applicable to the present action, and also the above two sums of 10s. and 8s. respectively."

Counsel for the Pursuer and Reclaimer—Dean of Faculty (C. S. Dickson, K.C.)—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Gentles. Agent—J. Stuart Macdonald, Solicitor.

Friday, February 19.

SECOND DIVISION.

CARNEGY *v.* JOSEPH.

Entail—Succession—Destination—"Heirs Whatsoever"—Branch.

By deed of entail an entailer destined his estate to "myself and the heirs-male of my body, and the heirs whatsoever of their bodies, whom failing to the heirs-female of my body and the heirs whatsoever of their bodies," under the conditions that "the males of every branch through the whole course of succession above appointed shall not only be preferable to the females, but also that the eldest daughter or heir-female shall always succeed alone without division and exclude heirs-portioners." On the death of the last descendant of the entailer's eldest son a competition arose between the daughter of the eldest son of the entailer's second son and the eldest surviving son of the second son of the entailer's second son. *Held* that, as the terms "heirs-male of my body" was not restricted to the heir-male of the body at the entailer's death, but called in succession all the heirs-male of his body, the entailer's second son was his next heir-male, and that, as he had predeceased, the female claimant as heir whatsoever of that son, was entitled to succeed, the first part of the condition being merely a recapitulation of the effect of the destination, and "branch" being synonymous with family.

Charles Gilbert Carnegy, M.V.O., Lieutenant-Colonel in His Majesty's Indian Army, retired, residing at Chesnut House, Lamarsh, near Bures, Suffolk, *first party*, and Mrs Isabella Eliza Butter Carnegy, wife of and residing with Francis Edward Joseph, Queen Anne's Mansions, London, S.W., and her husband as her curator and administrator-in-law, *second parties*, presented a Special Case for the opinion and judgment of the Court as to which of the parties to the case was entitled to succeed to the estate of Lour, in the county of Forfar, under the destination in a deed of entail of the estate by the deceased Patrick Carnegy, their great-grandfather, on 20th September 1813.

Under the *destination* in question Mr Carnegy disponed to "myself and the heirs-male of my body and the heirs whatsoever of their bodies, whom failing to the heirs-female of my body and the heirs whatsoever of their bodies, whom failing to Patrick Carnegy, my natural son, now residing at Penang in the East Indies, and the heirs whatsoever of his body, whom failing to Captain James Carnegy, lately commanding a country ship in the East Indies, son of the deceased Patrick Carnegy, Esq., my father, and the heirs whatsoever of his body, whom all failing to my own nearest lawful heirs or assignees whatsoever, . . ." All and Whole the estate of Lour: "But always with and under the provisions, conditions," &c., therein mentioned. The first condition contained in the deed of entail was as follows—"Under this condition and provision like as it is hereby provided and declared that the males of every branch through the whole course of succession above appointed shall not only be preferable to the females, but also that the eldest daughter or heir-female shall always succeed alone without division and exclude heirs-portioners as aforesaid, and that the heir-male of my body and whole heirs of tailzie before mentioned and the husbands of the heirs-female and such of their issue as shall in right of this entail succeed to the foresaid lands and estate" shall always assume and use the surname of Carnegy.

The Case stated, *inter alia*:—"2. The said Patrick Carnegy died on 24th November 1819, and was survived by several sons, of whom the eldest son was Patrick Watson Carnegy, otherwise Patrick Carnegy *secundus*, and the immediate younger son was Alexander Carnegy. The said Patrick Watson Carnegy completed his title to the said estate conform to, *inter alia*, (1) General service dated 28th April 1820 in his favour as eldest son and nearest and lawful heir-male of the body and of taillie and provision of his said father; (2) Crown charter of resignation following on the procuratory of resignation contained in the said deed of entail dated 2nd June 1820, and written to the Seal and registered 14th July 1820 in favour of himself as eldest lawful son and heir-male of the body of the entailer and the heirs whomsoever of his (the said Patrick Watson Carnegy's) body, whom failing the other heirs-male of the body of the entailer and the heirs whomsoever of their bodies, whom failing the other heirs and substitutes mentioned in said deed of entail, but always with and under the conditions, &c., of the said deed of entail and supplementary deed of entail. . . .

"3. The said Patrick Watson Carnegy died on or about 3rd September 1838, and was survived by two sons only, namely, his elder son Patrick Alexander Watson Carnegy and his younger son James Forbes Carnegy. The said James Forbes Carnegy was never married, and died on or about 1st May 1855. The said Patrick Alexander Watson Carnegy completed his title to said estate, conform to, *inter alia* (1) Extract retour of special service, dated 1st July and recorded in Chancery and extracted 19th August 1839, of the said Patrick Alexander Watson Carnegy as eldest lawful son and nearest and lawful heir of taillie and pro-

vision of his said father. . . . (4) Precept of clare constat, dated 29th May 1840, by the Magistrates and Town Council of Forfar in his favour as eldest lawful son and nearest and lawful heir of tailzie to his said father. This precept, which refers to certain small subjects contained in the said deed of entail, narrates that by the said deed of entail the entailer disponed, *inter alia*, the said subjects to the said Patrick Watson Carnegy 'and the heirs whatsoever of the body of the said Patrick Watson Carnegy, whom failing any other heirs-male of the body of the' entailer, &c. . . . The said Patrick Alexander Watson Carnegy, who was at his death the only surviving descendant of the said Patrick Watson Carnegy, died on or about 4th June 1914 without issue.

"4. The entailer's second son, the said Alexander Carnegy, died on or about 1st August 1862. He had only two sons, namely, Patrick Carnegy *tertius* and Alexander Carnegy *secundus*, and several daughters. The said Patrick Carnegy *tertius* died on or about 11th November 1886, and had only three sons, all of whom died unmarried. The second party, the said Mrs Isabella Eliza Butter Carnegy or Joseph is his eldest and only surviving daughter. The said Alexander Carnegy *secundus* died on or about 25th October 1900. He had five sons, of whom the eldest, Alexander Edward Carnegy, predeceased him unmarried. The first party, the said Lieutenant-Colonel Charles Gilbert Carnegy, is the second son of the said Alexander Carnegy *secundus*. . . .

"5. The first party and the second party, the said Mrs Isabella Eliza Butter Carnegy or Joseph, each claims to be the heir entitled to succeed on the death of the said Patrick Alexander Watson Carnegy to the said estate of Lour under the destination thereof contained in the said deed of entail."

The *questions of law* were—"1. Is the first party entitled to succeed to the said estate of Lour on the death of the said Patrick Alexander Watson Carnegy in terms of the destination thereof contained in said deed of entail? or 2. Is the second party, the said Mrs Isabella Eliza Butter Carnegy or Joseph, entitled to succeed thereto?"

Argued for the first party—The first party was heir-male of the body of the entailer at the date when the succession opened, and therefore was entitled to succeed. The second party was neither heir-male nor heir whatsoever of an heir-male, because her father, who would have been heir-male if he had survived, had predeceased the date of the opening of the succession, and therefore could in no sense be called heir-male of the testator. Heir-male in a destination such as the present did not include heir-presumptive. In any event, as the first party was a male of the same branch as the second party, he was entitled under the destination to be preferred to her. "Branch" meant each series of heirs divided by the words "whom failing" in the original destination, or at most did not go beyond sons of the entailer, each of whom in this view was the source of a separate branch. Within each branch males were to be preferred to females. This construction was supported by the preference of males to females throughout—*Lockhart* v. *Macdonald*, January 19, 1837, 15 S. 376, January 24, 1840, 2 D. 377, March 15, 1842; 1 Bell's App. 202, quoted in M'Laren on Wills, i, 447.

Argued for the second party—The second party was heir of line, and according to the ordinary principles of representation, and apart from any peculiarity in the present deed, would have been entitled to succeed—*Forbes* v. *Baroness Clinton*, June 6, 1868, 6 Macph. 900, 5 S.L.R. 593; Ersk. iii, 8, 11; M'Laren, i, sec. 880. As regards the order of succession there was no difference between deeds of entail and deeds of simple destination. The destination in the present deed meant that the moment an heir-male succeeded the heirs whatsoever of his body must be exhausted before the next heir-male or his heirs whatsoever could take—*Lockhart* v. *Macdonald* (*cit. sup.*). The last heir had taken the estate not as heir-male of the body of the entailer but as heir whatsoever of the entailer's eldest son. On his failure the heirs whatsoever of the first heir-male were exhausted and the estate passed to the next heir-male, viz., the entailer's second son Alexander and his heirs whatsoever. It did not matter, however, that he had predeceased the last heir in possession, because the terms of the deed imported not merely a substitution but a conditional institution of the heirs whatsoever of each heir-male. Therefore the second party as heir whatsoever of the entailer's second son and as a conditional institute to him became entitled to the estate. The word "branch" in the condition meant family, and included subordinate branches—M'Laren on Wills and Succession, i, 440. This condition, however, added nothing to what the deed implied, and was meant simply to do away with the division among heirs-portioners. On the word "branch" counsel referred to *Smith* v. *Fleming*, 1835, 2 Cr. M. & Roscoe, 638.

At advising—

LORD GUTHRIE—[*After stating the circumstances in which the question arose*]—The question as between the claimants depends on the sound construction of the clause of destination, and the condition and provision. In regard to the clause of destination, two canons of interpretation must be kept in view, the first of which may be stated in the words of Lord Barcaple in the case of *Gordon* v. *Gordon's Trustees*, 4 Macph. 501, at p. 532—"In construing the destination in an entail there is no ground for adopting any peculiar or strict principle of construction. The question is simply as to the meaning of the entailer in the use of the words which he has employed, there being no room for the strict principle of construction applicable to the fettering clauses." The other canon is thus laid down by Lord M'Laren in Wills and Succession, vol. i, sec. 880—"In what relates to the construction of destinations properly so called, *i.e.*, the interpretation of terms designative of persons and property, relationship,

and order of succession, there is no material difference between deeds of entail and deeds of simple destination."

The clause of destination, so far as important, runs as follows:—"To myself and the heirs-male of my body and the heirs whatsoever of their bodies, whom failing to the heirs-female of my body and the heirs whatsoever of their bodies." That clause is to be considered as at the date of the entail, at which time it was impossible to say who would ultimately be in the strict sense the heir-male of the entailer's body. On his death, leaving sons, the eldest of these, Patrick Watson Carnegy, succeeded as the heir-male of his body, and the estate on his death passed to his eldest son, the late Patrick Alexander Watson Carnegy, not as the heir-male of the body of his grandfather the entailer but, as the title which he made up bears, "eldest lawful son and nearest and lawful heir of taillie and provision" of Patrick Watson Carnegy his father. That line having failed, it is necessary to consider whether the term "heirs-male of the body" of the entailer is exhausted. Neither claimant says it is; it is common ground that it is necessary to go back to see who is the next heir-male of the body of the entailer. That person is to be found in Alexander Carnegy, the grandfather of both the claimants, who, had he survived his nephew Patrick Alexander Watson Carnegy, would have made up his title as the heir-male of the body of the entailer entitled to succeed on the failure of his elder brother and the heirs whatsoever of his body. But, if so, the expression "heirs-male of the body" cannot be construed, in accordance with the first party's argument, as limited to the individual who was the heir at the date of the entailer's death. It must mean the heirs-male of the body of the entailer in succession. As Lord Curriehill put it, speaking of the technical rules of tailzied destination in the case of *Forbes* v. *Baroness Clinton*, 6 Macph. 900, at. p. 904, 5 S.L.R. 593, at p. 594, "one of them (the technical rules) is that a general destination to heirs-male of a stirps who leaves more sons than one does not call to the succession all of them simultaneously as joint heirs, but calls each of them separately and *seriatim* in the order of birth. . . . That rule not only is established in practice but is also founded on principle, because although all the sons be male descendants of a stirps, yet on his death the eldest one alone is his male heir. . . . In the case of Largie (1 Bell's App. 215) Lord Cottenham explained the meaning of such a general destination thus — 'When any description of *heirs* are called, the term, though used in the plural is construed to mean individuals who from time to time and in succession may answer the description.'"

Accordingly, had Alexander Carnegy, the entailer's second son, survived his nephew Patrick Alexander Watson Carnegy, he would have succeeded him in the entailed estate. But he predeceased him, and therefore the heirs whatsoever of the body of Alexander Carnegy will succeed. But here again the person on Alexander Carnegy's death answering that description, namely, his eldest son Patrick Carnegy *tertius*, also predeceased Patrick Alexander Watson Carnegy. Consequently it is necessary to find out whether he had an heir of his body. Admittedly the claimant Mrs Joseph is in that position. Had the destination in the case of substitutes been limited to heirs-male the claimant Colonel Carnegy would have taken in preference to Mrs Joseph. But answering as she does the description of an heir whatsoever of the body of her father, who was the heir whatsoever of the body of his father, who was one of the heirs-male of the body of the entailer, I see no reason why she should not succeed to the estate under the destination in the entail.

It seems to me that the argument in favour of the first party Colonel Carnegy, to the effect that he as the heir-male of the body of the entailer is entitled to succeed, is inconsistent with the principle laid down by Lord Curriehill in the case of *Forbes* (p. 904 or 594) already referred to—"Another of the technical rules to which I have alluded is, that when such a general destination to heirs-male of a stirps is qualified with a subordinate destination to the heirs of any description of such heirs-male, then all those who are called to the succession by such subordinate destination succeed to each of such heirs-male separately and in succession *in* the order of their births. For example, if the destination be not only to the heirs-male of a stirps, and to the heirs whatsoever of the body of such heirs-male, the effect is that all the heirs of his body, whether they be male or female, succeed in their order to the eldest heir-male of the stirps; and unless all of them shall be exhausted, and so entirely fail, the succession does not open to the second heir-male of the body of the original stirps, or the heirs whatsoever of his body. Such was the destination in the Largie case, and such was found to be its legal meaning and effect. Lord Cottenham in that case follows up the remark I have already quoted as to the meaning and effect of a destination to heirs-male generally, by stating, as to the meaning and effect of such a qualification of a destination to such heirs-male, that 'if the gift to heirs may be so divided as to give the estate to every individual heir in succession, why may not the next gift to heirs whatsoever of the body be also construed distributively, so as to apply to heirs-general of the body of each successive heir-male who might be added to the succession?' And that was the principle of construction upon which the Largie case was decided in both this Court and the House of Lords."

In the Largie case the clause under construction was substantially identical with that contained in the present entail. It ran thus, "to heirs-male of the body, and the heirs whatsoever of the body of the said heirs-male," and it was found by the House of Lords, agreeing with the majority of the whole Court in the Court of Session, that the heirs-male did not require to be exhausted before the heirs whatsoever of the body of the first heir-male of the body could

take. The circumstance that in that case the successful claimant Mary Jane Macdonald Lockhart claimed as heir whatsoever of her father Sir Charles Macdonald Lockhart, who had *de facto* succeeded, whereas in this case Mrs Joseph claims as the heir whatsoever of a person who did not survive so as to succeed, does not seem to me to prevent the application of the general principles laid down by Lord Cottenham.

Colonel Carnegy submitted a separate argument based on the first condition of the entail. His counsel maintained that if the clause of destination was ambiguous this condition showed such a clear preference for males as to interpret the clause of destination in accordance with his construction. I cannot give any such effect to the condition. It had two purposes—first, in the case of females, to exclude heirs-portioners, and, second, to perpetuate the surname of Carnegy. The part of the clause relied on by Colonel Carnegy seems to me to be, in expression and in substance, a mere preamble introductory to the two provisions above stated. I read the word "branch" as synonymous with family, and construe the first part of the condition as a recapitulation of the effect of the entailed destination in the earlier part of the deed.

I am, therefore, of opinion that the first question should be answered in the negative, and the second question in the affirmative.

The LORD JUSTICE-CLERK and LORD DEWAR concurred.

LORDS DUNDAS and SALVESEN were sitting in the First Division.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First Party—Clyde, K.C.—C. H. Brown. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Second Party—Murray, K.C.—Wm. Wilson. Agents—J. & A. F. Adam, W.S.

Saturday, February 20.

FIRST DIVISION.

RITCHIE'S TRUSTEES *v.* M'DONALD AND OTHERS.

Succession — Testament — Construction — Joint or Separate Bequest—Accretion.

After making certain provisions a testator left the residue of his estate to trustees to hold and pay to his two cousins "a life interest in this said residuary sum to enjoy, sharing equally the interest therefrom . . . for the remainder of their lives." On the death of the last survivor the trustees were "to make over said residuary sum as far as it is then intact" to a certain institution, "the capital sum to be invested and the interest to be devoted" to certain purposes after specified. *Held* that the above direction constituted a joint bequest, and that accordingly there was a right of accretion in the survivor of the two cousins.

A Special Case was presented by (1) George Inglis, S.S.C., Edinburgh, and others, testamentary trustees of the late James Ritchie, Dilston House, Upper Norwood, Surrey, who died on 10th July 1909 leaving a holograph will and two relative codicils, *first parties;* (2) Catherine Clephan Minto M'Donald, 108 Gilmore Place, Edinburgh, a cousin of the testator, to whom a bequest was made, *second party;* (3) Isabella Ritchie, 12 Eildon Street, Edinburgh, a sister of the testator and his heir *ab intestato*, *third party;* and (4) the University Court of the University of Edinburgh, the testator's residuary legatees, *fourth parties*, to settle the force and effect of the bequest to the second party which was contained in a codicil dated 10th September 1907.

The *codicil*, dated 10th September 1907, *inter alia*, provided—"I give and bequeath to my maternal cousins A. M. M'Donald, M.B., and Kate M'Donald the whole of my furniture and household and personal effects and one hundred pounds each—One hundred pounds each (*Initld.*) J. R. I cancel and revoke the clause in my will naming the aforesaid cousins my residuary legatees, and I instruct my trustees to hold in trust the sum representing the remainder or balance of my estate after all the foregoing conditions are provided for, which sum will be augmented as the annuities fall in; and I give and bequeath to said cousins Dr A. M. and Kate M'Donald a life interest in this said residuary sum to enjoy, sharing equally the interest therefrom, payable six monthly, for the remainder of their lives. Upon the death of the last survivor I instruct my trustee to make over said residuary sum as far as it is then intact, but still providing for any annuitant in life by deed of settlement to the Principal or other responsible office-bearer of the Edinburgh University. The capital sum to be invested and the interest to be devoted to the promotion of physical and chemical research in conjunction with any scheme in progress or separately—subjects now receiving and deserving the highest attention in the development of scientific knowledge."

The Case stated—"4. In consequence of the death of the said Dr Alexander Minto M'Donald a question has arisen as to whether Miss M'Donald, the party of the second part, as the survivor, is entitled to the whole free income of the residue during her life.

"5. The first parties, in the event of neither the second or third parties being found entitled to the income of the said residue set free by the death of the said Dr Alexander Minto M'Donald, *contend* that they are bound to retain and accumulate the said income so set free in order to administer the same in accordance with the directions of the testator.

"6. The second party contends that the bequest of liferent is a joint bequest in favour of the said Dr Alexander Minto