LORD DUNDAS was absent, being engaged in the Extra Division.

The Court pronounced this interlocutor—

"Find in answer to the question stated that in the circumstances stated the arbitrator was entitled to award compensation from 31st August 1912 to 7th February 1914: Therefore dismiss the appeal, affirm the determination of the arbitrator, and decern. . . ."

Counsel for the Appellants—Horne, K.C. —Carmont. Agents—Wallace & Begg, W.S.

Counsel for the Respondent — George Watt, K.C. — Macdonald. Agent — D. R. Tullo, S.S.C.

Friday, February 19.

FIRST DIVISION.

[Lord Hunter, Ordinary.

ADAM *v.* RIO GRANDE RUBBER ESTATES, LIMITED.

Expenses — Taxation — Action One of a Series all Raised on same Grounds where Combination Impossible—Principles to be Followed by Auditor in Taxing Account of Expenses in such Circumstances.

In remitting to the Auditor to tax the account of expenses in an action which was one of a series of 121 in which the question at issue, though identical in each case, could not be tried in a combined action, the Lord Ordinary directed the Auditor that "in fixing the amount of said expenses he shall take into consideration that the action is one of a series of 121 actions raised by different pursuers against the same defenders on the same grounds, the pursuers in all the actions being represented by the same counsel and agents." *Held* that such was a proper direction in the circumstances. *Mode* of giving effect to the direction.

(See *Mair* v. *Rio Grande Rubber Estates, Limited*, 1913 S.C. 183, 50 S.L.R. 125, 1913 S.C. (H.L.) 74, 50 S.L.R. 876.)

William Adam, clerk, 128 Oxford Street, Glasgow, *pursuer* and *reclaimer*, brought an action of reduction against the Rio Grande Rubber Estates, Limited, 30 George Square, Glasgow, *defenders* and *respondents*, which was one of a series of 121 actions brought by shareholders against the Company to obtain a recision of their agreements to take shares in the Company, the actions being all based on the same allegation that the prospectus of the company contained false and fraudulent statements.

The actions were settled by letters between the parties' agents, dated 30th March 1914 and 2nd April 1914, in the following terms:—

"29 Queen Street,

"Edinburgh, *30th March* 1914.

"Messrs Mitchells, Johnston & Co.,

"Solicitors, Glasgow.

"Dear Sirs,

"*Rio Grande Rubber Estates Ltd.*

"*in Liquidation.*

"Referring to your letter of 12th inst., and the meetings and correspondence which have taken place between Mr Rankin and Mr MacLeod, we now beg to confirm the settlement of this case on the footing that your clients pay our clients full judicial expenses in all the actions, together with a contribution of £250 towards the extra-judicial expenses, and that no further claims are made against any of our clients in respect of calls on the shares of the Company held by them. Our clients on the other hand to waive all claim to participate in any surplus assets which may remain after payment of the creditors of the Company. This settlement is, of course, subject to the approval of the Court being obtained, and to our obtaining the approval of our clients individually.

"We are calling a meeting for this purpose within the next few days,—Yours faithfully, ST CLAIR SWANSON & MANSON.

"*P.S.*—Of course it is understood that the expenses paid to your agent on 16th January 1913 under the Court of Session decree are repaid.—ST. C. S. & M."

——— "*2nd April* 1914.

"Messrs St Clair Swanson & Manson, W.S.,

"29 Queen Street, Edinburgh.

"Dear Sirs,

"*Rio Grande Rubber Estates Ltd.*

"*in Liquidation.*

"We were duly favoured with your letter of the 30th ulto. confirming the settlement herein on the terms arranged, subject to the approval of the Court being obtained and to your obtaining the approval of your clients individually. It is of course understood that the expenses paid to Mr Stuart Macdonald on 16th January 1913 under the Court of Session decree shall be repaid,—We are, yours faithfully,

"MITCHELLS, JOHNSTON, & Co."

In accordance with the said settlement the Lord Ordinary (HUNTER) on 14th July 1914 pronounced the following interlocutor:—" . . . Finds the defenders liable to the pursuer in expenses and remits the account thereof when lodged to the Auditor to tax and to report, with the direction that in fixing the amount of said expenses he shall take into consideration that the action is one of a series of 121 actions raised by different pursuers against the same defenders on the same grounds, the pursuers in all the actions being represented by the same counsel and agents."

The account of the pursuer's expenses as taxed by the Auditor was as follows:—

"*Febr.* 1912.

Taking instructions					£0	13	4	£0 10 0
Framing summons (fresh matter, say 2 shs.)					0	12	0	0 4 0
Instructing counsel to revise	£0	6	8½x		0	6	8	
Paid him fee and clerk	1	3	6½x		1	3	6	
	£1	10	2					
Instg. printer to print					0	3	4	0 3 1
Paid him (proportion)					0	2	3	
Revising proof print (7 pp.)					0	10	0	0 8 6
Attce. signetting								
Paid dues					0	2	6	
Serving on defenders and posts					0	3	9	
Making up process and lodging								
Writing duplicate inventory					0	1	6	0 1 6
Paid dues					0	10	0	
Borrowing defences					0	3	0	0 2 6
Making up papers for printer					0	6	8	0 5 8
Carry forward,					£4	18	6	£1 15 3

	Brought forward,			£4	18	6	£1	15	3
Framing title page and index				0	3	0	0	2	6
Instg. printer to print				0	3	4	0	3	1
Paid him (one-half)				0	6	9			
Revising proof print of open record				0	10	0	0	9	0
Attce. lodging prints and intg.				0	5	0	0	4	0
Returning process				0	1	6	0	0	3
May 1912.									
Case out in adjustment roll—going over process and preparing for adjustment				0	13	4	0	13	4
Framing inventory of productions and copy				0	4	6	0	4	6
Attce. lodging				0	3	4	0	3	4
Paid dues				0	2	6	0	2	6
Instg. counsel to attend				0	6	8	0	6	2
Paid him fee and clerk				1	3	6	1	2	0
Attce. with defenders' agent arranging that one case shall be taken as a test case and the others sisted				0	2	6	0	2	3
Attce. in Court—productions held satisfied and cases sisted				0	6	8	0	5	8
Procuring interlocutor and booking				0	4	10	0	4	4
Copy for client				0	1	6	0	0	3
Jany. 7, 1913.									
Defenders having intimated motion to have sist recalled, instructing counsel to attend and oppose	£0	6	8 2/x	0	6	8			
Paid him fee and clerk	1	3	6 2/x	1	3	6			
Jany. 8, 1913.									
Attce. in Court—motion dropped	0	6	8 2/x	0	6	8			
Jany. 13, 1913.									
Attce. in Court—motion again renewed and refused	0	6	8 2/x	0	6	8			
Jany. 27, 1913.									
Attce. in Court—motion again renewed and refused	0	6	8 2/x	0	6	8			
Feby. 19, 1913.									
Attce. in Court—motion again renewed and refused	0	6	8 2/x	0	6	8			
	£2	16	10						
July 1914.									
Meetings and correspondence arranging settlement	£0	5	0 3/x	0	5	0			
Instg. Mr Sandeman for consultation and as to same	0	6	8 3/x	0	6	8			
Paid him fee and clerk	2	7	0 3/x	2	7	0			
Instg. Mr Christie	0	6	8 3/x	0	6	8			
Paid him fee and clerk	1	3	6 3/x	1	3	6			
Arranging consultation	0	5	0 3/x	0	5	0			
Attendance at same	0	6	8 3/x	0	6	8			
	£5	0	6						
Case having been settled and having failed to adjust joint minute—									
Framing minute (2 shs.)	£0	6	0 4/x	0	12	0	0	6	0
Extending same (2 shs.)	0	1	6 4/x	0	3	0	0	1	6
Attce. lodging	0	1	0 4/x	0	3	4			
Paid dues	0	2	6 4/x	0	2	6	0	2	4
	£0	11	0						
Attce. in Court on defenders' enrolment when their motion dropped, as they had not sisted themselves	£0	6	8 5/x	0	6	8			
Enrolling for Tuesday	0	3	4 5/x	0	3	4			
Instg. senior counsel to attend	0	6	8 5/x	0	6	8			
Paid him fee and clerk	2	7	0 5/x	2	7	0			
Instg. junior counsel to attend	0	6	8 5/x	0	6	8			
Paid him fee and clerk	1	3	6 5/x	1	3	6			
Attce. in Court—decree pronounced	0	6	8 5/x	0	6	8			
Procuring interlocutor and booking	0	4	10 5/x	0	4	10			
	£5	5	4						
Borrowing process	£0	3	0 6/x	0	3	0			
Framing account of expenses (4 shs.)	0	8	0 6/x	0	8	0			
Copy to lodge (4 shs.)	0	8	0 6/x	0	8	0			
Copy to intimate (4 shs.)	0	4	0 6/x	0	4	0			
Attce. lodging, fixing diet, and intimating	0	6	8 6/x	0	6	8			
Paid dues	0	12	6 6/x	0	12	6			
Attce. at taxation	0	6	8 6/x	0	6	8			
Returning process	0	1	6 6/x	0	1	6			
	£2	10	4						
Borrowing productions				0	3	0	0	3	0
Carry forward,				£26	14	3	£6	12	3

Brought forward,				£26	14	3	£6	12	3
Enrolling for approval and intimating				0	3	4	0	2	10
Attce. in Court—report approved				0	6	8	0	5	8
Procuring interlocutor and booking				0	4	10	0	4	4
Copy for extractor				0	1	6	0	0	3
Ordering and procuring extract				0	10	0	0	9	0
Session fee				0	10	6	0	8	0
Posts, &c.				0	2	6	0	1	6
				£28	13	7	£8	2	10
Less				8	2	10			
				£20	10	9"			

The Auditor appended the following report:—

"*Edinburgh, 20th November* 1914. — In obedience to a remit by Lord Hunter, the Auditor has examined the foregoing account and taxed the same in presence of the agents for the parties at the sum of twenty pounds ten shillings and ninepence (£20, 10s. 9d.) sterling. J. SMITH CLARK."

Note.—"The Auditor has in the first place taxed the foregoing account as directed by the Lord Ordinary.

"As the account is one of a series of 121 it would obviously lead to absurdity if full charges were to be allowed in each case. For example, a single half-hour's attendance in Court would entitle the agent to 6s. 8d. × 121 = £40, 6s. 8d. A similar result would follow in the case of other fees of the agent and of counsel.

"The Auditor has done his best to fix a *quantum meruit* as to each fee, and this in his opinion may be allowed in this and each of the other 120 cases subject to the following qualifications:—

"1. Fees marked thus — 1/x, £1, 10s. 2d. Counsel having been allowed a full fee in *Mair's* case and a modified fee in this case for revising the summons, the Auditor is of opinion that it was unnecessary to have the summons revised by counsel in the remaining cases. If the Court should allow revisal in each case the above £1, 10s. 2d. should be restricted to 2s. 6d., which multiplied by 121 would yield £15, 2s. 6d. instead of the said £1, 10s. 2d.

"2. Fees marked thus—2/x, £2, 16s. 10d. Here the defenders contend that only one case was enrolled and moved, and that there is no reason for allowing these fees in the 120 cases in which no motion was made. The pursuer contends that all the cases were moved. The Auditor after hearing parties adopt the defenders' view.

"3. Fees marked thus—3/x, £5, 0s. 6d. The Auditor has allowed full fees to the agents and counsel for settling in *Mair's* case and in this case. He sees no reason why these fees should be repeated in the remaining cases. If he had formed a different view he would have allowed a modified sum in this and each remaining case of 3s., *i.e.*, £18, 3s. 0d., instead of the above £5, 0s. 6d.

"4. Items marked 4/x, 11s. The defenders maintain that no minute will be necessary in the other cases. That is a question for the Court to determine, and the 11s. in each case will follow the result.

"5 and 6. Items marked 5/x and 6/x, £5, 5s. 4d. and £2, 10s. 4d. These expenses obviously need not be incurred in the other cases. There will be an enrolment and one attendance for decree and also for decree for costs, and this has been allowed.

"Assuming that the foregoing views should be approved of by the Court, the expenses falling to be awarded in each of the other cases would be as follows:—

Taxed amount of the foregoing account - - - - -					£20	10	9
Deduct items	1/x	-	£1	10	2		
do.	2/x	-	2	16	10		
do.	3/x	-	5	0	6		
do.	5/x	-	5	5	4		
do.	6/x	-	2	10	4		
						17	3	2
Sum to be awarded - -					£3	7	7

"But subject to the determination of the Court as to the items 4/x, 11s."

The pursuer having lodged a note of objections to the Auditor's report on his account of expenses, the Lord Ordinary on 2nd December 1914 pronounced the following interlocutor—"The Lord Ordinary having heard counsel on the note of objections by the pursuer to the Auditor's report on his account of expenses, repels said objections, approves of said report, and decerns against the defenders for payment to the pursuer of the sum of £3, 10s. 6d., being the taxed amount of the account incurred by the pursuer William Adam as an individual pursuer, amounting to £3, 7s. 7d., plus the sum of two shillings and ninepence, being his proportion of the expenses jointly incurred by the pursuers in the one hundred and twenty-one actions applicable to the present action."

Opinion.—"The situation in which this objection to the Auditor's taxation of the account remitted to him in the case of *Adam* v. *Rio Grande Rubber Estates, Limited*, is altogether a novel and exceptional situation. A number of shareholders of a company were dissatisfied with purchases of shares which they had made, and brought actions of reduction against the company upon the ground that they had been induced by fraudulent misrepresentation on the part of representatives of the company to take the shares. Only one action was discussed—that was the action at the instance of Mr Mair—and the other actions, over 120 in number, were sisted before the records were closed. In the case of Mair I took the view that no relevant case had been stated against the defenders, and that view was affirmed in the Inner House. On the case going before the House of Lords a different view was taken, and it was held that the pursuer was entitled to a proof of his averments. Following upon the judgment of the House of Lords the company went into liquidation, and a settlement was effected of the different actions brought by the different shareholders.

"In terms of the settlement approved of by the Court the pursuers were to get their judicial expenses and £250 to cover extra-judicial expenses. A motion was then made in *Adam's* case to have the sist recalled and the pursuer found entitled to expenses. It was understood that the one case was to govern all the others. Looking to the very exceptional circumstances of the case, I thought that the proper method to deal with the matter was to remit the account to the Auditor with a special instruction, justified, as it appeared to me, by the altogether unusual position in which the litigation was. That instruction which I gave the Auditor in the case of *Adam* was that in fixing the amount of expenses he should take into consideration the fact that the account was one of a series of 121 actions raised by different pursuers against the same defenders on the same grounds, the pursuers in all the actions being represented by the same counsel and agents. It may be that such a direction has not been given before, but I considered that it was my duty to give the direction, and accordingly I gave it. The Auditor in taxing the account has dealt with the matter thus. Full expenses have been given to the pursuer in the case of Mair, which was the case that was first taxed before the Auditor. In the case of *Adam* the Auditor has also given full expenses. He has then added a note concerning the 120 remaining actions, and expressed the opinion that a sum of between three and four pounds should be awarded in each case. This amount is a portion of the account in *Adam's* case. Technically what the Auditor has done may not be within the terms of my interlocutor, but in effect he has carried out the direction which I have given him. In my opinion the result he arrives at is sound.

"The real objection taken by the pursuer was not upon the technical ground that there should be a remit to the Auditor in the other actions, which, of course, would result in nothing if in effect I take the same view as the Auditor; but that, as there was a settlement on the footing of the pursuers receiving judicial expenses, it was not within the power of the Court to pronounce such a direction as I gave in the interlocutor remitting *Adam's* account. I might take up the position that I cannot review what I have done; but even if I were reconsidering the matter I should not take a different view, because I think the course followed was in the circumstances justified.

"As regards the objections in detail which were taken, these were really all matters purely of taxation. I cannot say that the Auditor, who is the proper person to deal with such matters, has erred. I therefore repel the objections stated for the pursuer.

"In dealing with *Adam's* case separately I think the proper way to give effect to my direction and the Auditor's taxation is to take the amount of the account which the Auditor has taken as falling to each of the 121 pursuers and to add to that the balance divided by 121. This will give the pursuer a sum of £3, 10s. 6d., or, if the whole cases are looked at, the pursuers, in addition to recovering full expenses in Mair's case, will receive a sum of about £420 as judicial expenses in actions the records in which were never closed and the grounds of action were identical."

The pursuer reclaimed to the First Division of the Court of Session, and argued—To give effect to the agreement between the parties the Lord Ordinary should have awarded to the pursuer as full expenses as if the action had stood alone. In the *"Gunford" Ship Company, Limited* v. *Thames and Mersey Marine Insurance Company*,

Limited, 1910 S.C. 1072, 47 S.L.R. 860; 1911 S.C. (H.L.) 84, 48 S.L.R. 796, where the action was one of thirteen similar actions, full expenses had been awarded. The Auditor had here in fact modified instead of taxing the account of expenses, which the direction of the Lord Ordinary had not entitled him to do—*Karrman* v. *Crosbie*, June 3, 1898, 25 R. 931, Lord Trayner at 933, 35 S.L.R. 725; C.A.S., K, iv.

Argued for the (defenders) respondents—The litigation had in fact been conducted by a committee of the pursuers, who were the clients of the agents, except in so far as they were not empowered to settle the actions. On consideration of the settlement the intention of the parties was perfectly clear. "This case" referred to *Mair's* case alone. "Full judicial expenses" simply meant such expenses as the Court awarded. The interlocutor of the Lord Ordinary of July 14 was final on the merits of the case, and could not be opened up by later interlocutors. The remit to the Auditor was therefore past criticism—*Duncan, &c.* v. *Salmond, &c.*, March 17, 1874, 1 R. 839, 11 S.L.R. 169.

At advising—

LORD JOHNSTON—In order to substantiate claims by shareholders in the Rio Grande Rubber Estates Company against the Company to obtain a recision of their agreements to take shares, based on the allegation that the prospectus of the Company contained false and fraudulent statements, a number of actions of reduction were raised. I understand that there were 122 in number, that one was abandoned, one selected as a test case to try the question, and the other 120 sisted to await its decision. The test case was that of *Mair* v. *The Rio Grande Rubber Estates, Limited.* It was raised in March 1912, was dismissed as irrelevant by the Lord Ordinary in July 1912, and his interlocutor was affirmed by the First Division in November of that year, 1913 S.C. 183, 50 S.L.R. 125. But the Company appealed, and the judgment of the Court of Session was reversed in July 1913 and the cause was remitted to the Court of Session to allow a proof, 1913 S.C. (H.L.) 74, 50 S.L.R. 876. On this result of the appeal to the House of Lords being considered by the Company it was found expedient to put the Company at once in liquidation. All this time the remaining 120 actions raised had been sisted, and the liquidators of the Company had to make up their minds whether they were to go on with the proof in *Mair's* case or compromise with the recalcitrant shareholders. After some correspondence in February and March 1914 the litigation was settled in terms of letters of 30th March and 2nd April 1914. And the question now is how the expenses to be paid by the Company in liquidation to the shareholders under the agreement of settlement are to be adjusted.

It must be prefaced that the question at issue could not have been tried in one action by a combined set of 121 shareholders, notwithstanding that the conclusions of all the actions were the same. The imposition, if the allegations of falsehood and fraud were proved, concerned each shareholder separately and individually. Moreover, the 120 shareholders were not in safety to wait the decision in *Mair's* case, for if in the meantime the Company had gone into liquidation, as ultimately it did, they would have lost their remedy by delay. Accordingly the Company cannot complain that 120 separate actions were raised besides that of *Mair*. On the other hand, it is equally clear that each of the 120 shareholders was not entitled to expenses without consideration of the fact that the raising of so many separate actions, though necessary, was to a great extent a legal formality only, and involved neither the time and trouble nor the care which must have been devoted to each had it stood by itself. As to the way in which the litigation was conducted the whole pursuers placed themselves in the hands of the same counsel and agents, and I think that it was admitted that as far as possible the agents were instructed by a committee of the pursuers. But at the same time there was no suggestion, or at any rate no offer to prove, that this committee were in such sense promoters of the litigation, that they were *domini litis*, and therefore liable to the agents in any bill of costs. I must take it that each individual pursuer was liable to the agents in any costs incurred on his behalf, and would have been personally liable for the costs in his own individual action to the defenders had the actions resulted in decrees of absolvitor with expenses.

In these circumstances the Lord Ordinary took what appears to me to have been quite a proper course. After the liquidators had been sisted as defenders in the various actions, and after he had disposed of the test case of *Mair*, giving effect to the settlement which had been come to in terms of the letters of March and April 1914, and found Mair entitled to expenses, he took up as a sample of the 120 remaining cases that of William Adam, and in the same way disposed of it by interlocutor of 14th July 1914 in terms of the agreement. He found the defenders liable to the pursuer in expenses, and remitted the account thereof to the Auditor to tax and to report, with this direction, that "in fixing the amount of such expenses he should take into consideration that the action is one of a series of 121 actions raised by different pursuers against the same defenders on the same grounds, the pursuers in all the actions being represented by the same counsel and agents." I must draw attention here to the terms of this direction, where it speaks of the action as one of a series of 121 actions. In that series, therefore, the Lord Ordinary includes Mair's action, and not only Adam's action and the remainder of the 120 which had been sisted. It is necessary to keep this in view because Mair's action in its inception was exactly *in pari casu* with Adam's and the rest, and in following the direction to him the Auditor was bound to keep in view that Mair had received the full expenses to which he was entitled as an

individual litigant. Whereas at the same time Adam and the other pursuers had had the benefit not only of the results of but of what had been done in the preparation of Mair's action.

Returning to the terms of the agreement of March and April 1914, the pursuers' agents, in introducing the subject, speak of the settlement of "*this case*," but they are really providing for the settlement of 121 cases. They thus showed themselves fully alive to the fact that the actions, though necessarily initiated by 121 separate summonses, were really one case. They stipulated that the defenders were to pay their clients "full judicial expenses in all the actions," with a contribution of £250 towards extrajudicial expenses, impliedly also in all the actions, the £250 going indiscriminately to Mair as well as the 120 other pursuers. There is no real difference between full judicial expenses and judicial expenses; and judicial expenses are just those which the Court in the exercise of its judicial discretion allows in the circumstances of each case. The contention, therefore, that each individual pursuer was entitled to full expenses as these would have been awarded had he been sole pursuer is quite untenable, and the Lord Ordinary took the right course in the direction which he gave to the Auditor.

The Auditor, however has not carried out the Lord Ordinary's instruction exactly in terms in which it was given, and his failure to do so has made some difficulty in disposing of the present question. The Lord Ordinary has at the same time, by combining the Auditor's note with his report, deduced from the two what he thinks would have been the proper result had the Auditor more exactly followed the lines which he dictated to him. But between them I think the Lord Ordinary and the Auditor have hardly dealt full justice to the pursuers. The proper course to have taken was to have audited Adam's account, keeping in view the circumstance that it was incurred in one of 121 separate actions, all proceeding on the same lines, but which had of necessity to be raised separately, because the pursuers could not combine in one action. In so auditing the Auditor should, I think, have separated those charges in which the individual element predominated from those in which the common element predominated. With regard to the former class of charges, he should have allowed reasonable separate charges based on the footing that though separate there was a great amount of similarity in the business done. With regard to the latter, he should have treated them as nearly as possible as if the actions had been conjoined, apportioning a gross amount among the individual pursuers. I have carefully examined the account, but though the above is pretty much what the Auditor has done indirectly, I think that the Lord Ordinary and the Auditor have not sufficiently allowed for those items which I have characterised as having a separate element, and that they have not given sufficient consideration to the fact that though certain items of business are absolutely similar and in a sense might be regarded as though there was only one action, still in point of fact there were 121 separate processes. As regards the first class of charges, in each of the actions there was a separate client to deal with. For instance, when it came to the point of settlement nothing could be done without consent of each pursuer and without his being individually communicated with. In the same way none of the 121 actions could be initiated without seeing to the careful designation of each individual pursuer, without ascertaining the precise number of shares held by him and the amount paid up on these shares, and so on. And in the same way, though the basis of the print would be the same, care had to be taken that the print was altered with accuracy to correspond to the specialties of each individual case. As regards the second class of charges, the mere fact that 121 different processes had to be made up indicates generally what I mean.

I have, as I said, very carefully examined the account, and while I have checked what I shall propose by the examination of the individual groups of entries, I do not feel that I should be justified in dealing with the matter on the basis of such detail. The course which I think will most fairly meet the case is that of dealing with it generally by the addition to what the Lord Ordinary has allowed of an increased fee in each case of 10s. for taking instructions, and an increased session fee of 8s. These are the sums taxed off the respective fees by the Auditor. The former will allow something additional for the trouble connected with the separate features of the different cases, and the latter will cover any defect in the remuneration for the process trouble involved in there being so many actions. This will raise the award of expenses in Adam's case from £3, 10s. 4d. to £4, 8s. 4d., and will, *in cumulo*, add £108 to the gross expenses in the 120 actions which were sisted.

The LORD PRESIDENT and LORD SKERRINGTON concurred.

LORD MACKENZIE was not present.

The Court pronounced this interlocutor—

"Recal said interlocutor [of 2nd December 1914]: Sustain the note of objections for the pursuer . . . to the Auditor's report on his account of expenses . . to the taxation (1) of 10s. off the fee for taking instructions, and (2) of 8s. from the session fee mentioned on page 2 of said note; with this alteration, approve of the Auditor's report on the said account of expenses, and decern against the defenders for payment to the pursuers of the sum of £4, 8s. 4d., being the taxed amount of the said account incurred by the pursuer William Adam as an individual pursuer, amounting to £3, 7s. 7d. plus the sum of 2s. 9d., being his proportion of the expenses jointly incurred by the pursuer in the 121 actions

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

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

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

Friday, February 19.

SECOND DIVISION.

CARNEGY *v.* JOSEPH.

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

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

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

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

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

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