magistrates meant it as such. But if the magistrates were found to be wrong, it would be better that the operations should not in the meantime be done at all. It might be true enough that money had been already expended, but that was no reason for spending more in the same way, and it was clear that the application to have the operations stopped, although a little late in being brought, was not so late as to be incompetent.

Lord Ardmillan absent.

The Court accordingly remitted to the Lord Ordinary to pass the note, and to grant interim interdict against further proceeding with operations for widening the road and forming a footpath on the ground which is part of the Green of Glasgow.

Agents for Complainers—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Respondents—Campbell & Smith, S.S.C.

Wednesday, June 10.

FORBES *v.* CLINTON.

Entail—Destination. An estate was destined to A and the heirs-male of the marriage betwixt A and the entailer's daughter, and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively, whom failing, to the heirs-female of the marriage, &c. On the death of A, his eldest son, B, took the estate. On the death of B without male issue, *held* that the estate descended to B's daughter, as heir whatsoever of the body of B.

In 1811 Sir John Stuart of Fettercairn made an entail of the estate, the destination being to "myself and, failing me, to the heirs-male of my body, whom failing to Sir William Forbes, Baronet of Pitsligo and the heirs-male procreated of the marriage between him and the deceased dame Williamina Stuart or Forbes my daughter his spouse and the heirs-male of their bodies respectively, whom failing to the heirs whatsoever of the bodies of such heirs-male respectively, whom failing to the heirs-female procreated of the said marriage and the heirs whatsoever of their bodies respectively, whom failing to." &c. Of the marriage of Sir William and Lady Forbes there were three sons, the eldest being the late Sir John Stuart Forbes, who succeeded to the estate on the death of his father in 1828. In 1866 Sir John died, and his only child, Lady Clinton, made up titles to the estate, as heir of entail. Her right was now challenged by Sir William Stuart Forbes, eldest son of Charles Forbes, who was the next brother of the late Sir John. Sir William Stuart Forbes pleaded that by the entail heirs-male of the bodies of heirs-male of the marriage of Sir William and Lady Williamina Forbes were entitled to succeed in preference to heirs-female or heirs whatsoever, either of Sir William Forbes or of any subsequent heir of entail. Lady Clinton, on the other hand, pleaded that the succession opened, on the death of Sir John without male issue, to the heirs whatsoever of his body, and the defender, being such heir, was entitled to succeed.

The Lord Ordinary (Jerviswoode) sustained the claim of the pursuer, Sir William Stuart Forbes. Lady Clinton reclaimed, and the case was argued before the First Division and three Judges of the Second.

Fraser and Gifford for pursuer.

Young, Clark, and Lee for defender.

At advising—

Lord Curriehill.—Sir John Hepburn Stuart Forbes, who was infeft as heir of entail in the estate of Fettercairn, having died in the year 1866, the right to that estate then became *in hereditate jacente* of him; and the question is,—Who then became entitled to succeed to him as the next heir of entail in that estate? The answer to this question must be found in the destination in the deed of entail. That entail had been made in 1811 by his maternal grandfather, Sir John Stuart. His intention, as to the order of the succession of the series of the heirs thereby appointed, will be more easily understood by keeping in view what was then the state of his family. He had no son. He had daughters, the eldest of whom, Williamina, had been married to Sir William Forbes, but she was then dead. There then survived three sons of that marriage, John, Charles, and James Forbes. There were also daughters of that marriage. The destination in the entail, so far as it regulated the order of succession among the entailer's descendants, was—(1) to the heirs-male of his body; (2) to his son-in-law Sir William Forbes; (3) to "the heirs-male procreated of the marriage between him and the deceased Williamina Stuart or Forbes, my daughter, his spouse, and the heirs-male of their bodies respectively; whom failing, to the heirs whatsoever of the bodies of such heirs-male *respectively;* (4) whom failing, to the heirs-female procreated of the said marriage, and the heirs whatsoever of their bodies *respectively.*" On the death of the entailer without male issue, Sir William Forbes succeeded to the estate as the first heir of entail, and he possessed it until 1828, when he died, and was succeeded by his eldest son John, as the heir-male of the marriage between him and Lady Forbes. John again (who was called Sir John Hepburn Stuart Forbes) survived until 1866, when he died; and the question as already stated is,—Who was then the party to whom the succession opened upon his death? In order to find the answer to this question in the destination of the entail, it is necessary to see what the position was which Sir John himself had held under that destination. It was that of *the eldest heir-male of the marriage between his parents Sir William and Lady Forbes.* Hence, on his death in 1866, the heir to him under the third branch of the destination would have been the heir-male of his own body, if any had existed. But he had no son, and so there was an entire failure of heirs-male of his body; and consequently, the next heir *to him,* in terms of the sequel of that branch of the destination, was the heir whatsoever of his body. And as he left a daughter, Lady Clinton (who is the defender in the present action), she was the party who was in that position, and to whom, therefore, as I think, the succession then opened. Her Ladyship accordingly, in the year 1866, expede a title to the entailed estate as being then the nearest heir of entail to her father, and she has since possessed the estate in virtue of that title.

The pursuer of the present action is a nephew of Sir John, being the son of his immediate younger brother Charles, who had predeceased Sir John. He had then become the heir-male of the marriage of Sir William and Lady Forbes; and the question now is, whether, in that character, he in 1866 also became the heir of entail of his uncle Sir John?

The pursuer would have been in that position if the third branch of the destination had been an

unqualified one to the heirs-male of the marriage of Sir William and Lady Forbes. But that branch of the destination was not made in these unqualified terms; and the fallacy in the pursuer's argument consists, as I think, in his ignoring the effect of the qualification which it embodies. That qualification consists in this branch of the destination providing the succession—not simply to the heirs-male of the marriage—but to them "and the heirs-male of their bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively." And as Sir John's position while he was heir of entail in possession had been that of the heir-male of the marriage of his parents, the next heir who was appointed to succeed to him on his death in 1866 (without heirs-male of his body) was the heir whatsoever of his body, who was his own daughter, Lady Clinton. The first objection therefore to the pursuer's claim, and it is itself a conclusive one, is, that it could not receive effect without denying all effect to the clause by which the entailer thus called to the succession the heir whatsoever of the heir-male of the marriage, in the event, which actually happened, of the failure. not only of the heirs-male of the marriage, but also of heirs-male of his body.

A second objection to the pursuer's contention is, that it is inconsistent with the established technical meaning of this branch of the destination. In order to see clearly what is the established meaning of such a destination, two of the technical rules of tailzied destination must be kept in view. One of them 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. And, accordingly, it is not disputed that, in uniformity with this rule, the right to the whole of the entailed estate descended on the death of Sir William Forbes to his eldest son John alone. 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*. This principle was strikingly illustrated by the *Roxburgh* case, in which there was a destination to the eldest daughter of Harry Lord Ker and their heirs-male; and it having been held from the whole scope of the deed of entail, that by the expression "the eldest daughter" was meant all the daughters of Lord Harry, it was nevertheless found that by that expression only the daughter who was eldest by birth, and her heirs-male, succeeded in the first instance, to the exclusion of the younger daughters and their descendants. And in the case of *Largie* (Bell's App. i, 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."

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, both in this Court and in the House of Lords.

The practical effect of so qualifying a destination generally to heirs-male of the body of a stirps, with such subordinate destination, is to constitute each of such immediate heirs-male of that stirps, in his order, a *subordinate stirps* in reference to the succession of his own descendants. This, also, was thus expounded, in the case of *Largie*, by Lord Mackenzie. He stated that "The heirs-male are called as stirps since their heirs whatsoever of their bodies are expressly called as descendants, although each of these stirps had herself been called to the succession as the substitute of a primary stirps." His Lordship also refers to Dallas' Collection of Styles for the model form of such qualified destinations. This is indeed the most explicit manner of calling to the succession the descendants of any substitute heir of entail, where the intention is to call in a certain order all the descendants of any substitute (whether these descendants be males or females) before the collateral heir of such substitute. This being the case, each of the heirs-male of the marriage of Sir William and Lady Forbes was constituted a subordinate stirps in reference to his own descendants—there being thus substituted to him, first, the heirs-male of his own body, and failing them, the heirs whatsoever of his own body, before the succession should pass to any of his younger brothers or their descendants, as the heirs-male of the marriage of their parents. Hence, on the death, in 1866, of Sir John, the eldest heir-female of the marriage—the party to whom the succession opened in virtue of the subordinate destination created by this qualification—was his daughter, the heir whatsoever of his body. The condition upon which the succession then opened to her was the failure, not of all the heirs-male of the marriage of her grandparents, but only the failure of heirs-male of the body of her own father, as the eldest of the heirs-male of that marriage. The contention of the pursuer is thus not only at variance with the words of the deed, but is also inconsistent with the established rules of tailzied succession in Scottish conveyancing.

Thirdly, in this case the entailer has himself explained that his meaning was in conformity with these rules. He did so by directing that the heirs-male of the marriage should *respectively* be succeeded by their own descendants, whether males or females, in a certain order. No meaning can fairly be attached to that expletive "respectively" as so used, except that the descendants of *each* of these heirs-male of the marriage, in his order of birth,

should be succeeded by the heirs-male of his own body—whom failing, by the heirs whatsoever of his own body,—before the succession should pass to the next younger heir-male of the marriage and his descendants.

Fourthly, that such is the true construction of the destination is corroborated by the fact that it gives a meaning to every one of the clauses in the destination, whereas the construction contended for by the pursuer would leave some branches of the destination altogether meaningless. In particular, it would deprive of any rational meaning the clause by which the destination to the heirs-male of the marriage of Sir William and Lady Forbes is qualified, as I have pointed out.

And finally, the meaning which it gives to all the branches of the destination is, that it interrupts the legal rules of succession *less* than that contended for by the pursuer. The intention which is indicated in the branches of the destination applicable to the entailer's descendants appears to be, that in every case when the right to the estate is provided to any party as a stirps, it is to go to the descendants of that stirps, in a certain order, so long as any of them shall exist; and that it shall never go out of his family until all his own descendants shall fail. This would not be the case according to the construction contended for by the pursuer. It is a principle which is of great importance in the construction of tailzied destinations, that the legal rules of successsion are not to be deviated from beyond what is directed by the entailer. In the case of *Largie*, Lord Jeffrey concludes his comments on the prior cases thus—"In all these cases, then, it was held clear that the rule is to interpret and read the destination as if it had made express reference to the legal order of succession, and that this is never to be excluded unless where the words do not at all admit of its adoption." In the present case the entailer's directions, according to my reading of them, proceeds upon this footing in so far as these relate to his descendants; and such will be their effect. And this is brought out prominently by a special provision which he made as to the only contingency in which the case might eventually have been different had the words of the destination itself been left unqualified. I allude to the clause in which it is "provided that the daughter of the heir who shall happen to be last in possession of the lands and heritages before mentioned (whether such heir was served heir of tailzie or not), succeeding always preferably to the daughters of any former heir, so often as the succession, through the whole course thereof, shall devolve upon daughters; and which I hereby declare to be my true meaning, notwithstanding of the aforesaid general destination of heirs whatsoever."

That clause shows clearly the granter's intention that the succession should never, according to the legal rule, be taken away from the descendants of any person who might actually have possession of the estate as its owner, except in those cases in which the ownership was expressly directed to pass to a different family; and so this clause secures that the legal rules of succession should not be deviated from in even such exceptional cases, unless some of the express provisions should direct such a deviation to take place.

The result is that, in my opinion, the title of Lady Clinton is not challengeable on the ground set forth in this action; and that she should be assoilzied from its conclusions.

The other judges concurred.

Agents for Pursuer—Skene & Peacock, W.S.
Agents for Defender—Mackenzie & Kermack, W.S.

Thursday, June 11.

SHEPHERD & CO. *v.* BARTHOLOMEW & CO.

(*Ante*, vol. iii, 170.)

Bill—Renewal—Security. For some years A supplied cotton on the order of C for the firms of C & Co. and B & Co., C distributing the cotton between the firms as he chose, and A being at liberty to draw bills on either firm for the price. A sued B & Co. on two bills accepted by them. They defended, on the ground that these bills had been superseded by a renewal bill accepted by C & Co., on whose estate A had already ranked for the amount of the renewal bill. Defence *sustained;* and *held*, after a proof, that in the circumstances A was not entitled to retain the two original bills as an additional security for the price.

The pursuers, who are merchants in Manchester, sued the defenders, merchants in Glasgow, for £4085, 1s. 9d., being the amount of two bills, one for £1706, 5s. 4d., dated 27th December 1864, and the other for £2378, 16s. 5d., dated 2d January 1865. In January 1867 the Court allowed the defenders a proof *prout de jure* of their averment that these bills had been superseded and extinguished. A proof was taken; and thereafter the Lord Ordinary (JERVISWOODE) pronounced an interlocutor finding "That, for some time prior to the raising of the present action, the pursuers on the one hand, and the defenders on the other hand, were engaged in a series of transactions, in the course of which the pursuers were in the habit of purchasing cotton on commission for the firms of John Bartholomew & Company (the defenders) and of John & Robert Cogan, merchants, Glasgow, of both of which firms Mr Robert Cogan and Mr Robert O Cogan were members: Finds that the said Mr Robert Cogan took the active management of the finance department of both of the said firms: Finds that, prior to the year 1865, the orders for the said purchases of cotton were made by, and the cotton so purchased invoiced to, the said firm of John & Robert Cogan, for behoof of their own firm, and also of that of the defenders, to be allocated according to the requirements of the said respective firms for the time: Finds that the pursuers drew bills from time to time on both of the said firms for the price of the cotton so purchased by them: Finds that such bills were not so drawn by the pursuers on said firms of John Bartholomew & Company and John & Robert Cogan, with special reference or in precise relation to the quantity of cotton which was actually allocated to each firm, but as a matter of mutual convenience, and having regard to the position of their respective pecuniary obligations and transactions at the time: Finds that, on the above footing, when the bills now sued on fell due, and were not retired by the defenders, the sums contained therein were included in a new bill, drawn by the pursuers upon, and accepted by, the said firm of John & Robert Cogan, for £5571, 8s. 7d., and bearing date 25th March 1865: And finds that the pursuers ranked on the bankrupt estate of the said John & Robert Cogan, and accepted a composition for the said bill for £5571, 8s. 7d., including therein the sums now sued for."