charge of such ship under" the provisions of the Act within section 55, because under section 72 he was bound to take charge. I am unable to agree. The obligation of the pilot to serve arose under the provisions of the Act. But his acting in the charge of the ship arose, not under any of the provisions of the Act, but by reason of the ship's asking him to act, from which it resulted that under the provisions of the Act he was bound to comply. *Lucey* v. *Ingram* I think was wrongly decided.

The "Stettin," Br. & Lush. 199, in the Privy Council, was a case in which the vessel inward bound to the Port of London came into collision within her own port, but was at the time being navigated by a duly licensed pilot. She had passed from an area of compulsory pilotage—had entered an area in which she was not compelled to have a pilot—but remained in fact in charge of the pilot. The ship was held liable for damage. This decision concurs with my own opinion. It is applicable to the present case unless a distinction is to be drawn (and I have said that in my opinion it is not) between the case of a ship passing from compulsory into free waters and that of a ship passing from free into compulsory waters.

In *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (L.R., 3 Ex. 330, 4 Ex. 238) the Court of First Instance followed *Lucey* v. *Ingram* and not *The "Stettin."* In the Exchequer Chamber it was held that the ship was not at the time of the collision within her own port and that pilotage was therefore compulsory. The point therefore did not arise, and what was said upon it was but dictum. I am bound, however, to say that I do not agree with the dictum. The grounds relied upon are two—first, that up to Gravesend pilotage was compulsory and that "we cannot see any indication of a fresh contract as to the latter portion of the transit." Fresh contract there could be none, for the previous relation was not contractual but compulsory. A contract (not a fresh contract), as I have already said, was, I think, to be inferred so soon as the compulsory relation terminated. Second, that the words of the Act are "within the district." I have already expressed my opinion upon the effect of these words. Lastly, the Court distinguished *The "Stettin"* on the ground with which I have already dealt, viz., that in *The "Stettin"* the vessel was passing from compulsory waters into free waters. *The General Steam Navigation Company* is, upon the point before the House, dictum only and not decision, and with the dictum I cannot agree.

In *The "Charlton,"* 8 Asp. N.S. 29, however, the case was by inadvertence treated by the Court of Appeal as a decision binding upon that Court. The "Charlton" was proceeding from compulsory to free waters. Lord Esher, M.R., decides the case on the ground that the pilot was no longer a compulsory pilot, but that he was still "in charge without any alteration of the relations between himself and the master of the ship." I cannot follow this. The original relation was that the pilot was *dominus*; it mattered nothing whether the master wished him to have charge or not, he was compelled to let him have charge. The subsequent relation was that the pilot was not *dominus* at all. The master could have told him to go below and could, adversely to the pilot, have taken charge himself. Secondly, the Master of the Rolls decides on the word "district." This is the point upon the statute with which I have already dealt. Lastly, he decides it on the ground of expediency, of the difficulty which would arise in determining when the terminus of compulsory pilotage had been reached. The rights of third parties cannot, I think, be taken away on grounds of expediency. Kay, L.J., adds no further ground. A. L. Smith, L.J., decides upon *General Steam Navigation* in the Exchequer Chamber.

In *The "Lion,"* L.R., 2 P.C., 525, it was held that the vessel was not carrying passengers and was therefore not bound to take a pilot. The Board followed *The "Stettin"* and not *Lucey* v. *Ingram.*

These are the authorities. Upon authority the balance is, I think, in favour of the view which I expressed in the earlier part of this opinion. However this may be, I submit to your Lordships that when this collision occurred the ship was in charge of the pilot, not compulsorily against the master, but contractually by the implied request and consent of the master, and that as towards third parties the owners cannot protect themselves from liability upon the ground of compulsory pilotage.

It results that, in my judgment, this appeal succeeds.

Their Lordships reversed the judgment appealed from and restored the interlocutor of the Sheriff-Substitute, with expenses.

Counsel for the Appellants—Horne, K.C.—Paton. Agents—Fyfe, Maclean, & Company, Writers, Glasgow—Campbell Faill, S.S.C., Edinburgh—Wm. A. Crump & Son, London.

Counsel for the Respondents — Laing, K.C.—Norman Raeburn. Agents—Thomas Cooper & Company, London.

Monday, October 18.

(Before the Lord Chancellor (Buckmaster), Lord Haldane, Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Parker, and Lord Sumner.)

CARNEGY *v.* JOSEPH.

(In the Court of Session, February 19, 1915, 52 S.L.R. 370, and 1915 S.C. 490.)

Entail—Succession—Destination—"Heirs-Male of my Body and the Heirs whatsoever of their Bodies."

An entailer destined his estate to "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," and under the condition 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 only surviving son 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 son of the second son of the entailer's second son.

Held (*aff.* judgment of the Second Division) that the daughter of the eldest son of the entailer's second son was entitled to succeed.

Per Lord Dunedin—"You get the very simple idea of the eldest son taking, and his family after him, and on the extinction of that family, then the second son if he has survived, but if not his family after him, and so on. Surely a much simpler idea than the other, which is, after the family of the eldest son is exhausted, to search then for the person that at the moment of the succession opening bears the character of heir-male of the body."

This case is reported *ante ut supra.*

The first party, Lieutenant-Colonel Charles Gilbert Carnegy, M.V.O., appealed to the House of Lords.

Their Lordships decided the case on July 28, and issued the following opinions on October 18:—

LORD CHANCELLOR—The succession to the Lour Estate, in Forfarshire, depends upon your Lordships' decision in this case, yet the point for determination rests upon the construction of a few words, and a few words only, in a deed of entail executed by one Patrick Carnegy, on the 20th of September 1813. The words are found in that sentence of the deed by which he purported to grant and dispone the estate, and they are in the following terms:—"I, Patrick Carnegy, . . . grant and dispone 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."

Short as this sentence is, only a small portion calls for critical consideration, for, in truth, this case depends upon determining what succession was designed by Patrick Carnegy under the disposition to "the heirs-male of my body and the heirs whatsoever of their bodies."

Words identical with these in meaning, and for all material purposes identical in form, have already given rise to litigation, for in 1837 a dispute arose as to their construction in connection with an estate known as the Largie estate. The point then discussed was whether the word "and" should be construed as "failing whom"—that is, whether all the heirs-male of the body of the granter were to be exhausted in succession before the heirs whatsoever of the body of an heir-male should be admitted to the estate.

This question was summarily disposed of by the learned Judges of the First Division, to whom the Lord Ordinary had reported the cause, and they were unanimous in rejecting the view that the word "and" possessed anything but its ordinary meaning. Their decision is reported under the title of *Lockhart* v. *Macdonald*, in 15 Shaw's Reports, on page 376. The case then came before this House, where regrets were expressed that the reasons upon which the learned Judges had proceeded had not been more fully stated, and the case was accordingly remitted with a direction that it should be heard before the whole of the Judges of the Court of Session. This direction was obeyed, and judgments which originally occupied only a few lines were expanded into some 50 pages of small print, as reported in 2 Dunlop's Reports, on page 377. Though Lord Meadowbank dissented, the original decision remained unaltered, and was ultimately accepted by this House, the report of the proceedings here being contained in 1 Bell's Reports, page 202.

It would have been surprising if judgments so extensive contained nothing except statements strictly and exclusively relating to the point of decision, and, indeed, the industry of counsel for the appellant in the present case has extracted from them a series of dicta which he has marshalled in favour of the view for which he contends. Notwithstanding that these dicta were no necessary part of the decision in the earlier case, they might have presented an imposing force of argument had they not been met by an array of statements to the contrary effect, recruited by the respondent from the same source. The point round which these conflicting statements gather can be best realised by a short statement of the actual facts in the present dispute.

Patrick Carnegy, having made the disposition to which I have referred, died on the 24th of November 1819, leaving several sons who survived him. Of these two only need be considered — the eldest, named Patrick Watson Carnegy, and the second, named Alexander Carnegy. There is no doubt that Patrick Watson Carnegy properly succeeded under the terms of the deed upon his father's death. He died on the 2nd of September 1838, and left two sons—Patrick Alexander Watson Carnegy and James Forbes Carnegy. P. A. W. Carnegy duly succeeded to the estate. He was in fact both the heir-male of the body and the heir whatsoever of the heir-male of the body of the disponer. James Forbes Carnegy died unmarried on the 1st of May 1855 and Patrick Alexander Watson Carnegy, who survived his brother, died without issue on the 4th of June 1914.

Now Alexander Carnegy, the second son of the entailer, died on the 1st of August 1862. The respondent is his granddaughter, the child of his eldest son Patrick, and admittedly answers the description of the heirs whatsoever of his body. The

appellant is one of the grandsons of Alexander Carnegy by a second son, and was admittedly the heir of Patrick Carnegy, the entailer, on the 4th of June 1914. The appellant accordingly contends that, as Alexander Carnegy died before the succession opened for his enjoyment, no member of his family can claim under the gift to the heirs whatsoever of his body, since it is necessary under the terms of the grant to search for the existing heirs-male of the body of Patrick Carnegy before the disposition can take effect in favour of the heirs whatsoever of the body of Alexander. This is the question for determination.

It may be stated in many different ways, but I think the shortest and the best is the way in which it was stated by Mr Macmillan, the counsel for the appellant, who said that, under the gift to the heirs whatsoever of the bodies of the heirs-male of the entailer, no one could be admitted unless the person to whom they were the heirs had been in actual enjoyment of the estate. I find myself quite unable to accept this view.

The disposition in favour of the heirs-male of the body of the disponer does not define the character of the estate that is to be taken, but, as is pointed out by Lord Cottenham in the case of *Lockhart* v. *Macdonald*, 1 Bell's App., at page 213, they describe a class of persons who are to be called to the enjoyment of the estate and to mesne individuals who from time to time and in succession answer the description. That is to say, it included Alexander Carnegy and the younger sons of the testator. For if Patrick Watson Carnegy had died without issue Alexander Carnegy would have succeeded him as heir of the body of the entailer, and so also would the younger sons in continuous succession, if each of the elder sons were dead without issue.

It is, of course, true to say that in a certain sense just as a man cannot be the heir to somebody who is alive, so he cannot be the heir if he himself be dead. But it is also true that no man can have more than one heir-male, and that "heirs-male of the body" of the entailer taken strictly is in itself a misdescription, and it was this view that was critically examined by Lord Cottenham, and was dealt with by him as I have already mentioned.

The result of the appellant's contention would certainly be strange, for it would prevent the disposition to the heirs whatsoever of an heir-male of the body of the disponer taking effect in favour of the families of all disponer's sons who died before their eldest brother, and leave it open to the family of whatever son happened to survive him for however brief a period.

It is, however, also urged that another clause in the deed of entail shows that the original disposition must be so construed as to give preference to a male descendant, and that, as the appellant stands in the same degree of relationship to the disponer as the respondent, he consequently ought to be preferred. This depends upon a provision in the deed, which is in these terms: "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."

If the original words of disposition were so ambiguous that the different contentions were balanced in perfect equipoise, this clause might afford an indication as to the true meaning. But in my opinion no such doubt exists, and full effect may be given to this clause by providing that when the heir whatsoever of any branch is sought, the heirs-male should be preferred over the heirs-female. In other words, if the respondent had had a brother he would have been preferred at her expense.

It remains to be considered whether the view that I have expressed is any way in conflict with the expression of opinion in this House in the case of *Lockhart* v. *Macdonald*. And here again both parties appeal to sentences in the speech of Lord Cottenham to support their rival claims.

One of the most important passages relied upon by the appellant is that on page 215 of the report, where Lord Cottenham, in discussing the *Roxburghe* case, makes this observation—"Why should not the limitation in this case 'to the heirs whatsoever of the body of the heirs-male of the bodies,' operate so as to give the estate to the 'heirs whomsoever' of each heir-male who should come into possession?" And it is true that this passage taken alone suggests that the heirs whatsoever must be sought of an heir-male who has been in the actual possession of the estate. But I cannot believe that this was the real meaning of the sentence, for it is opposed to the main structure and reasoning of the judgment. In particular, I refer to the passages on page 213 and 215, which appear to me to cover the present case, both of which passages are referred to in the opinion given by the learned Judges of the Inner Division in support of the judgment from which this appeal is brought. The same view is also expressed in plain terms by Lord Curriehill in the case of *Forbes* v. *The Baroness Clinton*, 6 Macph. 900, at 904.

Apart from the dicta, on which the apellant relies, no judgment has been called to the attention of your Lordships that conflicts with this view. This opinion, therefore, will not alter any determined or accepted rule of construction applicable to the words, according to whose fair and plain meaning the respondent is entitled to enjoy the estate.

LORD HALDANE—The succession in dispute opened on 4th June 1914. If Patrick Carnegy, the eldest son of Alexander, the entailer's second son, and the father of the respondent, had survived this date and then died, the main question argued would have been an easy one. For the decision of this House in the *Largie* case (*Lockhart* v. *Macdonald*, 1 Bell's App. 202) would have governed it. But Patrick died before the succession opened, and the question is

whether the destination in the entail is to be construed as entitling his daughter the respondent as "heir whatsoever of his body," to claim as the next heir of provision, notwithstanding Patrick's death in 1886. On this point, although there are dicta, there is no decisive authority, and I think that we have to approach the question as one of principle.

Bearing in mind that I am dealing with the construction of a destination of Scottish heritage, I wish to put a fundamental principle which would be applied did the question relate to land in England into contrast with that which governs the analogous but really wholly different case of land in Scotland. I wish to begin by doing this, because I am aware how easy it is for an English lawyer to be misled by analogy, and I bear in mind the wise warning given by Lord Eldon in his judgment in the *Roxburghe* case, to which I shall refer later, when he said that it did not appear to him that he could in such a case borrow much of useful argument from English decisions.

Under the law of England the property in land is divisible into estates. The tenant for life has the freehold, and his estate for life may be followed by a series of estates in remainder, which become actual estates of freehold only when they take effect in possession. These estates in remainder may be estates in tail or in fee-simple, but somewhere, either by direct gift or in reversion in the settlor as being undisposed of, there must be vested an ultimate remainder in fee-simple which is a separate interest in the land from any estates in tail which precede it. The nomination of heirs who are to take is, wherever this is possible, regarded as being simply an indication of the quantum of estate taken by the disponee. Thus, under a disposition to A and the heirs of his body the nomination of the heirs of the body, as if to succeed, simply means in English law that A is at once to take an estate tail, which after his death will descend to the heirs of his body, unless by a sufficient instrument he changes, as he may do, the character of the estate. Even if the land is expressed to be given to him for his life only, he will still take an estate tail in his own person under the rule in *Shelley's* case if there is a subsequent limitation in the settlement to the heirs of his body, and this not the less so where a remainder to B for life is interposed in front of what purports to be the remainder to the heirs of A's body, but actually imports a remainder in tail to himself.

In Scotland the law is very different. There the property in land cannot be broken up into estates. The liferenter does not own the freehold; he is not seized as is the tenant for life in England. His right is a mere burden on the fee. This fee is one and indivisible. When it is limited to successive persons these do not, as in England, take separate estates by way of remainder. What happens is that the fee descends in its integrity from person to person — as substitutes to the original institute. The succession takes place *per formam doni* (to use an expression familiar in the English law of some centuries back, before the Courts had developed the doctrine of estates), and in an entail it is preserved by irritant and resolutive conditions which fetter and preserve the succession. It follows that the construction of the destination in a Scottish entail is simply a question of what the entailer has intended by the language he has used. According to the interpretation of his meaning the fee will descend in its integrity from individual to individual filling the character of substitute in the line which he has prescribed. The technical difficulties which would arise in England, from the principle that words of destination to the heirs of a taker simply mark out the nature and *quantum* of the estate he takes, have no application.

If this be so, the only question in the present case is what the words mean when the entailer by an ambulatory deed of entail dispones to himself and the heirs-male of his body and the heirs whatsoever of their bodies, whom failing to the heirs-female of his body and the heirs whatsoever of their bodies. It is well settled that the heirs-male do not take jointly. The entailer's heir-male proper takes first. But is his intention to be taken to be that when the line of descent from his eldest son is exhausted, the next line of descent is to be traced from his second son, as the individual who, although he may be dead when the succession opens, was while he lived the person who might have satisfied the description of the next heir-male of his body? Or did he mean when he used the expression heirs-male of the body that the person who was the actual heir-male of his body when the succession opened in 1914 should take to the exclusion of the heirs whatsoever of the body of his second son, who died before the succession opened?

It is obvious that the language actually used by the entailer is elliptic, and that it is necessary in putting a construction on it to expand its literal scope. In other words, the Court has to fill in gaps by seeking for the general intent, and to prefer it to any particular intent which might be conjectured from a fragmentary construction of expressions used apart from their context. This preference of the general intent does not depend on technical considerations. The application of the principle is familiar in the very different system of English law. Those who are curious on this point may be referred to what was said by Cleasby, B., in delivering the judgment of the Court of Exchequer in *Allgood* v. *Blake*, L.R., 7 Ex. 339, and 8 Ex. 160.

In Scotland the principle can be applied with great freedom, because of the comparatively greater liberty to which I have referred of moulding destinations of heritable property. In the systems of both countries it may be expressed thus. If there is on the face of an instrument, and throughout it, a general intention expressed so to destine land as to keep it in one person, and to make all the particular provisions introduced subordinate to this purpose, the duty of a Court in construing the instrument is

to read it as a whole, and to interpret particular clauses, the language of which is by any possibility susceptible of two meanings, as giving effect to the general intention and object, and not as negativing it.

The *Largie* case illustrates this principle. The destination was "to myself and the heirs-male to be procreated of my body of my present marriage and the heirs whatsomever of the bodies of the said heirs-male; whom failing to the heirs-male to be procreated of my body in any subsequent marriage and the heirs whatsomever of the bodies of the said heirs-male; whom failing to E. M., my only lawful daughter, and the heirs-male of her body of her present marriage with C. L., and the heirs whatsomever of the bodies of the said heirs-male; whom failing to the heirs-male of the said E. M. in any subsequent marriage, and the heirs whatsomever of the bodies of the said heirs male; whom failing to the heirs-female of the said E. M. of her present marriage." E. M. took the property, and was succeeded in it by a son A and a grandson B, descending by the marriage with C. L. B. left daughters. It was held by the Court of Session, and afterwards by this House, that the estate descended to the daughters of B. as the heirs whatsomever of his body, in preference to his younger brother, who claimed as an heir-male of the body of E. M. The governing intention was taken to be to create a series of substitutions in which, when an heir-male succeeded his heir of line was to take after him before any other heir-male succeeded.

In his judgment in this case Lord Moncreiff states the principle clearly. He derives it from what was laid down by Lord Eldon in the *Roxburghe* case, 5 Paton, 320. There the destination was "to the eldest dochter of the said Harry Lord Ker, without division, and her heirs-male, she always marrying or being married to ane gentleman of honourable and lawful descent." Lord Moncreiff points out that this House could not have got the result it did out of the words without looking at the whole of them. "Eldest daughter" standing by itself would have meant a particular individual, Lady Jane Ker. "Heirs-male" standing by itself must have been construed heir-male general. But by taking all the words into consideration Lord Eldon got, says Lord Moncreiff, these results—First, that "eldest daughter" was to be taken as collective for all the four daughters, and as constituting a class as much as the expression heirs-male of a marriage. Secondly, that these daughters were to take *seriatim*, yet not by themselves only, but each and the heirs-male of her body called successively.

An important point in the decision in the *Roxburghe* case was that the succession was adjudged in favour of the heir-male of the body of Lady Margaret Ker, a younger daughter who had died long before the succession opened. This goes far towards establishing what is contended for by the respondent in the present case, that it does not matter whether a person called in such a destination as one of those who may possibly fill the character of an eldest daughter or heir-male of the entailer's body at the time when the succession opens has actually survived the opening. Such persons may not inherit personally. It is sufficient if they have given rise to a stock of descent which is available for the destination to operate on so as to make the individual who satisfies the terms of that destination when the succession opens the actual and true heir of provision.

Upon this interpretation the respondent was the heir of line of a possible heir-male of the entailer, designated by him as a person through whom the line of substitution was to be traced, and it is beside the point to inquire whether that person actually succeeded or not. It is enough that he was represented in the line of substitution by an actual heir ready to take when the substitution opened.

I do not think that this conclusion is affected by the subsequent clause in the deed of entail which declares that the males of every branch through the whole course of succession appointed shall not only be preferable to females, but also that the eldest daughter or heir-female shall always succeed alone without division and exclude heirs-portioners. I read the initial words as a mere recitation of the existing general law which prefers males to females, a recitation introduced in order to emphasise the entailer's declaration that the analogy is to apply so as to exclude heirs-portioners. It will be observed that later on, when the entailer gives subsequent heirs the right to redeem and purge diligences and executions, and thereby acquire the property, he gives it not to the nearest heir-male, as one would expect if the construction contended for by the appellant were the true one, but to the nearest heir without reference to sex.

For these reasons I agree that the appeal fails.

LORD DUNEDIN—[*Read by Lord Haldane*]—The construction of a limb of destination in substantially the same terms as that which is to be found in the entail of the estate of Lour in the present case was the subject of anxious consideration in the *Largie* case, and we have on the subject the opinions of all the Judges of the Court of Session and also of the noble and learned Lords in this House. That case settled that when a destination was conceived in favour of an institute and the heirs-male of the body of the institute, and the heirs whomsoever of the bodies of the said heirs-male, whom failing to other substitutes, then the words "and the heirs whomsoever of the bodies of the said heirs-male," formed a subordinate destination to the first branch, *i.e.*, the heirs-male, the word "and" in such a collocation not being equivalent to "whom failing"; and that such subordinate destination was to be introduced distributively—that is to say, that the heirs male of the body did not require to be first exhausted, but that the heirs whomsoever of the body of the heirs-male of the body fall to be called after each of the heirs-male in their turn. Now the only distinctions that exist between that case, which authori-

tatively settled the law, and this, are—first, that in that case the heir whomsoever of the body of an heir-male was descended from an heir-male who had actually taken the estate, whereas here the heir whomsoever is descended from a son of the body of the institute who never actually took; and second, that there is an explanatory clause which was not in the *Largie* case and to which I shall presently revert.

The question therefore comes to be whether these distinctions make any difference. I am of opinion that they do not. The underlying principle in the construction of destinations is that the wish of the framer of the destination should be given effect to, and that the shorthand expressions which may be used are capable of expansion. There is also another rule, viz., that *in dubio* that construction will be most favoured which makes the least deviation from succession as determined by law. All these rules find their exemplification in what must always be the leading case in this branch of the law, viz., the *Roxburghe* case, and they were applied in the solution of the *Largie* case.

Now in view of these rules, what is the object of what is termed the subordinate destination? Obviously the absolute preference for heirs-male of the body is abandoned. If it were not it would be exceedingly easy—and has been done in many entails—to call the heirs-male of the body whom failing any other individuals or class of heirs. In such a case all the possible heirs-male of the body would need to be exhausted before the next class could be called. But when the heirs whomsoever of the body of the heirs-male of the body are called, then, *applicando singula singulis*, it means that the heir whomsoever of the body of each successive heir-male of the body should take before the next heir-male of the body is reverted to. Now who from the point of view of the testator would be the heirs-male of his body? Surely his sons in their order. In other words, you get the very simple idea of the eldest son taking, and his family after him, and on the extinction of that family, then the second son, if he has survived, but if not, his family after him, and so on. Surely a much simpler idea than the other, which is, after the family of the eldest son is exhausted to then search for the person that at the moment of the succession opening bears the character of heir-male of the body. The results of such a construction are manifestly fantastic. Not only is the daughter of an eldest son who happens to predecease the father cut out, but if the eldest son lives to take, then it may well be that the families of all the other brothers are cut out in favour of the descendant of a youngest son who at the moment of the extinction of the eldest son's family happens to bear the character of heir-male of the body of the institute and entailer. It need only be pointed out that in accordance with one of the rules mentioned, the former construction maintains the legal order of succession, the latter disregards it.

It must always be kept in view that the very term heirs-male of the body—heirs in the plural—is in absolute strictness an inaccuracy. When the institute and entailer dies he can have only one heir-male. It therefore must mean a series of persons in succession. From the settler's point of view it is much more likely that he contemplates the series of persons who each in turn might be his heir-male of the body, that is, his sons, rather than the series of persons who at unknown dates might be able for the moment to hold the character of heirs-male of the body.

I have so far dealt with the case on general principles. But I think a closer regard to what was said in the *Largie* case shows that the learned Judges there never contemplated that actual taking was a necessary condition for any heir-male of the body to introduce the subordinate destination of his heirs of the body whatsoever, but that the idea was that each male son of the entailer in the order of their birth was the head of a fresh stirps, whose heirs of the body whatsoever were called on, the heirs whatsoever of the body of the elder stirps having failed. I do not weary your Lordships by picking out from the voluminous opinions in the Court of Session particular passages which lead me to this conclusion. I will, however, take one passage from the judgment of Lord Chancellor Cottenham in the House of Lords which when properly understood is really conclusive. The Lord Chancellor says—"If therefore it could be established that the consequence of holding that the eldest son took with remainders upon his death to his daughters if he had no son, would be that upon the failure of the line of such daughters the estate would never return to the younger sons or their issue, as Lord Meadowbank thinks would be the case, I should feel the greatest difficulty in adopting a construction which would lead to such a result, but I have come to the conclusion that such would not be the consequence of the construction adopted by the majority of the Judges."

Now Lord Meadowbank, who was the sole dissenting Judge, and who argued in favour of the total exhaustion of heirs-male of the body before coming to the heirs whomsoever of the body of heirs-male, had said that as soon as you came to heirs whomsoever of the body of the heirs-male of the body you had exhausted the first great limb of the destination. If therefore, said he, you call the heirs whomsoever of the body of the eldest son, and they succeed after the death of the eldest son and then die without issue, then the estate will pass to the next limb of the destination—in that case a daughter of the testator, but it might have been anyone—and all the second and third sons of the settler and their descendants will be excluded. Now this is what the Lord Chancellor says is unsound, and observe what he says—"if . . . the estate could never return to the youngest sons *or their issue*." Now it could only come to the issue of younger sons on the failure of the heirs whomsoever of the body of an

eldest son who had taken upon the theory that the younger sons each in their turn founded a stirps, or, in other words, were in the eyes of the settler each in their turn an heir-male of his body.

The learned counsel for the appellants naturally enough sought to make a puzzle by saying that Mrs Joseph could never serve as the heir whomsoever of the body of her grandfather as heir-male of the body of the entailer, because her grandfather never was in a position to serve as heir-male of the entailer. But this is quite beside the question. There is nothing in her grandfather to take by service. What she must do is to serve in special to the person last vest and seised, who was her cousin, and the only service she can effect is service as heir of tailzie and provision. This she can do if she can satisfy, in old times the jury summoned under the brieve, in modern times the sheriff sitting on the petition for service, that she holds the character that entitles her to call herself heir of tailzie and provision. And if the opinion above submitted as to the true interpretation of the destination in the tailzie be sound, then she can do so, and will be entitled to be served heir in special to the last holder.

I must now advert, to show that it has not been admitted, to the second argument. This is based on the special clause, which runs as follows: — "It is hereby provided and declared that the males of every branch through the whole course of succession shall not only be preferable to the females, but also that the eldest daughter or heir-female shall always succeed without division and exclude heirs-portioners. . . ." And then comes a condition as to all holders and husbands of holders bearing the arms and taking the name of Carnegy of Lour.

The appellant argues that, assuming he is wrong in the former argument and cannot claim as heir-male of the body of the entailer, yet inasmuch as he is descended as well as the respondent from the second son of the entailer, that stirps forms a "branch," and that in virtue of this clause he has a preference over the respondent, who is admittedly the heir whomsoever of the body of said second son. It will be observed that this clause is only necessary because of the calling to the succession of heirs whomsoever. If heirs-male alone had been called there never could have been heirs-portioners. That being so, I agree with Lord Guthrie that the initial words are only of a prefatory character, and enounce no more than what the common law does in the selection of the heir whomsoever. But further, I think it legitimate to test this clause also by seeing what the result of the appellant's construction would be under certain circumstances. Suppose he were right, he could take the estate to the exclusion of the respondent. Supposing then he died leaving a daughter, the estate would then go back to the respondent, or to one of her issue if she were dead, for she, or he or she, as the case might be, would always be the heir whomsoever of the body of the second son of the entailer in preference to the child of the respondent. This is a truly fantastic result, and goes far to show that the construction contended for is not a correct one.

I am therefore of opinion that the appeal fails, and ought to be dismissed, with costs.

LORD ATKINSON—The question for decision in this case is whether the first party, Charles Gilbert Patrick Carnegy, or Mrs Isabella Eliza Butter Joseph *née* Carnegy, his cousin, became entitled on the death on the 4th June 1914 of Alexander Watson Carnegy to succeed to the estate of Lour under the terms of the destination of that estate contained in a certain deed of entail dated the 20th September 1813, executed by Patrick Carnegy, the great grandfather of both claimants. This question turns, in the first instance, upon the construction of the already cited clause in this deed.

Patrick Carnegy, the entailer, had several sons, of whom Patrick Watson Carnegy was the eldest and Alexander Carnegy the second.

This Patrick Watson Carnegy, as heir of the body of his father, succeeded to the estate on the latter's death in November 1819. He had only two children, namely, Patrick Alexander Watson Carnegy, who as heir whatsoever apparently of the body of his father succeeded to the estate on the latter's death on the 3rd September 1838, and lived till the 4th June 1914, and James Forbes Carnegy, who died unmarried on the 7th September 1855. The elder line thus became extinct.

Both parties admit that on this failure of the elder line it became necessary to go back to the entailer and his sons to discover who, according to the entailer's intention as expressed in his deed, is the heir-male of his body, who himself, or the heirs whatsoever of his body, is or are entitled to succeed. Well, both parties select Alexander Carnegy, the second son of the entailer, as the subordinate stirps from whom they both trace their descent. He was the grandfather of each of them, Mrs Joseph's father being the elder of Alexander Carnegy's two sons, and the appellant's father being the younger. Now had Mrs Joseph's father succeeded to the estate of Lour this case would be quite undistinguishable from the case of *Lockhart* v. *Macdonald*, 1 Bell's Appeals 202, styled in argument the *Largie* case. Every argument put forward in the present case, save that rested upon the fact that Mrs Joseph's father never succeeded, was put forward in the *Largie* case. It was urged there that in the sentence "the heirs-male of my body and the heirs whatsoever of their body," the word "and" should be read as equivalent to "whom failing." It was also contended that the heirs whatsoever of the first heir-male of the body of the entailer should not succeed till all the heirs-male of his body had been exhausted; but equally in vain.

Lord Cottenham, at page 213, said that under the law of Scotland, unlike the law of England, the word heirs or heirs of the body are "generally descriptive of the class of persons who are to be called to the enjoyment of the estate upon some particular event happening, and when different classes

are to be so called in succession that event is generally the failure of the class immediately preceding, and is most aptly described by the words whom failing." And at page 215 he said "when any description of heirs are called, the term 'heirs' though used in the plural is construed to mean individuals who from time to time and in succession may answer the description." And then follows the passage embodying the principle of the decision—"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 whatsomever of the body be also construed distributively so as to apply to the heirs general of the body of each successive heir-male who might be added to the succession?"

This, as Lord Guthrie points out in his judgment, was in effect decided earlier by Lord Curriehill in *Forbes* v. *Baroness Clinton*, 6 Macph. 900, 5 S.L.R. 593. At p. 904 that learned Judge is reported to have said —"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 order of birth. . . . That rule not only is established in practice but is also well 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."

Now the argument of the appellant amounts to this, that an heir-male of the body does not answer that description unless he has succeeded to the estate. That principle would have extraordinary results. For according to it, notwithstanding the decision of the *Largie* case, if the entailer had six sons, all of whom except the first and last had only daughters, and all of whom except the last predeceased the first, then on the death of this first son, unmarried and without issue, the daughters of all the sons who had predeceased the first would be passed over because none of those sons had ever succeeded to the estate. It is hardly possible to suppose that the entailer ever contemplated such a result or ever desired to effect it. It in effect attaches a condition to the gift to the heirs whatsoever of the body of an heir-male to the effect that the latter should have succeeded to the estate. Moreover, if the father of Mrs Joseph is not an heir-male of the body of the entailer within this destination, so as to entitle her to succeed as heir whatsoever of his body, I do not well see how the appellant can claim as heir-male of the body of the entailer, as neither his father nor grandfather ever succeeded to the estate.

As I understand this argument it is founded on the fact that Mrs Joseph is not in a position to prove that her grandfather was ever in a position to serve as heir-male of the entailer. But this she is not required to do. What she has to do is to serve in special to the person last vested and seized of the estate, namely, her cousin, and the only service she can effect is service as heir of tailzie and provision. If she can convince the adjudicator on her petition for service that she is entitled to call herself an heir of tailzie and provision, that is enough.

I quite concur with Lord Guthrie as to the construction of the first condition of the entail. Its objects were merely to exclude in the case of female portioners, and to perpetuate the name of Carnegy. He had already given a preference to the males over the females, and the first part of the condition is really a recital or recapitulation of the entailed destination in the earlier part of the will introduced as preamble.

I think the judgment appealed from was right and should be upheld, and this appeal be dismissed with costs.

LORD SHAW—[*Read by Lord Atkinson*]—By a deed of entail by Mr Patrick Carnegy of Lour, dated 20th September 1813, certain lands were 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." The question is, what is the true meaning of that destination, and especially of the first portion of it. I do not myself find any difficulty on the subject, and I think the learned Lord Guthrie, giving the opinion of the Second Division of the Court of Session, has in all points come to a correct conclusion.

It seems to me that (1) heirs-male are mentioned as a class. They are mentioned in the plural, and are to be a class which was viewed as such by the maker of the entail. (2) When the destination accordingly deals with "the heirs-male of my body and the heirs whatsoever of their bodies" it can and must alone mean that when the heirs whomsoever of the body of one heir-male are exhausted, you then go back to the next of the original class of heirs-male of the body of the entailer in the order of seniority, and exhaust him and the heirs whatsoever of his body, and so on successively. (3) The heirs-male having been thus exhausted respectively and successively along with all the heirs whatsoever of their bodies, you then proceed to ascertain the heirs-female of the entailer and the heirs whatsoever of their bodies.

Proceeding in this manner, which, in my opinion, is the only manner possible according to correct construction, the respondent is admittedly entitled to succeed.

The entailer left several sons, the eldest being Patrick Watson Carnegy. He succeeded. After him came Patrick Alexander Watson Carnegy. On his death that whole family was exhausted. This being so, under what I think the only construction possible, the next heir-male of the body had to be looked for, namely, Alexander Carnegy, and the succession opened to the heirs whatsoever, he being dead, of his body. This class is represented (as it happens, in its entirety) by Mrs Joseph.

The answer to this is that the destination means that you are prevented from looking upon Alexander Carnegy as one of "the heirs-male of my body" mentioned by the entailer, because Alexander Carnegy himself did not take the property, but died before this particular succession opened.

There is no such limitation in the entail to the heirs-male of the entailer's body who should take at the particular opening or openings of the succession, and the idea of a search for them in the course of years and generations on any such principle was not in the entailer's mind.

The class of heirs-male, taken in its natural sense, and looked at from the point of view of the maker of the deed, was the entire class of heirs-male of his body, and not the particular heir-male who alone stood in that position according to the law of Scotland. It was not the heir-male who was called, but a class of heirs-male, including not the eldest son alone, who took, but, of course, also his brothers who did not or might not take. When the one heir-male and the heirs whatsoever of his body are exhausted, the occasion has arisen for going back to the next of the class, namely, the second son and the heirs whatsoever of his body, and there is no justification for the proposition that this operation is rendered invalid by the second son not having taken.

So far for the construction, which is extremely simple. The appellant's argument, however, was rested upon authority. I do not find such authority either direct in Scotland or by analogy in England. The *Largie* case was referred to, namely, *Lockhart* v. *Macdonald*, 2 D. 377. It was interesting. At one stage, being considered clear and simple, it had been decided by the Scotch Judges on the principle

> "Since brevity is the soul of wit,
> And tediousness the limbs and outward flourishes,
> Let us be brief."

But having reached this House, it was sent back to the Court of Session for opinion by all the Judges. And the judgment which followed was one of what I might venture to describe as copiousness under protest.

In these circumstances, accordingly, there is here and there to be found an expression which if isolated might suit the appellant's argument, but the entire scope and bearing of the case was in another direction. The expression under construction there was, "to myself and the heirs-male to be procreated of my body of my present marriage, and the heirs whatsomever of the bodies of the said heirs-male." The Lord Justice-Clerk said this—"The defenders maintain that the heirs whatsomever of these heirs-male are successively called after each of them in their order. I am very clearly of opinion that the last is the true and legal construction of the destination." Lord Medwyn says—"The clause 'and to the heirs whatsoever of the bodies of the said heirs-male' does not properly take the succession from the heirs-male of the marriage as a class, but only shows that by the addition of this clause, and not by using the usual technical expressions, the entailer did not mean to bring in all the heirs-male of the marriage first and exhaust them before bringing in any of the heirs whatsoever of their body, but that the destination is, and was intended to be, to each heir-male of the marriage, and the heir whatsoever of the body of such heir *seriatim*."

I do not pursue the subject, for similar expressions of opinion abound.

I think that Lord Guthrie rightly attached importance also to the opinion of Lord Curriehill in the case of *Forbes* v. *Baroness Clinton*, and I do not find anything to controvert these views in the opinion of Lord Cottenham in the *Largie* case, 1 Bell's Appeals 202.

I agree that the appeal should be disallowed.

LORD PARKER—[*Read by Lord Sumner*]—The question in this case depends on the true construction of a clause of destination contained in a deed of entail executed by the late Patrick Carnegy, dated the 20th September 1813. The destination in question is to the heirs-male of the entailer's body and the heirs whatsoever of their bodies. It must, I think, be taken as well settled since the case of *Largie*, 1 Bell's Appeals, 202, that this destination must be read as a destination to a single class, and not as a destination to the heirs-male of the entailer's body, whom failing to the heirs whatsoever of their bodies. Where a class is called to the succession without any order of precedence being prescribed by the entailer the individual members of the class are called to the succession in the order prescribed by the general law. If these principles be applied to the construction of the deed in question, the destination after the death of the entailer is as follows—that is to say, (1) to Patrick Watson Carnegy, the eldest son of the entailer, (2) to the heirs whatsoever of the body of Patrick Watson Carnegy, failing whom (3) to Alexander Carnegy, the second son of the entailer, and (4) to the heirs whatsoever of his body. It seems reasonably clear that in the events which have happened the person called to the succession on the failure of heirs whatsoever of the body of Patrick Watson Carnegy was Isabella Eliza Butter, the daughter of the eldest son of Alexander Carnegy, her father and grandfather being then both dead. Her right to succeed can in fact only be displaced by introducing into the destination words excluding the heirs whatsoever of the body of an heir-male who does not live long enough to take up the succession. I can find no authority which would warrant the introduction of any such words, and it appears to me that such introduction would be calculated in the highest degree to defeat the entailer's intention, which is obviously that the heirs-female of his own body and the heirs whatsoever of their bodies should take only on failure of the heirs-male of his body and the heirs whatsoever of their bodies. If any such words were introduced the heirs-female of his body and the heirs whatsoever of their bodies might be called to the succession, although there might be numerous heirs whatsoever of the bodies of heirs-male still living.

Some stress was laid in argument upon the provision in the deed that the males of every branch through the whole course of succession thereby appointed shall not only be preferable to the females, but also that the eldest daughter or heir-female shall always

succeed only without division and exclude heirs-portioners. I think that Lord Guthrie's interpretation of this clause is correct. The first part of it connotes only that which the general law prescribes, and is intended merely as an introduction to the alteration which the entailer intends to make in the order according to which females are by the general law called to the succession.

In my opinion therefore the appeal fails.

LORD SUMNER—I agree in the motion proposed from the Woolsack, and for the reasons that have already been given.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant—Macmillan, K.C.—C. H. Brown. Agents—Lindsay, Howe, & Company, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondents—Watson—Wilson. Agents—J. & A. F. Adam, W.S., Edinburgh—Druces & Attlee, London.

COURT OF SESSION.

Friday, October 22.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

FREE CHURCH OF SCOTLAND AND OTHERS *v.* MACKNIGHT'S TRUSTEES.

Trust — Charitable Bequest — Administration — Trust for Religious Purposes — Breach of Trust — Personal Liability of Trustees.

A testator directed his trustees to expend the free annual income of his estate for the promotion of the Home Mission in connection with the Free Presbyterian Church of Scotland, declaring that it should be in the power of his trustees to engage Free Church missionaries in the promotion of the mission in such way as they might think proper either through the Church or independently of it. The trustees, independently of the Church, appointed and paid a licensed probationer and ordained preacher of the Free Church of Scotland to conduct a mission in Bathgate

By Allocation Orders, dated 10th November 1909, under the Churches (Scotland) Act 1905 (5 Edw. VII, cap. 12), the funds left by the testator were as from 10th October 1909 allocated to the Free Church of Scotland. The trustees, however, continued to expend the income of the trust estate on the mission in Bathgate until it was decided in the *Free Church of Scotland* v. *Macknight's Trustees*, 1913 S.C. 36, 50 S.L.R. 55, that the discretionary powers of the trustees to administer the trust estate independently of the Church had ceased after the said Allocation Orders, and that the Church was entitled to payment of the income. The trustees thereafter ceased to expend the income as aforesaid, and paid the same to the Church.

In an action of count, reckoning, and payment against the trustees, concluding for decree of accounting against them for their intromissions with the trust estate prior to the decision above referred to, *held* that the trustees were not personally liable to repay the expenditure by them independently of the said Church on the said mission at Bathgate either before or after the date of the said Allocation Orders.

Charitable Bequest — Trust — Revenue — Administration of Trust — Recovery of Estate—Income Tax—Personal Liability of Trustees—Averments of Trustees.

In an action of count, reckoning, and payment by the beneficiaries under a trust for religious purposes against the trustees, the beneficiaries averred that the trustees had for a number of years negligently failed to recover income tax which they were entitled to recover.

Held that, in answer to such an averment, the trustees must make specific explanation to enable the Court to decide the question with or without inquiry, and the trustees *allowed* to amend their record and the beneficiaries to answer their amendments.

The Free Church of Scotland, *pursuers*, brought an action of count, reckoning, and payment against Hugh Martin and others, the sole trustees, original and assumed, acting under the trust-disposition and settlement of the late Alexander Edward Macknight, advocate, Edinburgh, dated 22nd June 1896, and codicils thereto dated respectively 13th July 1896 and 13th May 1898, and all registered in the Books of Council and Session on 13th June 1899, as such trustees and also as individuals, *defenders*, concluding for decree against the defenders to account for their intromissions with the free annual income of the trust estate in their hands.

By *codicil* to his *trust-disposition and settlement*, dated 13th May 1898, the late Mr A. E. Macknight, who died on 8th June 1899, directed his trustees, the defenders, "to expend the free annual income of my estate in manner after mentioned for the promotion of one or other or both of the following missions, the residue of my estate to form a capital fund for the same, viz —(1) The Mission to the Miners of Scotland promoted or being promoted by the Reverend Doctor James Hood Wilson of Edinburgh, and (2) the Home Mission in connection with the Free Presbyterian Church of Scotland . . . : Declaring that it shall be in the power of my trustees to engage Free Church missionaries, or in their discretion other workers, including laymen and lady missionaries or workers being members of the Free Church, in the promotion of the above missions or either of them in such a way as they may think proper either through the Church or independently of it, such missionaries or other workers receiving suitable remuneration, or my