implication' from his language, that he intended to use the words in a different sense.

"II. That not only has the defender failed to adduce any evidence of such a declaration plain, or necessary implication; but the circumstances of the case—particularly looking to the state of the entailer's family in 1779, when he made the deed—lead to the conclusion that he did not mean that the heirs-female of his grandson John Collow should be restricted to the heirs-female of his body, but intended that the words should receive their wider and natural meaning, so as to admit to the succession, on the failure of his favoured grandsons and their male posterity, not only any daughters which these grandsons might have, but also his, the entailer's, own granddaughters, or any daughters who might be born to himself during his life; and that, as the words could not in the case of John Collow's collateral heirs-female descending from the entailer himself be read in the limited sense contended for by the defender, they ought not, in the case of his collateral heirs-female descending from the entailer's brother, to receive any such limited signification.

"III. That their natural meaning cannot be torn from the words without either adding to the entail the words 'of the body,' which the entailer himself did not employ, or holding that branch of the destination as no longer operative, and as now mere surplusage, and that either method of dealing with the instrument would be a violation of the primary rules of construction laid down in many cases both by the Court of Session and by the House of Lords.

"IV. That the inconsistencies and absurdities which the defender says would follow from giving effect to the construction contended for by the pursuer, are not greater than occurred and were disregarded in the cases of Linplum, Urrard, and others; and, on the other hand, are less than would occur if effect were given to the defender's construction."

The following authorities were cited:—Ersk., 3. 8. 48; Bell's Prin., sec. 1694, 1699; Skene's Reg. Maj., B. 1, ch. 258, B. 2, ch. 25, 34, and 41, B. 3, ch. 29; Skene de verb. sig.; Dalrymple *v.* Hope, 27th March 1739, Craigie and Stewart's App., p. 237; Blair *v.* Lyon, 19th June 1739, 5 Br. Supp. 663; Ewing *v.* Miller, 1st July 1747, M. 2308; Ker *v.* Innes, 13th Nov. 1810, F.C.; Craig 2, 16, 19; Sinclair *v.* Earl of Fife, 24th June 1766, M. 14944; Bell's Law Dict., *voce* "Destination;" Leny *v.* Leny, 28th June 1860, 22 D. 1272; Macgregor *v.* Gordon, 1st Dec. 1864, 3 Macp., 148; Tinnoch *v.* M'Lewman, 26th Nov. 1817, F.C.; Hay (of Linplum) *v.* Hay, 17th April 1789, M. 2315, and 5 Paton's App., 437; Braid *v.* Ralston, 20th Jan. 1860, 22 D. 438; Roxburgh Case, 5 Paton's App., 347; Duke of Hamilton *v.* Earl of Selkirk, 8th Jan. 1740, M. 5615; Sandford on Entail, p. 72 and 91; Baillie *v.* Tennant, 16th March 1770, M. 14941; Sutties, 19th Jan. 1809, F.C.; Stewart *v.* Stewart, 8th April, 1824, 2 Sh. App., 149; Campbell *v.* Campbell, 28th Nov. 1770, M. 14949; Leitch *v* Leitch's Trustees, 3 W. and S. App., 366; Farquhar, 3d Feb. 1842, 4 D. 600.

On the second branch of the case they argued—By the words "nearest of kindred" the entailer meant the person or persons who, at the date of the succession opening, should be of his blood, and so nearly related to him in line or degree as to be entitled to succeed to his heritage *ab intestato*. It must be kept in view (1) that the subject-matter in dispute is a landed estate; (2) that the deed to be interpreted is a *mortis causa* settlement; and (3) that that deed has been found (4 Macp., 465) to be a subsisting deed of entail, and that the destination to the "nearest of kindred" is a part of the tailzied destination. The term "nearest of kindred" is not synonymous with "next of kin" either in its technical or literal sense. It is not a *nomen juris*, and must therefore be construed. It does not mean the nearest in degree absolutely. Reading the deed *secundum subjectam materiem*, the nearest in line are preferred to the nearest in degree. The pursuer's construction of the phrase is consistent with a tailzied destination, while the defender's is not. The pursuer's son is *jure repraesentationis*, the entailer's nearest of kindred, and also the representative of his next of kin as at the date of his death. But even assuming that the destination is to the next of kin at the time of the succession opening, the pursuer's son is entitled to share the succession with the defender, and under the Intestacy Act, 18 Vict., c. 23, he represents a person equally near in degree to the person whom the defender represents. The following were the pursuer's authorities on this part of the case:—Ersk., 1, 8, 5; 3, 8, 2, and 11; 3. 9. 2.; Book of Leviticus, chap. 18; Act 1555, c. 35; Bell's Prin., sec. 1650, 1694; Bankton, 3, 4, 28; Reg. Maj., B. 2, ch. 33; Craig, 2, 13, 21; 2, 17, 21; Innes *v.* Kerr, Nov. 13, 1810, F.C.; Russell's Treatise on Conveyancing, p. 254; Leny *v.* Leny, *ut supra*; Gordon *v.* Gordon's Trustees, March 2, 1866, 4 Macp. 507; Wharrie, M. 5299; Brown, M. 2318; Scott *v.* Scott, May 10, 1855, 2 M'Q. 281; More's Notes, vol. i. p. 628; Bowie, Feb. 23, 1809. F.C.; John Voet, 28, 5, 19, and 20; 36, 1, 25.

LORD ADVOCATE, CLARK, and LEE, for the defender, argued—I. The term "heirs female" has not a fixed legal meaning in the sense contended for by the pursuer. But, assuming that it has, it obviously means in this deed heirs female of the body of John Collow. Any other reading would involve inconsistency, contradiction, and absurdity. John Collow having died childless, the pursuer cannot, therefore, take under this part of the destination. II. The expression "nearest of kindred," though unusual in a destination of land, is quite intelligible. It implies (1) relationship by blood; (2) that the kindred be the entailer's own; and (3) that the person or persons must be nearest in de-

gree of propinquity to him. It admits all who answer that description, and excludes all others. It is synonymous with next of kin, the legal meaning of which is the same as its literal meaning. The pursuer's son is two degrees more remote from the entailer than the defender is. The fact that this is a destination of land gives additional significance to the language employed. Nor is it any answer to the defender to say that the effect of her construction might have been to split the succession among several individuals, for this was contemplated by the entailer when he destined the estate after his nearest of kindred to "*their* heirs and assignees whomsoever." They referred to the following authorities, in addition to some of those cited by the pursuer :—Johnstone *v.* Johnstone, 19th November 1839, 2 D. 73 ; Stair, 3, 8, 31 ; Balfour's Practicks, p. 219 ; Acts of Sederunt 1666, p. 99 ; Mackenzie's Inst., 2, 2, 9 ; Mackenzie's Observ. on Stat., 1617, c. 14 ; Primrose *v.* Primrose, 9th Feb. 1854, 16 D., 498.

At advising,

Lord CURRIEHILL—The solution of the questions between the parties depends upon the meaning of the destination in the deed of entail which was granted by William Collow of his estate of Overkirkcudbright on 30th March 1779. It is therefore advisable at the outset to analyse that destination. It consisted of four branches. It appears that he had a son, Thomas Collow, who was married to Helen Grierson, and that through him he had then at least three grandchildren—William, John, and Gilbert Collow. But he did not appoint his own immediate son Thomas *nominatim*, either institute or an heir of entail.

By the first branch he conveyed the estate "to my said grandson, John Collow, and the heirs-male descending of his body ; whom failing, to Gilbert Collow, my grandson, and the heirs-male descending of his body ; whom failing, to any other heirs-male which shall be procreate betwixt my son Thomas Collow and Helen Grierson, his spouse." This branch did not include either his eldest grandson William or any female issue he, the entailer, might have, either through his grandson William, or through any of his grandsons, or any descendants male or female he might have through such female issue.

The second branch of the destination was to the heirs-female "of the said John Collow, my said grandson ; and failing his heirs-female, to the heirs-female of the said Gilbert Collow ; and in default of such, to the heirs-female of the male heirs to be procreated hereafter betwixt my son Thomas Collow and his said spouse ; and failing all such heirs male and female, to and in favour of William Collow, my grandson, and the heirs whomsoever, male or female, descending of his body."

One of the questions in this case is, whether or not the parties here described as heirs-female were meant to be limited to heirs-female of the body. That question will afterwards be adverted to ; but in the meantime it may be remarked, that even these destinations, if they have that restricted meaning, would not have included among the heirs of entail daughters either of the entailer himself, or of his son Thomas (and he had two daughters, Mary and Jean), or any of their issue male and female to the remotest generations.

By the third branch of the destination the entailer called even certain collateral relatives in preference to all these female lines of his own issue. It was granted to "William Collow, eldest son of the deceased Mr John Collow, late minister of the gospel at Penpont, my brother-german, and the heirs-male descending of his body, whom failing" to three younger sons of that brother in their order, and the heirs-male descending of the bodies of them respectively ; "whom failing to Mr William Grierson, present minister of the gospel in Glencairn (the son of the entailer's sister Jean Collow), and the heirs-male descending of his body."

The fourth branch of the destination, which was to regulate the succession in the event of the failure of all the heirs called by the three preceding branches, and of no other destination being made by the entailer, was to his "own nearest of kindred," and their heirs, and assignees, and disponees whatsoever. This branch of the destination gives rise to another of the questions in dispute in this action.

Mr Collow intended this entail to be a statutory one, as appears from his directing it, in the registration clause, to be recorded in the register established by the statute 1685. It was accordingly duly recorded.

The entailer having died in 1782, his grandson John then succeeded as institute. He having died in 1813 without issue, his brother Gilbert, the next substitute, succeeded and possessed the estate until 1863, when he also died. Not only did he leave no issue, but all the other heirs called to the succession by the first three branches of the destination had then entirely failed, if those called under the second branch by the designation of heirs-female were only heirs-female of the body. But if that expression as there used meant heirs-female general, then the pursuer of this action, who is confessedly the heir-female general of John Collow, would succeed under that branch of the destination. Hence the first question to be decided in the case is, which of those two meanings did the entailer express by the phrase "heirs-female," as used by him in this branch of the destination.

If he used that phrase in its ordinary meaning, he designated by it the person who, in the event contemplated by the third branch of the destination, would then be in the position of being his heir-at-law ; for the heir-female of a stirps when used in an unrestricted sense, means the heir general of that stirps, whether such heir be a male or a female, or be connected with the stirps, through either males or females. But that rule is not inflexible, and the phrase is held to be limited to the heirs-female of the body of the stirps, when it appears from the context of the deed, or its import, that such was truly the entailer's intention. This principle has been fully established by authority ; and it is well illustrated by the opinions delivered in the House of Lords in the Roxburghe case. But the *onus* lies on the defender of establishing that Mr Collow did truly intend so to limit this general destination to the heirs-female of John Collow. And this *onus* is rendered formidable by the consideration that in framing the destination in this entail he had clearly in his view the distinction between heirs general and heirs of the body, as appears from the context. In the first branch of the destination, where he limited the succession to the heirs-male of the body of his several grandsons, he expressed the limitation in clear and appropriate language. He did the same thing also in this second branch itself of the destination, by limiting the heirs of his grandson William, in the event of succeeding under it, to the heirs "male or female descending of his body." And again, he did the same thing in the

third branch of the destination to his five nephews successively and the heirs-male descending of their bodies. His having so clearly discriminated heirs of the body from heirs general, in the preceding and succeeding context, increases the difficulty of holding that he intended those whom he called as heirs-female generally of John Collow to be limited to heirs-female of his body, when he did not express such limitation.

This difficulty is increased by another consideration. If the destination in question be held to have been so limited, then, as I have already remarked, all daughters who might be born to himself and his two granddaughters, who were born to his son Thomas, and all other granddaughters who might be born to him, and all his issue male or female by such daughters or granddaughters, not only would not have been called to the succession by this second branch of the destination, but would have been actually excluded from it by the entailer's collateral relations, who were called by the third branch—viz., by the heirs-male of the bodies of his five nephews, if such issue should exist. There is difficulty in holding that the entailer entertained such an intention, when the language which he used, according to its ordinary meaning, would not have led to such an unnatural result.

But notwithstanding all these considerations, it is still more difficult to hold the testator to have used the phrase as designating more than heirs-female of the body. The reason is, that unless the phrase was used by him in that restricted meaning, every one of the steps in the second, in the third, and in the fourth branches of the destination, after the very first one in favour of the heirs-female of the entailer's grandson, John Collow, would have been utterly meaningless. Since a destination to heirs-female general is just a destination to heirs whomsoever, the destination in the very first step of the second branch of the destination—viz., that in favour of the heirs-female of John Collow—would itself have carried the right to the estate, on the failure of the descendants of John Collow himself, to the descendants in their order of all his brothers and of all his sisters; and failing them, to the descendants in their order of his father; and failing them, to the descendants in their order of his grandfather, the entailer; and failing them, to all his collateral kindred and their descendants in their order. And since such would have been the extent of the operation of the first step in the destination (that in favour of the heirs-female of John Collow) in the ordinary meaning of these words, what meaning could the entailer have attached to the second step of that destination—viz., that in favour of the heirs-female of Gilbert Collow? As these in the unrestricted sense of the phrase heirs-female would have consisted of the very same persons as those who were previously called as heirs-female of his brother John, it follows that if the description were used in that sense, the entailer would have intended to call to the succession the very same persons, and no others, by all the branches of the succession, after that in favour of the heirs-female of John Collow, and that he intended the same absurdity as to every other step, not only in the second, but also in the third, and even in the fourth, branches of the destination; for as every person called in each of these branches would have been within the category of heirs-female general of John Collow, the calling of the very same persons a second time, and indeed several times over, could have had no intelligible meaning. And it would have been worse than meaningless. It would have been absurd and preposterous. On that assumption it would have made the non-existence of each of these persons the very condition upon which he or she should succeed to the entailed estate. And as thus the branch of the destination cannot be read intelligibly without holding the phrase to have been restricted to heirs-female of the body, we are constrained to hold that such was truly the entailer's meaning. And holding such to have been his meaning, it follows that the pursuer is not to succeed to the estate under the second branch of the destination.

This brings us to the question, which of the two parties to this action is entitled to the succession under the fourth branch of the destination—viz., that in favour of "the nearest of kindred" of the entailer himself. The parties are agreed that the pupil pursuer, J. W. F. Connell is the nearest existing heir in heritage of the entailer; that the defender, Miss Grierson, is his nearest existing heir in moveables; and that, reckoning their propinquity by merely natural degrees, the proximity of the latter is nearer by two degrees than that of the former. But which of them was nearest of kindred to the entailer in the meaning in which he himself used the phrase in this deed of entail? The phrase has no established technical meaning; and we must therefore endeavour to penetrate into the entailer's mind, in order to discover how he intended any party to whom he applied this description to be distinguished.

In the first place, he plainly intended that the position of every person who should succeed under this branch of the destination should be that of an heir of tailzie in conformity with the statute 1685. This branch of the destination is clearly distinguished from the concluding destination to the "heirs and assignees and disponees whomsoever" of such nearest of kindred. And accordingly the judgment of the Court in a former branch of this case was expressly pronounced on the footing that the position of any party called to the succession under this branch of the destination is that of an heir of entail. Now, one indispensable test of any person being in that position is, that he should be qualified to obtain himself served and retoured heir of tailzie and provision, under the destination in the entail, to the person who died last entered and infeft in the estate in that character. And on the death of the first party who might thus be first invested with the right under this destination, the right would of course descend, according to the rule of tailzied succession, to the party who in that contingency would be the nearest of kindred of the entailer; and that party also would require to be served and retoured heir of tailzie and provision to his immediate predecessor. The same remark applies to every person who might afterwards succeed under this destination. Of course, also, any person succeeding under this destination must have been qualified to perform, and subject himself to the operations of, the conditions of the entail.

Secondly, every person who might so succeed as heir of entail under this destination behoved to be connected with the entailer by consanguinity. The destination is so expressed as to preclude the possibility of any person succeeding under it unless he should be of the entailer's own blood. And as, according to the fundamental law of tailzied succession already mentioned, when a class of heirs is called by their being connected in any specified way with an individual as a stirps, each successive

heir must at the time of his succession be the party who stands in that connection with that stirps, so at each step in the succession to the estate in question, under the destination to the nearest of kindred of the entailer, the party claiming the succession must prove that he is the party who is then in that position. In this way the succession would always be kept in the blood of the entailer so long as any blood relations of his should exist and could be traced.

And, thirdly, any person succeeding under this destination behoves to be in the position of being nearest of kindred to the entailer at the date of the succession, according to the rule by which the entailer himself meant such proximity of kindred to be reckoned. This proposition admits of no doubt. But here the question arises, What is the rule according to which the entailer intended the proximity of kindred to be reckoned? Upon this question the parties differ.

There is great diversity among the rules which have been adopted in different countries for this purpose. The rules of the civil law, of the canon law, of the English law, and of the Scotch law, differ from each other in many respects. And in the Scotch law there are different rules applicable to marriage and to succession; and those which are applicable to succession differ according as the subjects of the succession are heritable or moveable. And these rules of reckoning proximity of kindred are rendered more complicated by lines as well as by degrees of propinquity being recognised; for in the words of Erskine (i. 6, 8)—"Propinquity is distinguished by its different lines and measured by degrees." The question then is, What was the rule by which the entailer, Mr Collow, intended the propinquity to be reckoned of the parties whom he called to the succession by the designation of his nearest of kindred? It is according to his will, so far as it can be ascertained, that this question must be decided.

One thing appears to me to be clear enough, that the rule by which he intended that reckoning to be made could not have consisted in counting merely the natural degrees by which his kindred from time to time might be connected with him, disregarding the proximity of the different lines. The reason is, that according to that mode of reckoning there might be called to the succession from time to time a multiplicity of persons as joint-heirs of entail, contrary to the nature of tailzied succession. According to such a mode of reckoning propinquity all the children of a man male and female, without distinction of age, are equally near to him, being connected with him in the first degree; and both his father and his mother are equally connected with him in the same degree of propinquity. Again, his grandchildren, and his four grandparents, and all his brothers and sisters are equally connected with him in the second degree of propinquity; but the father and mother being in the first degree would, if alive, be nearer than the brothers and sisters, who are in the second degree. All his nephews and nieces by both his father and mother, and all his great grandchildren are equally connected in the third degree; but the latter are postponed to his brothers and sisters if alive, who would be in the second degree. Thus the kindred of equal degrees generally go on multiplying in each successive generation; and those nearest in degree according to this mode of reckoning would, although remote collateral relations, exclude the party's own issue if the degrees between him and them should be more numerous.

Now, Mr Collow, the entailer, certainly could not have intended the proximity of the nearest of kin, whom he designated to be his heirs of entail, to be reckoned according to the rule which might and probably would call such a multiplicity and mixture of persons as joint-heirs of entail. Such a thing is inconsistent with the object of entails, and the conditions under which entailed estates are held. It is for this reason that it is held that heirs portioners cannot be heirs of entail. The entailer's "chief view in making the entail is presumed to be the continuing the representation of his family in one person." Ersk. III., 8, 32. And that such was Mr Collow's view when he made this entail appears from his having excluded heirs-portioners from the succession. He would not have done so if he had meant that all persons connected with him in the same degree of propinquity should succeed as joint-heirs of entail. And accordingly there never has been such a proceeding known in the practice of Scotland as such a multiplicity of persons being served and retoured by an inquest as joint-heirs of entail. And the incongruity of such a proceeding having been intended by the entailer becomes more glaring when it is considered how the feudal investiture could be renewed in favour of the successors of each of such joint-heirs in only his own *pro indiviso* share. On the death of each of them his successors would be the whole class of persons who, by that time, might have become, in their turn, the nearest of kindred of the same degree of propinquity to the entailer. In the course of a few generations the confusion would become inextricable. For example, on looking at the genealogical tree in process, it will be seen that the defender had seven brothers and sisters; and if all of them were still alive, then, according to this rule of reckoning kindred, eight persons must have been served and retoured joint-heirs of tailzie and provision. Or if she as well as her brothers and sisters had died, there were seventeen persons of the next generation, and if all of them were alive, these would have a service and retour of seventeen joint-heirs of tailzie and provision. It is impossible to assume that Mr Collow, the entailer, intended the proximity of his nearest of kindred whom he designated as his eventual successors or heirs of entail should be reckoned by a rule which would lead to such results.

The presumption against his doing so is strengthened by the consideration that, according to such an interpretation of those whom he denominated his next of kindred, he would have excluded from the succession all such individuals of even his own issue who might be in existence when this branch of the destination should come into operation, and also at every subsequent renewal of the investiture, if there should then happen to be alive any of the descendents of the brother or sister who were connected with him in a nearer degree.

The defender feeling apparently this to be the case, maintains that the entailer should be held to have meant that the persons whom he called to the succession of his entailed estate by the designation of "next of kindred" were to be the same class of persons as in Scotland succeed to the executry funds of an intestate defunct under the denomination of his "next of kin." But in the first place, that mode of reckoning the proximity of kindred would still lead to similar absurd results. Although according to that rule, the entailer's kindred by the mother's side would not be included, and his kindred by the descending lines would be

preferred to those in the collateral and ascending lines, yet, in whichever line his kindred should exist, that mode of reckoning the proximity would be subject to the same objection of eventually admitting a multiplicity of heirs of entail.

And, in the next place, if the entailer intended that the proximity of his kindred should be reckoned according to the rule adopted by the Scottish law of succession, the presumption is that the rule, by which proximity is reckoned in Scotland in the succession of heritage is the one which he intended to be followed. And I think it is certain that this was what he truly intended; because that is the only mode of reckoning his kindred by which the very object of the entail, the continuance of the succession through one person at a time, could be secured.

The feudal law has well-known rules of its own for reckoning proximity of kindred. Not only natural degrees, but likewise different lines, the difference of sex, and primogeniture, are all combined in the rules by which the proximity is measured in reference to feudal subjects. By following these rules the succession to such subjects is always kept in one person at a time, provided that the succession of heirs-portioners is prevented, as is the case by the entail in question. It is thus the only mode of reckoning proximity of kindred by which an entail, such as is authorised by the statute law of Scotland, and such as Mr Collow intended to make, can be rendered effectual. And therefore I cannot doubt that, according to the true meaning and intention of his deed of entail, it is the one which he intended to be adopted.

That this construction is according to Mr Collow's intention is strongly confirmed, as I think, by the intense predilection for feudal succession which he evinced in the other branches of the destination. His feudal propensities, as we have seen, were so strong as to induce him to prefer the heirs-male of the bodies of his brother and of his sister to several lines of the issue of his own body; and therefore it cannot be assumed that he intended that when he directed that, failing all the persons he so preferred, he intended the proximity of his own nearest of kindred to be reckoned otherwise than according to those rules which are established by the feudal institutions of this country, and by means of which alone his object in entailing his estate could be effected.

It is true that according to this mode of reckoning the entailer's kindred, the succession devolves upon the person who would be his heir at-law, if the estate had still been in the entailer's *hæreditas jacens*, and he had died intestate. But a great part of the estates in Scotland, which are held by effectual entails, are in the same predicament. That is no objection to the validity of an entail, so long as the destination effectually prevents the succession from going out of the blood of the entailer; and, as already stated, that object is effectually secured by the terms of Mr Collow's entail.

I am therefore of opinion that the pursuer, who is confessedly the heir-at-law of Mr Collow, is his nearest of kindred in the sense in which that phrase is used in this entail; and that therefore decree ought to be pronounced in terms of the conclusions of the action at his instance.

Lord DEAS—There is here in question the destination of two estates, the estate of Over-Kirkcudbright and the estate of Auchenchain. Your Lordship has very fully stated the circumstances of the case, and it would, therefore, be quite superfluous in me to go over them again. We have already substantially found that the entails of these estates did not come to an end in the person of the last heir; and the question raised in the cases now before us is to whom these estates respectively now descend under the tailzied destination. As regards the estate of Over-Kirkcudbright there are two questions, the first as to whether the destination failing heirs-male procreate of Thomas Collow and Helen Grierson, "to the heirs-female of the said John Collow, my grandson," means heirs-female in general of John Collow, the entailer's grandson, or heirs-female of the body of John Collow, the entailer's grandson. James Walter Ferrier Connell claims to be the heir-female of John Collow, but he does not claim to be heir-female of the body of John Collow. If the meaning of that destination is a destination to the heirs-female of the body of John Collow, then J. W. F. Connell is not the heir-female of the body of John Collow, and, therefore, he cannot succeed under that destination. Now, the construction of these words very often raises questions of great nicety and of great difficulty. They are, however, capable of construction, and so it has been found in various cases, that although expressed to heirs-female they were to be held as limited to heirs-female of the body. Every case of that kind must depend very much upon its own circumstances. But if within the clause of destination itself you find satisfactory evidence that the entailer using the general words, meant them in the more limited sense, then there is no doubt whatever of the competency and of the necessity of holding them to have that meaning. It is a question of intention. The strict rules of construing entails have no application there; it is a simple question whether it sufficiently appears that by the heirs-female of John Collow the entailer meant the heirs-female of the body of John Collow. Now, there may be great difficulty in that question in many cases, particularly in respect to the competency of introducing these things as considerations by which it is proposed to construe the deed; but there is no difficulty about the competency if these materials are supplied within the clause itself. Now, without going over the considerations which your Lordship has noticed, there is one consideration here which to my mind is quite conclusive. After the various destinations which occur in that clause—destinations to the "heirs male and female of William Collow, my grandson, and the heirs whomsoever, male or female, descending of his body," we have these words, "and in default of all such issue, to and in favour of William Collow, eldest son of John Collow." It appears to me that when we take these words and look back to what precedes them, it becomes perfectly clear on the face of the clause itself, that in the various cases in which the entailer was making these destinations, he was making them to the issue of the parties, including this case of the heirs-female of John Collow. I think that is his own interpretation of his meaning given within the four corners of the clause, and throughout all these destinations, whether to heirs-female or to others, he is speaking of the case of issue; and it is in default of all such issue that the other destination is to take effect. I think that relieves us from all difficulty upon the competency of the matters by which you are to construe the deed. Therefore, my opinion agrees with that of your Lordship, that under this destination J. W. F. Connell is not entitled to succeed. There is, however, the further and concluding destination of the same estate of Over-Kirkcudbright, that

failing the various parties mentioned, the estate is to go to those who may be nominated in a writing under the hand of the entailer, "and in case of no such nomination" to my own nearest of kindred, and their heirs and assignees and disponees whomsoever, absolutely and irredeemably. Now, we having already held that that is a tailzied destination, the question is, which of the two competing parties is to succeed. Both the parties are blood relations. To my own nearest of kindred means a certain blood relation. We use these words in two senses —the one applicable to succession *in mobilibus*, and the other applicable to succession in heritable estate; and the question here is, in which of these two senses did the entailer use it. Did he use the words in the sense of his nearest of kindred who would succeed in moveable succession, or did he use the words in the sense of nearest of kindred who would succeed in heritable succession? I am of opinion that he must be held to have used the words in the sense of nearest of kindred who would succeed in heritable succession. It was heritable succession he was dealing with, and it is plain enough that he had reference to the laws of heritable succession, and to the rules of the feudal law. The important consequence of that is, that only one person can succeed at a time. I think the fair presumption is that the entailer had a view to the construction under which one person only can succeed, rather than to the construction under which, in many cases, a great many persons would at once succeed. It happens here that Miss Grierson, who is the nearest blood relation to the party who would succeed, if the question were *in mobilibus*, is the only individual in that position, but there might have been several, and I think it is more probable that the entailer had in view that construction which would give it to one person, than that which would give it to several, not only because it was heritable estate, but because it was a tailzied estate which he wished to continue tailzied as long as he could. The construction contended for by Miss Grierson would, if there had happened to be two or three instead of one in the position in which she is, have at once put an end to the entail, just as in the case of heirs-portioners, whereas the construction, which we propose to prefer, gives the succession to J. W. F. Connell, and he must serve as the next heir of entail. Whether the estate shall become fee-simple in his person or not, notwithstanding of his being one individual, who must serve as heir of entail, is a question which is not before us. I have no doubt that the entailer wished that the entail should continue to operate in his person. If it does not continue to operate in his person, it must be on account of some rule of law which the entailer could not control, and which, therefore, cannot affect the construction which we have to put upon the words which he did use. His meaning, I think, was, that the person who should succeed was to be his nearest blood relation, who would succeed according to the laws of heritable succession, and that is J. W. F. Connell.

Being of that opinion as to the estate of Over-Kirkcudbright, I am, of course, of the same opinion as regards the estate of Auchinchain, because there the destination is, to say the least of it, as favourable to this construction as it is in regard to the estate of Over-Kirkcudbright. If there be any difference at all, which it is not easy to see, it would be a difference that would come into question in the future succession of this estate, and not just now. As regards the question whether the entailer meant the nearest blood relation, to succeed according to the law of heritable succession, to be the party, there is no doubt. I am, therefore, of opinion that, as regards both of the estates, the party to succeed is J. W. F. Connell, the nearest in blood to the entailer, who would succeed in a question of heritable succession.

Lord ARDMILLAN—This is a very interesting question, raised in a competition between the great-great-grandson of the entailer's only brother, and the granddaughter of the entailer's only sister; and although the succession to two estates is involved there is one question which is peculiar to the one estate, and which is conclusive in my view of it, in regard to the other. The first question, which relates to the estate of Over-Kirkcudbright, is whether the words "heirs-female of John Collow, my grandson," who is institute in the entail, is to be held as meaning the heirs general of John Collow, or to mean heirs-female of the body of John Collow? and that both your Lordships have stated is a question which may frequently be attended with great difficulty. There are certain settled rules of construction which lead us so far, and then we have simply, in my view, to ascertain the meaning of the particular deed. I may mention that the case has been argued very fully, and extremely ably in the papers before us on both sides. They are very satisfactory papers in all respects. It has been soundly argued, I think, by the counsel for Mr Connell, that the ordinary and natural meaning of the words, "heir-female of John Collow" is the wider meaning, and that if there are no materials for arriving at a different construction, the Court will adopt the wider meaning. The presumption is in favour of the wider and natural meaning. But the words are not inflexible; they are capable of construction; and I come to the same conclusion as your Lordships that in this deed the words do not bear the wider interpretation, but ought to be construed as meaning the heir-female of the body of John Collow. Along with Lord Deas, I place very considerable reliance on the use of the words, "in default of all such issue." I think that these words, bearing back as they do, go very far to lead to the construction that the succession spoken of is that of heirs-female, as a succession by issue, and thus mean heirs-female of the body of John Collow. I am also very much persuaded to the same conclusion by what appears to me to be a species of *reductio ad absurdum* in reading it in the other way; for if the words "heirs-female" are to be read as covering heirs general, it would bring in William Collow among heirs of that description, putting him in before the heirs-female of Gilbert Collow. But the deed goes on to say that, in default of heirs-female of Gilbert Collow, William Collow shall come in. That is, it is a condition of William Collow taking, that he has previously failed under the former part of the destination. He can only take under those words in his favour *nominatim*, upon the assumption that he has failed under the previous destination. It appears to me that if we are asked so to read the deed, it would come very clearly to a *reductio ad absurdum*. It would be such an incongruity in the reading of the deed that the Court would not willingly adopt; and in a question of construction, I cannot suppose that that was the meaning of the party. Therefore I shall merely say that I quite agree with your Lordship that on this part of the case the reading is in favour of the contention that heir-female of John Collow means here heir-female of the body of John Collow.

The other question, which is of a different kind,

is also attended with considerable difficulty. I think we are called on to consider that this gentleman in his deed is not only dealing with a landed estate, and making an entail which we have already found to be an existing entail in the person of the last party, but he describes his reason for his procedure to be "for the continuance of my inheritance with John Collow and his posterity." Probably he was a great feudalist, and wished to adhere to feudal law, but I think it very plain that his object was to make an entailed destination, giving his estate, with the single exception of heirs-portioners, to one person after another in the succession; and I think that much aid is got from the consideration of the case of Roxburgh, and some of the other cases. Therefore, I think we are entitled to hold that what he meant here was the succession of one person after another. Then at the close of his deed, he says, "whom all failing, to any person or persons as shall be called and nominated to the succession to the lands." I think that that means any person, if I nominate one, or persons, if I nominate several, in succession. It does not mean any one or dozen of persons, but it means any one person, or any succession of persons, one after another, "to the succession of the lands." I think that plainly means to the succession of heritable property according to the Scotch law of heritable succession. Then follows, "And in case of no such nomination"—that is, no such nomination to the succession of the lands—"then to my own nearest of kindred." And without occupying time by more fully explaining my views upon that, I have come to the conclusion that it does not mean exactly the same as our technical phrase next of kin, but that here it must mean my nearest heir in heritage who is of the blood of the entailer, or the nearest heir of the blood of the entailer who would take the succession of the lands according to the law of Scotland applicable to such succession. Whether that would mean ultimately a succession to the nearest of kindred one after another, or whether the entail would be at an end in the person of the first party taking the estate, is a question not now before us, and I give no opinion on it at present. There are strong grounds for holding that it might be a succession to a series of nearest of kindred being of the blood of the entailer, so long as there were such persons, but that matter is not at present before us. It is enough for the decision of this case that we are all of opinion that the nearest of kindred here means the nearest of kindred who would succeed to the heritable estate, being of the blood of the entailer.

Lord CURRIEHILL—Lord Deas has indicated his opinion as to the estate of Auchinchain, and I have only to say that I entirely concur in his Lordship's view. I believe Lord Ardmillan does the same. It it quite unnecessary, therefore, to repeat what we have already said in the other action.

I think it is right to mention that I have the authority of the late head of the Court to say that he entirely concurred in consultation in the opinion which we have now expressed.

MILLAR, for the pursuer, moved for expenses.

Lord CURRIEHILL—The opinion of the Court is that this is not a case in which to give expenses. On one very important question the defender has been successful, and we think it is a case in which there should be no expenses found due to either party.

The interlocutor of the Lord Ordinary was therefore altered.

Agents for Pursuer—A. & A. Campbell, W.S.
Agents for Defender—Mackenzie & Kermack, W.S.

Wednesday, Feb. 20.

FIRST DIVISION.

ADV.—PIRIE AND SONS *v.* WARDEN.

*Jurisdiction—Sheriff—Foreigner—Locus Solutionis—Personal Citation—*1 *Gul. IV., c.* 69—1 *and* 2 *Vict., c.* 119. Held that a Sheriff had maritime jurisdiction over a foreigner personally cited within his territory in regard to a contract, the *locus solutionis* of which was also within it.

This was an advocation from the Sheriff Court of Aberdeenshire. The pursuers are Alexander Pirie and Sons, paper-manufacturers, Aberdeen, and the defender called is Captain John Warden, designed as "owner, or representing the owner or owners, and as master of the ship or vessel called the Emily and Jessie, of Liverpool, presently in the harbour of Liverpool."

The following are the conclusions of the action:—"The defender (as owner, or representing the owner or owners, and as master of the said ship or vessel) ought to be decerned to make delivery in Aberdeen to the pursuers of one hundred and forty tons six hundredweight of esparto or Spanish grass, shipped at Aquillas in Spain, to be delivered at Aberdeen, conform to bill of lading dated 25th January 1865, signed by the said defender, and endorsed to and held by the pursuers, and which bill of lading was signed in terms of a charter-party dated at Alexandria the 22d day of November 1864, between W. J. Wynands, shipbroker, Newcastle-upon-Tyne, and the defender; or otherwise, and in the event of the defender failing to make delivery to the pursuers of the foresaid esparto or Spanish grass within such space as may be appointed by me, the defender ought to be decerned, as owner, or as representing the owner or owners, and as master foresaid. to pay to the pursuers the sum of £1000 sterling, being the value of said esparto or Spanish grass, and the damages sustained by the pursuers, or which they may yet sustain and incur, in consequence of the defender's failure to deliver said grass; and generally, in consequence of his non-implement of said charter-party and bill of lading held by the pursuers, with interest on the foresaid sum, at the rate of £5 per centum per annum, from the date of citation to follow hereon till payment, with expenses." By a minute put into process the pursuers admitted that the defender was a foreigner not domiciled in this country; and arrestments to found jurisdiction had not been used.

The summons was served personally on the owner of the vessel, and afterwards the charterer of the vessel claiming to be owner of the cargo was sisted as a defender in the action. Besides pleas on the merits, the defender pleaded that the defender Warden, the defender called in the summons, being a foreigner not domiciled in Scotland, the Court had no jurisdiction to entertain the action. The pursuers answered that the defender having been resident and having been cited personally within the territory where the contract libelled on was to receive effect, he was liable to the jurisdiction of the Court; further, that the Sheriff Court as in place of the High Court of Admiralty had jurisdiction in the case in virtue