No. 25. DAVID CARNEGY, Appellant.—*Romilly—Clerk—Fullerton.*
Miss MARGARET SCOTT, Respondent.—*Gifford—Moncreiff—H. J. Robertson.*

Landlord and Tenant—Clause.—A lease having been granted for two 19 or 38 years, 'and the lifetime of the person having right to this present tack at the expiry of 'the said two 19 years, either as heir or assignee,' provided such assignation be made within 29 years from the commencement of the lease, failing which, the lease to belong to the heir of the tenant; and the tenant having remained in possession for the whole period, and during his own lifetime—Held, (affirming the judgment of the Lord Ordinary, and reversing that of the Inner House,) that a party claiming right as his heir could not insist on possessing during her own life.

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2D DIVISION.
Lord Pitmilly.

THE late Mr. Carnegy, the father of the appellant, exposed in 1769 two farms, Upper and Nether Dysart, to be let according to articles and conditions of roup. Patrick Scott, the father of the respondent, was preferred to that of Nether Dysart; and an instrument of lease was immediately executed, by which Mr. Carnegy let to Scott, 'his heirs and assignees, (such assignees being 'always made in manner and within the space after expressed,) all 'and haill the town and lands of Mains of Meikle or Nether Dy-'sart, &c., and that for the space of two 19 or 38 years and crops; 'and after the expiration of the said two 19 years, for all the years 'and crops of the lifetime of the person having right to this pre-'sent tack, at the expiry of the said two 19 years, either as heir or 'as assignee appointed within the space after expressed, from and 'after their entry to the said lands, which is hereby declared to be 'and begin to the said dovecot at the term of Martinmas next; 'to the houses, yards, and grass at the term of Whitsunday 1770; 'and to the arable land at the separation of the crop 1770 from the 'ground;—reserving always to the said Thomas Carnegy an acre 'of land or thereby of the lands hereby set,' &c. 'And farther, 'the said Thomas Carnegy hereby gives and grants full power to 'the said Patrick Scott and his foresaid, to assign this present tack 'at any time before the expiration of the first 29 years thereof; 'but if such assignees are not made, and the assignations duly 'intimated to the said Thomas Carnegy, or his heirs and succes-'sors, before that time, then this tack is to fall to the heirs of 'the person having right to the same at the end of the said 29 'years; and all assignations made of this present tack after the 'lapse of the said 29 years, and although then made, if they 'are not duly intimated to the said Thomas Carnegy or his 'foresaid before that period, are hereby declared to be void 'and null.' Mr. Scott did not avail himself of the power to assign, but continued in the possession till the year 1814, being

six years after the expiration of the stipulated period of 38 years. He had three daughters, all of whom were alive at the termination of the 29 years; but two of them died before the lapse of the 38 years, and one of them left issue. Mr. Scott died in 1814; and soon thereafter the appellant, as the heir and successor of his father in the estate, presented a petition to the Sheriff of Forfarshire, praying for warrant of removal against Miss Scott, the surviving daughter, and who remained in possession after her father's death. In defence she contended, that, according to the terms and the true meaning of the contract of lease, a liferent, after the expiry of the 38 years, was conferred on the assignee, or on the heir of the original tenant in possession;—that although it was competent to her father to have assigned the lease within the first 29 years, and thereby to have given a right to an assignee, not only for the remaining period, but for the assignee's life, yet, as he had not done so, the liferent right necessarily fell to her as her father's heir;—that it was impossible to interpret the lease, so as to infer that her father was to have a right of liferent; and that accordingly, on the understanding that such was the case, and that she was to enjoy the lease during her life, her father had made great and extensive ameliorations. To this it was answered, that by the lease Mr. Scott obtained a right to the farm for himself, his heirs and assignees;—that the right of assigning without the consent of the landlord was limited to 29 years, and his own right to that of 38 years, and (if he should survive that period) for his lifetime;—that it was not intended to give both to him and to his heirs a right of liferent, and that if the liferent was enjoyed by the one, another liferent could not be insisted on by the other;—that Mr. Scott had availed himself of his own liferent right for more than six years after the expiration of the term specified in the lease, and that consequently the period for its termination had arrived. The Sheriff having decerned in the removing, Miss Scott brought a bill of advocation, which was refused by Lord Glenlee; but, on a petition to the Court, a remit was made to pass it. Thereafter, the case having come before Lord Pitmilly, he, on the 11th July 1815, found 'that 'the clause in the lease on which the advocator (Miss Scott's) 'claim is founded, is not applicable to the case which happened, of 'the original tenant not having assigned the lease within the stipu- 'lated term of 29 years from its commencement, but having sur- 'vived the period of 38 years from the date of the lease, and 'having himself remained in possession of the farm during his life- 'time: That the clause of the lease referred to by the advocator 'provides for the continuance of the lease after the fixed period of

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March 6. 1822. ‘38 years during the lifetime either of an assignee who might ‘have acquired right to the lease before the expiration of the first ‘29 years, and in virtue of his assignation might have been in pos- ‘session at the end of the 38 years,—or during the lifetime of the ‘person who may have been the heir of the tenant at the end of ‘the 29 years, and afterwards might have succeeded to the lease, ‘and been himself in possession at the expiration of the 38 years: ‘That the right of liferent adjected to the fixed period of 38 years ‘was intended to be given to the person in possession when the ‘liferent was to commence, and was accordingly in one of the cases ‘mentioned in the tack conferred on an assignee to the lease; and ‘there is no room for holding, either that the heir of the original ‘tenant could dispossess the tenant in possession, or that the dura- ‘tion of the right of the tenant in possession after the fixed period ‘was to depend on the length of the life of the person who may ‘have been presumptively his heir at the end of 29 years from the ‘commencement of the lease;’ and therefore repelled the reasons of advocation, and remitted simpliciter to the Sheriff. To this interlocutor he adhered on the 16th of January and the 23d of May 1816. Miss Scott reclaimed; and the Court, after having been equally divided, altered the interlocutor, assoilzied her, and found her entitled to expenses; and to this interlocutor they adhered on the 26th of May 1818.* Mr. Carnegy having appealed against these judgments, the House of Lords (without requiring the appellant's counsel to reply) ‘Ordered and adjudged, that the in- ‘terlocutors complained of be reversed: And it is further ordered ‘and adjudged, that the interlocutors of the Lord Ordinary of ‘the 11th of July 1815, and the 16th of January and 23d of ‘May 1816, be affirmed.’

Lord Chancellor. — This is a question as to the endurance of a lease. In the course of the cause, an interlocutor was pronounced by Lord Pitmilly, Ordinary, which appears to me to express the clear meaning of the lease. In my opinion, therefore, the interlocutor of the Court, altering that of the Lord Ordinary, cannot stand. The Court of Session make the respondent heir of her father. There is some difficulty, I think, in investing her with this character, and they give her a liferent after that of her father. I think there is no doubt that the intent was, that if her father outlived 38 years, the lease was to expire with his life. Therefore we must reverse the interlocutor complained of, and affirm that of the Lord Ordinary.

Spottiswoode and Robertson,—A. Mundell,—Solicitors.

(*Ap. Ca. No. 7.*)

* Not reported.