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

M'Donald and Catherine Clephan Minto M'Donald, under which, on the death of the said Dr Alexander Minto M'Donald, the survivor the said Miss Catherine Clephan Minto M'Donald has right so long as she lives to the whole free income of the residue.

"7. The third party contends that the bequest of liferent was not a joint bequest in favour of the beneficiaries, but that only one-half of the income from said residue was bequeathed to each of the said Dr Alexander Minto M'Donald and Catherine Clephan Minto M'Donald, and that upon the death of Dr Alexander Minto M'Donald the share of income thereby set free forms undisposed-of estate of the testator and passes to the third party as his heir *ab intestato*.

"8. The fourth parties offer no contention on the question at issue between the parties of the second and third parts, but in the event of neither of these parties being found entitled to the share of income of the said residue set free by the death of the said Dr Alexander Minto M'Donald, the fourth parties claim that the said share of income falls to be paid to them as residuary legatees of the said James Ritchie."

The *questions of law* were—"(1) Does the whole of the free income of the residue of the trust estate fall to be paid as from the date of the said Dr Alexander Minto M'Donald's death to the party of the second part? Or (2) Does one-half thereof fall to be paid to the party of the third part? Or (3) Does one-half fall to be paid to the parties of the fourth part? Or (4) Does one-half fall to be accumulated in the hands of the parties of the first part for the purposes of the trust until the death of the said Catherine Clephan Minto M'Donald?"

Argued for the second party—The result reached in *Paxton's Trustees* v. *Cowie, &c.*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, did not here apply, because there was evidence in the settlement of the intention of accretion. The general rule was as stated by the Lord President in *Paxton's Trustees* v. *Cowie, &c.* (*supra*), at 1197. There was no provision in the settlement for the death of one beneficiary, but only for the death of the last survivor, when the residue was to go to the University. There was no provision for the University getting the interest of the liferent before the death of the last survivor, and there was always a strong presumption against intestacy. In *Stobie's Trustees*, January 27, 1888, 15 R. 340, 25 S.L.R. 250, the terms of the settlement were different from the present. The present case was covered by authority—*Tulloch* v. *Welsh*, November 23, 1838, 1 D. 94; *Barber, &c.*, v. *Findlater*, February 6, 1835, 13 S. 422, Lord Glenlee at 424; M'Laren on Wills, 3rd ed., vol. i, pp. 654, 631, 633.

Argued for the third party—There were here two separate bequests, and therefore no accretion; on the lapse of one bequest the amount fell into intestacy and did not go to residue. The general rule was that in bequests to individuals, if the words "share equally" appeared, there was no accretion—*Paxton's Trustees* v. *Cowie, &c.* (*supra*), Lord President at 1197, approved in *Cochrane's Trustees* v. *Cochrane*, 1914 S.C. 403, 51 S.L.R. 382; *Bartholomew's Trustees* v. *Bartholomew*, January 28, 1904, 6 F. 322, Lord M'Laren at 324, 41 S.L.R. 259. These words did not appear in *Tulloch* v. *Welsh* (*supra*). The rules applicable in the case of gifts to a class did not apply, because *quoad* the settlement the brother and sister were treated as individuals, and a separation of interests clearly intended—*Menzies' Factor* v. *Menzies*, November 25, 1898, 1 F. 128, Lord M'Laren at 131, 36 S.L.R. 116. Assuming there was no accretion the bequest must fall into intestacy, because the University's right only emerged on the death of the last survivor. Both branches of the argument were confirmed in *Stobie's Trustees* (*supra*), Lord President at 342.

Argued for the fourth parties—The general rule was that subjects conveyed to trustees and not specially appropriated fell into residue. Here on the death of one beneficiary his share fell to the residuary legatees—*Playfair's Trustees* v. *Hunter, &c.*, July 17, 1890, 17 R. 1241, 27 S.L.R. 991; M'Laren on Wills, 3rd ed., vol. i, p. 329. In England the same rule applied regarding personal property—*Hodgson* v. *Earl of Bective*, [1863] 1 H. & M. 376; *Countess of Bective* v. *Hodgson, &c.*, [1864] 10 H.L.C. 656; *Wharton* v. *Masterman*, [1895] A.C. 186; Jarman on Wills, 6th ed., vol. i, pp. 701, 941, 943, vol. ii, 1046.

Counsel for the first parties was not called upon.

At advising—

LORD PRESIDENT — The testamentary writings before us are the handiwork of the testator himself, and he seems quite unconsciously, but very successfully, to have evaded the rule laid down in the case of *Paxton's Trustees* v. *Cowie*, 1886, 13 R. 1191, for, plainly, the bequest before us is a joint bequest, and not two separate bequests. In other words, there is a right of accretion in the survivor of the testator's two cousins. He directs his trustees, in the clause on which the controversy centres, "to hold in trust the sum representing the remainder or balance of" his estate. As appears subsequently, it is to be held as one undivided whole, and during the time the trustees are to hold it they are to pay the life interest of that sum—again the undivided life interest of that sum—to his two cousins for the remainder of their lives.

Now if that were all, it appears to me that there could be no doubt that the testator was there making a joint bequest. He gives no directions, it will be observed, with regard to the disposal of the share of the life interest which is enjoyed by each or either of his two cousins—the codicil is silent with regard to the disposal of the share of the life interest—in the event of one or other dying. It is said, however—and really this gives the only colour for the application of the rule of *Paxton's Trustees*—that, in a parenthesis, he indicates a wish that they should share equally this life interest which is payable to them. That does

not appear to me to indicate an intention to sever the interest. It does no more than indicate what the law itself would dictate. In other words it is exactly the same as the expression found in the old case of *Barber* v. *Findlater*, 1835, 13 Shaw, 422, where, as Lord Glenlee observed, it would necessarily follow that when the bequest was joint each during their joint lifetime would take one-half. But if any doubt remained on the subject that doubt is solved by the direction to the trustees to pay over what he calls the "residuary sum" on the death of the last survivor of his two cousins. I cannot conceive any reason why the trustees should be directed to hold until the death of the survivor of the two cousins except for the purpose of providing for the life interest while either of them remained in life.

Accordingly it appears to me that we have here as clear a case as one could well imagine of a joint, and not of a separate, bequest. If we are to be guided by authorities, I imagine that the cases which come nearest to the present are the two old cases cited to us to-day—*Tulloch* v. *Welsh*, 1838, 1 D. 91, and *Barber* v. *Findlater*. I am unable to distinguish them, but on the words of the codicil taken by themselves I have no doubt that we ought to answer the first question put to us in the affirmative, and if we so do it will be unnecessary to answer the other questions.

LORD MACKENZIE—I concur, and upon the same grounds.

LORD SKERRINGTON—I also concur.

LORD JOHNSTON was not present.

The Court answered the first question of law in the affirmative, and found it unnecessary to answer the remaining questions.

Counsel for the First Parties—Ingram. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Second Party—Wilson, K.C.—Jas. Macdonald. Agents—Cornillon, Craig, & Thomas, W.S.

Counsel for the Third Party—Cooper, K.C.—Paton. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Fourth Parties—Hepburn Millar. Agents—W. & J. Cook, W.S.

Saturday, February 20.

SECOND DIVISION.

NIXON'S TRUSTEES *v.* KANE.

Succession—Election—Approbate or Reprobate—Forfeiture or Equitable Compensation—Res aliena.

A testatrix provided by her will that a provision to her daughters should be in full of all claims competent to them against her as executrix of their late father, or against his estate, or under his settlement. The daughters having claimed the amount due to them by their mother under their father's will, as well as their legal rights in their mother's estate, *held* that they had not forfeited their testamentary provisions absolutely, but only so far as necessary to make equitable compensation to the other beneficiaries under the will.

Christopher Johnston Bisset and others, the testamentary trustees of the deceased Mrs Hannah Smith or Kane or Nixon, who resided at Newport, Fife, *first parties*, and Miss Catherine Maria Kane, Mrs Paulina Kane or Burns, Mrs Adriana Kane or Henderson, and Mrs Esther Kane or Berman, four daughters of the testatrix, with the consent and concurrence of their respective husbands as their curators and administrators-in-law, *second parties*, presented a Special Case for the opinion and judgment of the Court as to whether the second parties having claimed their legal rights were entitled after equitable compensation had been made to participate as beneficiaries under the deceased's will.

By her *trust-disposition and settlement* the testatrix, who died on 4th April 1896, directed her trustees, thirdly, to apply the free annual proceeds and income of her means and estate or the residue thereof towards the education and maintenance of the second parties, and the survivors or survivor of them. The proceeds and income so provided were declared to be strictly alimentary and not assignable, and she provided further—"Which provision shall be accepted by my said daughters in full of all claim they can have against me as executrix of their father the late Paul Kane, or against his estate or under his settlement." She further provided that on the death of the survivor the trustees should divide the capital of her estate or the residue thereof among the children of the second parties, the division being *per stirpes* and the issue of those predeceasing taking their parent's share, and failing issue she directed that it should belong to the heirs and assignees of the last survivor.

The Case stated, *inter alia*—"5. . . . Each of the four daughters named in the third purpose of the said trust-disposition and settlement above referred to, shortly after they attained majority on or about 8th January 1897, 24th May 1900, 24th April 1902, and 23rd June 1903 respectively, and having been independently advised, elected to claim and receive their legal rights, and accepted payment thereof, amounting to the sum of £51, 16s. 8d. each. Each of said four daughters after said advice also elected to claim and received payment from the trustees of a sum of £200 which was due to them by the truster as executrix of the will of her first husband the said Paul Kane, he having left a legacy of that amount to each of said daughters by his will, and appointed the truster as executrix of his will. The said Paul Kane died on 24th May 1889, and the truster, as his executrix appointed by his will, took and retained possession of his whole estates, and immixed them with her own. The discharges granted by said four daughters for legitim narrate that the