thought that there was nothing had it not been for the case of *Smith's Trustees*, and it seems to me rather more difficult than it appears to your Lordships to distinguish that case from the present.

I do not think there is anything in the words of the fourth purpose descriptive of the funds, to wit, "the free income and proceeds," to suggest that it is a fund from which income tax has been deducted; nor do I think that in the clause introduced by (*primo*) is there anything of that kind. But in the clause (*secundo*) I think that there is at least a suggestion that income tax has been deducted from the fund with which this particular clause is dealing. I think so, because there is not only a direction to the trustees to divide and pay the surplus income or revenue to certain other beneficiaries, but there is an alternative power given to them to retain and accumulate the surplus income or any part thereof with the capital. That indicates to my mind that before they can do so that surplus must be income from which no further deduction was liable to be made at the instance of anybody.

Your Lordships take a different view, and I do not feel constrained to differ from the result reached, because after all each will must be decided on its particular terms, and the phraseology of this will is certainly not identical with that in the case of *Smith's Trustees*. I should not myself have thought that the words "income and proceeds" are equivalent to the words "net annual proceeds" as these words are construed in that case, nor that the words here "surplus income or revenue" need have just the same effect as the word "balance" in that case. Therefore I agree in thinking that the questions may be answered as your Lordships suggest.

The Court answered the first question in the affirmative, and the third question in the negative.

Counsel for the First Parties—Mackay, K.C.—Taylor. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Second Parties—Chree, K.C. — D. Jamieson. Agents — Webster, Will, & Company, W.S.

Counsel for the Third Parties—Mackay, K.C.—Taylor. Agents—M. J. Brown, Son, & Company, S.S.C.

Friday, May 28.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

CURLE'S TRUSTEES *v.* MILLAR AND OTHERS.

Succession — Construction — Accretion — "Survivors."

Testamentary trustees were directed to hold the residue of the testator's estate, in equal shares, in liferent for the testator's son and two daughters and in fee for their issue; "In the event of my son or daughters or any of them dying without leaving lawful issue" the trustees were directed to hold "the fee . . . of the [shares in question] for behoof of the survivors of my said son and daughters . . . in the same way as . . . provided with regard to the shares originally taken by [such] survivor or survivors in their own right." Then followed clauses dealing with the case of children predeceasing the testator with and without issue; and then the settlement provided—"Failing any survivor of my said son and daughters or issue of any of them, I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables." The testator was survived by his three children. The son died without issue; a daughter predeceased the son but left issue; the other daughter survived the son and had issue. *Held* that the clause first above quoted applied literally to the circumstances which had arisen, to the effect of excluding the issue of the daughter who predeceased the son from taking any part of his share, and that its literal meaning was not to be departed from because of inferences founded upon the clause of destination-over, inasmuch as that clause only applied to the case of the children and their issue predeceasing the testator, which had not occurred.

Authorities upon the construction of "survivors" as equivalent to "others" *examined per* Lord President (Clyde).

Mrs Isabella Curle or Millar and another, the testamentary trustees of the late Robert Curle (*the testator*), *pursuers and real raisers*, brought an action of multiplepoinding against (1) Mrs Millar, who was a daughter of the testator, and others, and (2) the children of the deceased Mrs Lamont, another daughter of the testator, and others, *claimants*, raising questions as to the distribution of the estate of the testator.

The testator died on 8th June 1879 leaving a *trust-disposition and settlement*, whereby he conveyed his whole estate to the pursuers and real raisers for various purposes, which included the payment of an annuity of £80 to his widow and a bequest of £12,000 for his son, and with regard to the residue directed as follows:—"And further, I direct my trustees to hold and retain the residue and remainder of my means and estate for behoof of my three children, the said Robert Barclay Curle, Mrs Isabella Curle or Millar, and Mrs Jane Curle or Lamont, equally amongst them, share and share alike, the said shares being to be retained and invested as hereinafter mentioned—that is to say, I direct my trustees to hold and retain and invest the said shares in their own names, as trustees foresaid, for the respective liferent uses allenarly of my said son and two daughters, and for behoof of their lawful issue respectively in fee, in such proportions among such issue respectively if more than one child, and whether there be one or more children, subject to such restrictions and conditions as such son or daughters may

respectively direct by any deed or writing under their hands or signed by them respectively, to take effect at their decease respectively, and failing such appointment equally among such issue, if more than one child, share and share alike, but with power to my son and daughters who are or may be married to confer upon their wife and husbands respectively, if surviving, a liferent of not more than one-third of the whole of their respective shares should they respectively think proper notwithstanding of their leaving a child or children: And in the event of my son or daughters or any of them dying without leaving lawful issue, or of such issue all dying before majority or marriage, I direct my trustees to hold and retain the fee or capital of the said shares for behoof of the survivors of my said son and daughters equally among them, share and share alike, if more than one: And in the event of only one surviving, for his or her behoof in the the same way as is hereinbefore provided with regard to the shares originally taken by the said survivors or survivor in their own right: And in the event of any of my children predeceasing me leaving lawful issue, such issue shall in every such case receive, if more than one child, equally among them, share and share alike, the capital of the provisions which would have fallen to their deceased parent or parents in liferent had he, she, or they survived, but in the event of such deceasers leaving no lawful issue, then the capital of the provisions or shares provided for them in liferent shall be divided equally among my surviving children and the lawful issue of any of my children who may have died leaving such issue, such issue taking, if more than one child, equally among them the shares or proportions of shares the liferent of which would have fallen to their deceased parents had they survived, and be paid over or held and retained subject to the same conditions and provisions as regards liferent and fee, and otherwise in every respect as are hereinbefore provided in reference to the shares of my children and their issue; and failing any survivor of my said son and daughters or issue of any of them, I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables: And further, I authorise and empower my trustees, notwithstanding any conditions and limitations which my said son and daughters may appoint in regard to the capital of the shares falling to their issue respectively, to pay to or for behoof of such of the issue of my said son and daughters as may be in minority at the decease of their parent the annual proceeds of their shares respectively, or so much of such annual proceeds as my trustees shall think necessary for their maintenance and education, accumulating the remainder, if any, for their behoof respectively, and adding the same to the capital of their shares until they shall respectively attain majority if sons, or attain majority or be married, whichever of these events shall first happen, if daughters."

The pursuers and real raisers *averred*—"(Cond. 3) The testator was survived by his widow Mrs Jessie Margaretta Christie or Curle, who died in the year 1883, and by three children, viz., Mrs Isabella Curle or Millar, Mrs Jane Curle or Lamont, and Robert Barclay Curle. The said Robert Barclay Curle never married, and died on 12th December 1916 survived by his sister Mrs Millar, but predeceased by Mrs Lamont. Mrs Lamont died on 5th November 1909 predeceased by her husband, and leaving five children, viz., Henry Charles Lamont, Mrs Ada Curle Lamont or Brettell, Mrs Dora Chearnley Lamont or Chearnley, Mrs Frances Jane Curle Lamont or Kingscote, and Gerald Barclay Lamont, who died unmarried on 21st November 1913. Mrs Millar has two children surviving, Mrs Ethel Mary Millar or Schlemm and Miss Isobel Ada Millar; a third child, Robert Curle Millar, died unmarried in the year 1915. (Cond. 4) The said Robert Barclay Curle having died without issue one-half of the one-third share of the residue held for his behoof in liferent devolves on his sister, the said Mrs Millar, in liferent and her issue in fee. A question, however, has arisen as to the manner in which the remaining one-half of the said share falls to be dealt with in terms of the said trust-disposition and settlement, and in particular, whether it also devolves on the said Mrs Millar and her issue in liferent and fee respectively, or whether it falls to be held for or paid to the issue of the late Mrs Lamont. This one-half share (which is estimated to amount to not less than £15,000) is the fund *in medio* in this action."

The children of Mrs Lamont and their representatives, *claimants*, claimed to be ranked and preferred to the whole fund *in medio*, and *pleaded*—"1. Upon a sound construction of the testator's settlement, the claimants, as children of Mrs Jane Lamont, are entitled to the one-half of the share of residue liferented by their uncle Robert Barclay Curle, which would have been liferented by their mother if she had survived. 2. The claimants being the children or representatives of children of the deceased Mrs Jane Curle or Lamont are entitled in terms of their claims to the fee of one-half of the one-third share of the trust estate held by the pursuers and real raisers in liferent for behoof of the said Robert Barclay Curle."

Mrs Millar and her children, *claimants*, claimed to be ranked and preferred to the whole of the fund *in medio*, in trust for behoof of the claimant Mrs Millar for her liferent use and of her lawful issue in fee, and pleaded—"1. On a sound construction of the testator's trust-disposition and settlement, the claimants are entitled to have decree of ranking and preference to the fund *in medio* granted in terms of their claim. 2. The share of the residue of the testator's estate held for behoof of the said Robert Barclay Curle having passed, on his death without issue, to the said Mrs Millar, as the sole survivor of the testator's children, in liferent, and to her issue in fee, the claim of these claimants should be sustained."

The pursuers and real raisers also lodged claims.

On 9th July 1919 the Lord Ordinary

(BLACKBURN) pronounced the following interlocutor—"Finds, upon a sound construction of the trust-disposition and settlement of the late Robert Curle, mentioned on record, one-half of the one-third share of residue left for behoof of the late Robert Barclay Curle falls on the death of the latter to be held for or distributed among the claimants, the children or representatives of children of the late Mrs Jane Curle or Lamont," &c.

Opinion.—"By his trust-disposition and settlement, dated 13th December 1878, Robert Curle, who died on 8th June 1879, directed his trustees to 'hold and retain' the residue of his estate for his son Robert and his two daughters Mrs Millar and Mrs Lamont, in equal shares, for their respective liferent uses allenarly, and for behoof of their issue in fee. The deed contains a clause of devolution which directs the trustees in the event of any of the children dying without issue, 'to hold and retain the fee or capital of the said shares for behoof of the survivors of my said son and daughters, equally among them, share and share alike, if more than one. And in the event of only one surviving, for his or her behoof, in the same way as is hereinbefore provided with regard to the shares originally taken by the said survivors or survivor in their own right.' In the event which has now happened there is only one survivor of the children, the claimant Mrs Millar. Her sister Mrs Lamont died in November 1909 leaving issue, and her brother Robert in November 1916 leaving no issue. One-half of Robert's share of residue forms the fund *in medio*, and the question in the case is whether the trustees of the testator are to hold the fund *in medio* for the surviving sister Mrs Millar in liferent and for her issue in fee, or whether the issue of the predeceasing sister Mrs Lamont are entitled to it. If there was nothing more in the deed than the clause above quoted, the question would not be one of any difficulty, for it is quite settled that, however capricious or unreasonable such a provision may appear to be, the language admits of only one construction, which is arrived at by giving the word 'survivors' its natural meaning—*Swan's Trustees*, 1912 S.C. 273—and if this meaning is given, then Mrs Millar and her issue would be entitled to the whole of Robert's share of residue, including the fund *in medio*. It has been often argued against this construction that it may in some circumstances lead to intestacy, and in this case it would have done so had Robert Curle survived his sister Mrs Millar. The only case in which any effect has been given to this argument was in *Ramsay's Trustees* (4 R. 243), where the only alternative before the Court was to give a greater latitude to the meaning of the word 'survivor,' or to hold that the fund in question had fallen into intestacy, and the former alternative was adopted. This case has frequently been referred to as a very special one, and seems to be overruled by the case of *King* v. *Frost* 15 A.C. 548. If in the case now under consideration the clause of devolution stood alone, I should have attached no importance to the fact that the effect of giving the word 'survivors' its natural meaning might have led to intestacy.

"But there follows on the clause of devolution a clause which provides for the event of any of the testator's children predeceasing him leaving lawful issue, in which case the issue are to take the share of residue of which the parent would have enjoyed the liferent had he or she survived. Immediately following on this clause are the words 'and failing any survivor of my said son and daughters *or issue of them*, I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables.' In the record and in the print of the trust-disposition and settlement this clause is shown as separated by a comma only from the preceding clause, and is introduced by words printed in the same type as those which immediately precede and follow them. A reference, however, to the extract of the deed shows that the comma should be a colon, and that the words 'and failing,' by which this clause is introduced, are written in somewhat larger type than the preceding or following words, but not in such large type as the introductory words of other clauses in the deed. It is maintained for the issue of Mrs Lamont that this is a destination-over of the residue to provide against intestacy, and that the fact of its being so expressed as only to come into operation in the event of the failure of the liferenters, *or of the issue of any of them*, indicates that the testator intended to provide, and believed he had provided, for the complete disposal of the residue under the clause of devolution so long as there existed a survivor of the liferenters or surviving issue of a deceased liferenter. It was argued that to give effect to this intention it requires and justifies some latitude in the construction of the language of the clause of devolution. Either the word 'survivors' should be treated as equivalent to 'others,' or it should be construed as applicable not only to the liferenters, but also to the surviving issue of a predeceasing liferenter.

"It was argued for the other claimants that this destination-over was not intended to be of general application, but to be confined to the event dealt with in the clause which immediately precedes it, namely, the case of the testator being predeceased by all his children without their leaving any issue. It is in this connection that the punctuation assumes importance. It was admitted at the bar that the punctuation ought to be as I have stated, and not as it is shown in the record and the print. In my opinion this destination-over must be treated as one of general application, both on account of the punctuation, which appears to me to introduce it as a separate clause, and because the destination-over is to the heirs and representatives of the testator's own children, which appears to me to be more consistent with the case contemplated being that of their surviving him than of their predecease.

"It is apparently a settled rule in England that a clause of devolution followed by a destination-over, so expressed as only to come into operation in the event of the failure of a survivor of the liferenters, or of the issue of all of them, does require greater latitude to be given to the word 'survivor' than is admissible if no such destination-over exists. The rule is so stated by J. Kay in the case of *Bowman*, 1889, 41 Ch. Div. 531, though it appears to me that the learned judge misapplied it, for in that case the residue clause was not introduced by the words of failure, which alone can indicate, in my opinion, the testator's intention that the fund dealt with in the clause of devolution should not fall into intestacy so long as issue of the liferenters survive.

"The two leading English cases which illustrate the rule are *Wake* v. *Varah*, 1876, 2 Ch. Div. 348, and *Waite* v. *Littlewood*, 1872, 8 Ch. Ap. 71. These cases were founded on in argument in *Forrest's Trustees* (1884, 12 R. 389), where there was no destination-over, and where accordingly they had no application. Lord Shand refers to them in his opinion, at p. 394, and says—'If a case should arise in which there is a gift-over, it will be for consideration whether the effect of the terms in which the gift-over is made ought to be to control the destination of accrescing shares to survivors, but in the meanwhile that question is entirely open.' They were again founded on without success in *Ward* v. *Long* (1893, 20 R. 949), where, again, there was no destination-over, and Lord Kinnear in referring to them (p. 952) says—'The reasoning on which the cases of *Waite* v. *Littlewood* and *Wake* v. *Varah* were decided appears to me, if I may respectfully say so, to be very convincing, and if it were applicable to the will we are construing I should have no difficulty in following those decisions.' I am not sure that the question was quite so open as Lord Shand seemed to think, for in *Aberdein's Trustees* (1870, 8 M. 730), which was not referred to in either *Forrest's Trustees* or *Ward* v. *Lang*, and in which there was no reference to English authority, the same result was arrived at for much the same reasons. In that case there was a clause of devolution and a destination-over to a charitable institution in the event of the testator's two sons 'dying without lawful issue, or failing such issue.' This was held to entitle the issue of the predeceasing son to the fee of the share of his surviving brother, who died without issue. It was held in the case of *Hairsten* v. *Duncan* (1891, 18 R. 1158) that a residue clause in the will which is not so expressed as to be dependent on the failure of survivors or their issue has no effect upon the construction of the word 'survivors' in the clause of devolution. This decision does not touch the question in the present case, but supports the view I have indicated that the decision of Mr J. Kay in the case of *Bowman* was not sound.

"In *Paterson's Trustees* (1894, 21 R. 253) a specific sum had been settled on two nephews equally for themselves in liferent and their issue in fee, followed by the usual clause of devolution to survivors. The deed also contained a residue clause introduced by the words 'whom all failing.' One nephew died leaving issue, and the other subsequently died without issue. Lord Stormonth Darling (p. 255) held that the words 'whom all failing' expressly referred to the survivors of the two nephews and their issue mentioned in the clause of devolution. He accordingly had to consider the English cases I have referred to, and followed the result they have arrived at, holding that the context of the will justified him in construing the word 'survivor' in the clause of devolution as equivaleut to 'other,' and accordingly finding the issue of the predeceasing nephew entitled to the fee of the share of the survivor. This decision was affirmed by the Second Division in the absence of Lord Young, and dissenting Lord Rutherfurd Clark. Shortly afterwards another case was decided in the same Division—*Monteith* v. *Belfray* (1894, 21 R. 615)—in which there was no destination-over, and *Forrest's Trustees* and *Ward* v. *Lang* were followed. I read Lord Young's opinion in that case as indicating that he would have concurred in Lord Rutherfurd Clark's dissent in *Paterson's Trustees*. In this difference of opinion it is difficult to say that the question whether the English rule should be applied in Scotland is finally set at rest, but I think that I am bound to follow the decision in *Paterson's Trustees*. I do so with no reluctance, as I think that the opening words of the destination-over in this case sufficiently indicate the testator's intention that the clause of devolution should not be so strictly construed as to lead to what would be an apparently capricious result.

"But there remains a question in this case which at once illustrates the difficulties which may arise through any departure from the strict construction of the language of a clause of devolution. The testator gave his son and daughter a power of appointment of their shares among their issue. Mrs Lamont exercised this power, and the question arises whether the appointment applies to the share of the fund *in medio* which now accresces after her death, or whether her issue take this share as a direct gift to themselves free from any appointment by their mother. I know of no authority on this point, but it appears to me that if the word 'survivor' is held as equivalent to 'other,' then the issue of a child can only be held to take as representing their parent, and subject to the restrictions imposed by their parent on the share accrescing to them. I shall accordingly hold that the share of the fund *in medio* to which the Lamont family are entitled falls to be held for or distributed among them in terms of the deed of appointment by their mother."

The claimants Mrs Millar and others reclaimed, and argued—If the trust-disposition and settlement was clear and unambiguous in meaning, that meaning must be accepted. Only if a clause was ambiguous was it legitimate to have recourse to inferences based upon the general meaning of the deed as a whole and other considerations, but even then only to solve the ambi-

guity. In the present case Robert Barclay Curle's share was in question. He had survived the testator, but died without issue, survived by Mrs Millar and predeceased by Mrs Lamont, who left issue. Such a state of affairs was expressly provided for by the testator in the clause beginning—"And in the event of my son or daughters or any of them. . . ." The argument against those claimants was based upon the clause containing the destination-over to heirs and representatives in moveables. Those were to succeed failing any survivor of the testator's son and daughters or issue of any of them. The inference drawn from that clause was that if, as here, there were surviving issue they were preferred to the heirs and representatives in moveables. The claimants Mrs Millar and her children founded on the clause beginning—"And in the event of my son or daughters or any of them dying without leaving lawful issue. . . ." The destination-over did not apply to the facts, whereas the survivorship clause last referred to applied in terms. Yet the argument against the present claimants necessarily involved that the inference based on the destination-over clause was to override the express terms of the survivorship clause. The true construction of the deed was that the survivorship clause applied to the period after the testator's death, whereas the destination-over clause only applied to the period before the testator's death. So read both clauses became simple to understand. The topography of the deed indicated that that was the proper construction of the destination-over clause, for it followed after clauses dealing with the same period. If the deed was read in the other sense it would require to be entirely re-written to be intelligible, or to convey the meaning for which the claimants Mrs Lamont's children contended. If no date were fixed for the test of survivorship such as that of the testator's death, there must always be a survivor of three persons. It was fallacious to argue that it would be capricious if the issue were not to succeed to an accrescing share which would have gone to their mother if she had survived, for if so the common law was capricious, as unless expressly provided the issue of predecessors did not take the share which would have gone by accretion to their parent —*Henderson* v. *Hendersons*, 1890, 17 R. 293, 27 S.L.R. 247. The "said shares" in the destination clause must mean shares which could not have been paid away, but the contention of the claimants the children of Mrs Lamont would make the clause refer to shares which might have long been paid away and dissipated. The mere fact that the testator had favoured issue in other places in the deed meant that when he made no mention of issue as he did in the survivorship case he did not intend issue to benefit. Even if "survivor" were read as other" the clause in question would still require considerable modification to support the contention of the Lamont claimants. In *Swan's Trustees* v. *Swan*, 1912 S.C. 273, *per* Lord Skerrington at p. 278, 49 S.L.R. 222, the Court refused to give survivor anything but its natural meaning. The argument based on caprice was negatived. The words of the deed were less explicit than those here in question, and the result of the construction adopted would have been intestacy in certain events. In *Ward* v. *Lang*, 1893, 20 R. 949, *per* Lord Kinnear at p. 952, 30 S.L.R. 823, survivor was again read in its natural meaning, and two conditions necessary to admit of a different meaning being adopted were laid down, viz., the testator's language must be ambiguous, and there must be a plain indication elsewhere in the deed showing that the ordinary literal sense was not intended. Neither of those conditions applied here. The same construction had been adopted in *Forrest's Trustees* v. *Rae*, 1884, 12 R. 389, *per* Lord Shand at p. 393, 22 S.L.R. 285; *Hairsten's Judicial Factor* v. *Duncan*, 1891, 18 R. 1158, 28 S.L.R. 873; and *Monteith* v. *Belfrage*, 1894, 21 R. 615, 31 S.L.R. 499. In *Aberdein's Trustees* v. *Aberdein*, 1870, 8 Macph. 750, 7 S.L.R. 433, "survivor" had been read as "other" to the effect of letting in issue, but there the question was between issue and charities, and the testator plainly preferred issue. *Ramsay's Trustees* v. *Ramsay*, 1876, 4 R. 243, 14 S.L.R. 168, proceeded on the consideration that if survivor were read literally intestacy would result, but that was no longer good law in view of *Forrest's* case and *King* v. *Frost*, 1890, 15 Ap. Cas. 548. *Paterson's Trustees* v. *Brand*, 1893, 21 R. 253, 31 S.L.R. 200, where survivor was read as other, had been distinguished in *Monteith's* case from that case and from *Ward's* case. *Wake* v. *Varah*, 1876, 2 Ch. D. 348, *per* Baggally, J.A., at p. 352, and *Waite* v. *Littlewood*, 1872, L.R., 8 Ch. 70, were cases where the testator's language was defective. Disapproval of the construction of "survivor" as "other" was expressed in *Waite's* case (*cit.*), *per* Lord Selborne, and in *O'Brien* v. *O'Brien*, [1896] 2 I.R. 459. Pallas, C.B., at p. 467, only would adopt that construction because he was "coerced" into so doing. He also rejected the notion of stirpital survivance, *i.e.*, of a dead person through his descendants. That had never become part of the law of Scotland. The argument based on caligraphy and punctuation was wholly out of place except with reference to a holograph deed.

Argued for the claimants, Mrs Lamont's children—There was a clear inference from the destination-over clause that so long as any child of the testator or issue of such child survived, that child or issue was preferred by the testator to the intestate heirs. On the other hand, it was not clear whether the survivorship clause applied to the period before and after the testator's death or merely after it. If the survivorship clause applied to the period after the testator's death—and survivors was used literally—then at the death of the last survivor of the children without issue there would be intestacy, a result which should be avoided if possible. On the other hand, the destination-over clause could not be regarded as applicable merely to the case where all the children and their issue predeceased the testator—the caligraphy and punctuation of the deed indicated that the destination-over clause was not a mere pendant to the

preceding clause applying in the same circumstances, but was a new departure, for it was introduced by large letters and followed upon a colon. If the contention of the claimants, Mrs Millar and her children, was sound, then when the last survivor of the testator's children died after him leaving issue, the testator's own heir succeeded, whereas where the children predeceased him leaving no issue their heirs succeeded. Such a result was capricious. Those difficulties disappeared if the survivorship clause was read as referring to a child dying without leaving lawful issue at any time, and reading "survivors" as "others" including issue of predeceasing children, and the destination-over clause also read as referring to any time. The two clauses were then complimentary; the survivorship was intended to cover all cases where one or more *stirpes* survived, and the destination-over clause applied where all the *stirpes* failed. Such a construction gave "survivors" the same meaning everywhere in the deed, and was just the doctrine of stirpital survivance. Such a construction was authorised by the cases of *Ward*, *Forrest*, *Aberdein*, and *Paterson* (*cit.*) in Scotland, and was firmly fixed in England—*Waite's* case (*cit.*), *Badger* v. *Gregory*, 1869, L.R., 8 Eq. 78; *in re Bowman*, 1889, 41 Ch. D. 525, *per* Kay, J., at p. 531, cited and approved in *Harrison* v. *Harrison*, [1901] 2 Ch. 136, *per* Cozens-Hardy, J., at p. 142. Those claimants were therefore entitled to one-half of the share of Robert Barclay Curle.

At advising—

LORD PRESIDENT (CLYDE)—The testator, who died in 1879, was survived by three children, a son and two daughters. The only survivor of these three children is one of the daughters, Mrs Millar; she has issue still living. The other daughter, Mrs Lamont, died in 1909; she left issue, also still living. The son, Robert Barclay Curle, died in 1916 unmarried. By his trust-disposition and settlement the testator directed his trustees to hold and retain the residue of his estate for behoof of his said three children *nominatim*, equally among them, the shares to be retained and invested in the trustees' own names "for the respective liferent uses allenarly of my said son and two daughters, and for behoof of their lawful issue respectively in fee," subject to powers of appointment. The one-third share of residue which was retained and invested for Mrs Lamont's liferent devolved, in terms of this direction, upon her issue at her death.

The present question relates to the one-third share of residue which was retained and invested for Robert Barclay Curle's liferent. Mrs Millar and her issue contend that the whole of this share falls to be held by the trustees for her in liferent and her issue in fee. They found on the survivorship clause which follows immediately in the settlement after the direction above summarised. This survivorship clause is in the following terms—"And in the event of my son or daughters or any of them dying without leaving lawful issue, or of such issue all dying before majority or marriage, I direct my trustees to hold and retain the fee or capital of the said shares for behoof of the survivors of my said son and daughters equally among them, share and share alike, if more than one, and in the event of only one surviving, for his or her behoof in the same way as is hereinbefore provided with regard to the shares originally taken by the said survivors or survivor in their own right." If these words are to be read according to their ordinary and natural meaning, the contention of Mrs Millar and her issue succeeds. Mrs Millar is the "only one surviving" of the testator's three children, and the share now accrescing to her by survivorship being directed to be held and retained for her behoof in the same way as was provided in the settlement with regard to the share "which she originally took in her own right," it would follow that the trustees must hold and retain the now accrescing share for her in liferent allenarly and for her issue in fee.

But Mrs Lamont's issue claim to participate equally with Mrs Millar and her issue in the now accrescing share, and this claim the Lord Ordinary has sustained. The argument is that the testator's true intention, as that is to be gathered from the residuary directions as a whole, is to include the issue of predeceasing children, along with surviving children and their issue, in the distribution of accrescing shares. They therefore ask us to disregard, or at anyrate to construe, the express gift in the survivorship clause in favour of the "survivors" and the "only one surviving" of the children, so as to admit of the true intention of the testator receiving effect; and they found on (1) the fact that the survivorship clause, literally read, would result in intestacy in the event of the only one surviving of the children dying without issue; (2) the alleged unreasonable or capricious preference in the survivorship clause for the surviving children and their issue over the issue of predecessors; (3) the condition attached to certain words of gift-over which occur near the end of the residuary directions—which condition they say implies, in the event which has occurred, a gift to the issue of predecessors equally with survivors and their issue; and (4) the authority of certain cases in which the word "survivors" in a survivorship clause has been read to mean "others," with the effect of admitting the issue of predeceasors to participate in accrescing shares.

Before examining this argument it is necessary to explore the remaining parts of the residuary directions. Immediately following the survivorship clause there comes a clause dealing with the event of any of the children predeceasing the testator. If they leave issue, such issue are to receive the capital of which their parents would, if surviving, have enjoyed the liferent; if they leave no issue then the "capital of the provisions of shares provided for them in liferent shall be divided equally among my surviving children and the lawful issue of any of my children who may have died

leaving such issue." Then come the words of gift-over—"And failing any survivor of my said son and daughters or issue of any of them I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables."

The case for Mrs Lamont's issue is that these words of gift-over are not a mere part of the clause to which they are appended—viz., the clause dealing with the event of any of the children predeceasing the testator—but form a clause by themselves, applicable or pendent both to that clause and to the preceding survivorship clause alike. They point to the condition on which the gift-over is to operate, namely, the failure not merely of any survivor of the children but also *of the issue of any of them;* and maintain that this condition implies a prior bequest in favour of the issue of any of the children, whether surviving or not.

Implied will and gift by implication are not unfamiliar principles in the law of testate succession in Scotland. Thus in *Aberdein* v. *Aberdein's Trustees* (1870, 8 Macph. 750, 7 S.L.R. 433) two sons received the liferent of the testator's estate in equal shares; on the death of either leaving issue such issue was to receive the fee of their parent's share; if the first deceaser died without issue his share was to accresce to the survivor and his issue; then came a gift-over to charities conditional on *both* sons dying without issue. The event of the first deceaser dying leaving issue while the longest liver died without issue was, so far as express provision went, wholly unprovided for. But that was precisely the event which actually occurred. Inasmuch as the condition on which alone the gift-over could have operated was that *neither* son left issue, the Court held that a prior bequest to the issue of the predeceaser was implied in the condition, although not expressed anywhere in the settlement, and so rejected the claim of the heir-at-law. It has been said of this decision that it is one of those in which the word "survivor" has been read as "other." But it is not really so. The case was a pure case of gift by implication. As Lord Justice-Clerk Moncreiff pointed out in his judgment, no violence was done to the words of the deed. All that was done was to imply a bequest relative to an event which was not provided for at all.

Now in the present case the express and clear language of the survivorship clause exactly meets the event which has occurred. It makes an express gift of the accrescing share to Mrs Millar and her issue. Accordingly if the condition in the gift-over carries the implication which Mrs Lamont's issue assign to it, the bequest so implied would be brought into direct competition or conflict with the express gift to Mrs Millar and her issue in the survivorship clause. It follows that the claim of Mrs Lamont's issue cannot receive effect without submitting the survivorship clause, and particularly the word "survivors" and the expression "only one surviving" therein occurring, to construction. It is an easy matter to construe words which are capable of two meanings, even though one of these be natural and ordinary and the other secondary and unusual; but this case is one in which the Court is asked to read "survivors"—a perfectly unequivocal term—as including its direct opposite, "predeceasors." Even in the case of a word having only one meaning, it is possible to control it by construction, if that is necessary, in order to make the settlement in which it occurs intelligible; but it is a condition of this being done that the deed, either as a whole or in some other important part of it, contains positive evidence from which the Court can be satisfied that to give the word its proper meaning would be inconsistent with the true intention of the settlement—in other words, that the testator had made a wrong or mistaken use of the word. There have been two cases before the Court in Scotland in which the construction contended for by Mrs Lamont's issue was applied to the word "survivors," with the effect of including among the participants in accrescing shares the issue of "other" children who had not survived, but on the contrary predeceased. The first of these is the case of *Ramsay* v. *Ramsay's Trustees* (1876, 4 R. 243, 14 S.L.R. 168). In that case there was no gift-over, and the claim of the heir-at-law was rejected by construing "survivors" to mean "others." The ground on which this construction was adopted was the simple one, that otherwise intestacy would occur under a settlement which appeared to be intended to dispose completely of the settled estate. That decision was distinguished in *Forrest's Trustees* v. *Rae* (1884, 12 R. 389, 22 S.L.R. 285), where the construction of "survivors" to mean "others" was rejected on what appear to be narrow grounds, for while the Court was not faced with the alternative of an immediate intestacy in the circumstances in which the case was presented, intestacy was none the less an admittedly inevitable result in other and quite possible circumstances. It was mentioned, but not followed, in *Hairsten's Judicial Factor* v. *Duncan* (1891, 18 R. 1158, 28 S.L.R. 873). Further, it is not consistent with the judgment of the House of Lords in *King* v. *Frost* (1890, 15 App. Cas. 548). It is accordingly not possible to treat *Ramsay* v. *Ramsay's Trustees* as an authoritative precedent in the present case. The second case is that of *Paterson's Trustees* v. *Brand* (1893, 21 R. 253, 31 S.L.R. 200). In it there was not only a possible intestacy but a conditional gift-over, and it was the implication from the condition which was held to make the construction of the words "survivors," as equivalent to "others," not only admissible but "irresistible." Lord Rutherfurd Clark, however, dissented from the judgment. In *Hairsten's Judicial Factor* v. *Duncan* there was no gift-over, and the decision followed that in *Forrest's Trustees* v. *Rae* in rejecting the proposed artificial construction of the word "survivors." Again, in *Ward* v. *Lang* (1893, 20 R. 949, 30 S.L.R. 823) the absence of a gift-over, or (using Lord Kinnear's words), "of any *positive* expression of

intention" adverse to the literal interpretation of the word "survivors," was held fatal to arguments in support of the artificial interpretation, founded on the possibility of intestacy, and also on the supposed unreasonable or capricious nature of provisions which "enlarged the liferents of surviving children rather than added to the capital already paid over to grandchildren." In *Monteith* v. *Belfrage* (1894, 21 R. 615, 31 S.L.R. 499) there was also no gift-over; and the case being considered indistinguishable from *Ward* v. *Lang* the proposed artificial construction was again rejected.

Two conclusions relevant to the present case appear to follow from these cases. The first is that neither a possible intestacy, nor the so-called capricious character of the survivorship clause provisions, is a consideration which, by itself, affords any ground for adopting the artificial construction of the word "survivors" occurring in the survivorship clause. The second is, that in the condition attached to the gift-over there may, according to the particular terms of the condition, and of the settlement generally, be found evidence of the testator's true intention strong enough to show that the word "survivors" in the survivorship clause is wrongly used, and that "others" is meant. Now in the present case the condition attached to the gift-over is the only positive evidence of such intention which Mrs Lamont's issue have been able to find in the settlement. It follows that the passage in the Lord Ordinary's opinion in which his Lordship affirms the applicability of the gift-over to the survivorship clause is of crucial importance. For if the gift-over is only a part of the clause dealing with the event of children predeceasing the testator (to which it is appended), there is no evidence of intention on which Mrs Lamont's issue can found, neither the possible intestacy nor the alleged capricious character of the provisions of the survivorship clause being of themselves sufficient.

The position and sequence in the settlement of (first) the primary gift of the three shares to the children and their issue respectively, (second) the clause providing for survivorship among the children *inter se*, (third) the clause dealing with the case of children predeceasing the testator, and (lastly) the words of gift-over, give me *prima facie* the distinct impression that the words of gift-over are part and parcel of the clause to which they are immediately pendent, and have nothing to do with the survivorship clause. What is sometimes called the geography of the settlement points strongly to this result. In the principal settlement, however, a colon separates the words of gift-over from the preceding passage, and the words "and failing," which are the first of the words of gift-over, are written in a larger hand than the words occurring immediately before and after them, but without a capital initial, such as is sometimes employed in writing the first word of a fresh clause in other parts of the settlement. Upon these matters we were referred to the decision and opinions in the case of *Turnbull's Trs.* v. *Lord Advocate* (1918 S.C. (H.L.) 88, [1918] A.C. 337, 55 S.L.R 208). I am unable to derive any help from either the punctuation or the caligraphic style adopted by the engrossing clerk in extending this deed. Colons are the only form of punctuation used in it except where the names of several persons succeed each other (in that case commas are employed to divide the names), and in the testing clause, where two full stops occur. But if the deed as a whole is examined I find the colons—both in the use and in the omission of them—are treated without regard to any consistent or rational principle of composition known to myself; and I am unable to regard the employment of the particular colon founded on by counsel for Mrs Lamont's issue as having the effect of giving to the words of gift-over any larger application than their geographical position in the settlement naturally suggests. The same remarks apply to the size of the handwriting and to the initial letter. There is more in the point referred to by the Lord Ordinary as to the objects of the gift-over, but it appears to me wholly insufficient to outweigh the considerations to which I am about to allude. (1) It will be observed that the survivorship clause and the immediately succeeding clause (which deals with the case of children predeceasing the testator) are in marked contrast. The latter contains *in extenso* the very direction which Mrs Lamont's issue seek to read into the survivorship clause by construing the word "survivors" as therein occurring to mean "others." This makes the contrast all the more remarkable. The provision in favour of the issue of predeceasing children is as conspicuous by the full and precise language employed to make it in the clause dealing with predecease of the testator as it is conspicuous by the total omission of all reference to it in the clause dealing with predecease of the children *inter se*. (2) Moreover, the words of the gift-over follow appropriately, and correspond exactly with, the words of the express gift to survivors and the issue of predeceasers in the former clause, but read disjointedly and unexpectedly if they are applied to the latter. (3) Again, if Mrs Lamont's issue are right the event described by the words "and failing any survivor of my children and their issue" with which the gift-over begins, must be supposed to refer to survivance at both of two quite different points of time—(*a*) the decease of a child, (*b*) the decease of the testator. This is a most improbable conjecture. (4) Further, the direction "to pay over *the said shares*" in the gift-over, though perfectly apt and consistent if the gift-over applies to the immediately preceding provision, would require to be read "to pay the said share or shares as the case may be" if it is made to apply to the survivorship clause. (5) Lastly, even if we could read "survivors" as meaning "others" in the survivorship clause, I am by no means satisfied that this would overcome the further difficulty presented by the expression "only one surviving" which occurs in the part of the clause

directly applicable to the event with which the present case is concerned. It is true that a direction, "in the event of any of the children dying without issue, to hold and retain the capital for behoof of the others of my said son and daughters in the same way as is provided with regard to their original shares" (*i.e.*, in liferent for them and for their issue in fee) would receive effect as regards the capital rights of the issue even though the child (parent of such issue) had not lived to take his or her liferent of it. But what would be the effect of reading the words "in the event of only one surviving" to mean "in the event of there being only one other?" *Ex hypothesi* there were three children, and it would not be consistent to read these words as referring to the reduction of their number to one by events fully and separately covered by the immediately succeeding clause. I have not noticed this feature as occurring in any of the cases which have come before the Court, at any-rate in Scotland. The difficulty might have been comparatively easy to overcome if the expression used had merely been "survivors" or "survivor." It was perhaps for this reason that counsel for Mrs Lamont's issue reminded us that in the English case of *Waite* v. *Littlewood* (1872, L.R., 8 Ch. 70) Lord Chancellor Selborne dissented from the language which, as his Lordship said, pervades almost all the cases of this kind—that the question is whether the word "survivors" is to be read "others"—and suggested that a better construction would be to hold "survivors" as meaning "survivors either actually in person or figuratively in their stirpes." This further refinement has not, however, been hitherto expressly adopted in this country, and notwithstanding the high authority on which it was recommended in England, I should be disposed respectfully to deprecate any further opening of the door in Scotland to extended facilities for the application of what is, in any view of it, a highly artificial construction.

In the result, I think the interlocutor reclaimed against should be recalled, and that the trustees should be ranked and preferred in terms of the first alternative branch of their claim.

LORD MACKENZIE—The testator, who died in 1879, was survived by his widow, who died in 1883, and by three children, viz., Mrs Isabella Curle or Millar, Mrs Jane Curle or Lamont, and Robert Barclay Curle. Robert Barclay Curle never married, and died on 12th December 1916, survived by his sister Mrs Millar but predeceased by Mrs Lamont.

The testator directed his trustees to hold and retain the residue of his estate for behoof of his three children equally among them, share and share alike, the shares being to be retained and invested for the respective liferent uses of the son and daughters and for behoof of their lawful issue in fee.

Then follows the clause which is directly applicable to the circumstances which have arisen, viz.—"And in the event of my son or daughters or any of them dying without leaving lawful issue, or of such issue all dying before majority or marriage, I direct my trustees to hold and retain the fee or capital of the said shares for behoof of the survivors of my said son and daughters equally among them, share and share alike, if more than one, and in the event of only one surviving for his or her behoof."

It is contended for the Lamont family that one-half of the one-third held for behoof of Robert Barclay Curle devolved upon the children or representatives of children of Mrs Lamont although she predeceased Robert Barclay Curle. This is the contention given effect to by the Lord Ordinary. I am unable to take the same view. The express language of the clause I have just quoted seems to me in terms to give Robert Barclay Curle's share to Mrs Millar. She is the only one surviving. The argument for the Lamont family was that "survivors" is to be read as equivalent to "others." This, however, would not enable them to succeed. What they desire is to insert at the end of the clause some such words as —"and for behoof of the issue of those who may have predeceased." It is said that although this cannot be taken from the clause if it stood alone, that if the deed is read as a whole this meaning is to be attributed to the testator.

The clause which immediately follows, which I do not require to quote, shows that the writer of the deed when he wanted to call issue of predeceasers did so in express terms. The language of this clause by its plain contrast with the earlier one emphasises the point that the issue of predeceasers were purposely omitted in the earlier clause.

The clause upon which the Lamont family found their argument is the one which immediately follows—that which makes provision for the event of any of the testator's children predeceasing him.

It runs thus—"And failing any survivor of my said son and daughters or issue of any of them I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables." In my opinion this clause is the pendant to the one which it immediately succeeds. It fits that clause. It does not fit the clause above quoted. This consideration to my mind outweighs any inference to be derived from punctuation. The word "failing" must refer to a point of time, and the most natural time to take is the death of the testator. The clause contemplates, not the contingency which has occurred of failure of one child, but the complete failure of all three, for the whole money is to go over.

I am unable to hold that this clause of devolution is sufficient warrant for compelling the conclusion that the testator must be held to have thought he had made a gift to the issue of predeceasing children in the first clause.

It may be that the doctrine of stirpital survivance may be invoked in Scotland in some future case if and when the language of the deed requires it. I think there is no room for it in the present case if the canon

of construction explained by Lord Kinnear in *Ward* v. *Lang* (20 R. 949, 30 S.L.R. 823) is adopted. What is there said, at p. 953, is that in order to bring into operation the rule of construction which was followed in *Waite* v. *Littlewood* and *Wake* v. *Varah*—"It is necessary in the first place to find from the indications of the will, apart from the clause immediately under construction, some reason for holding that the literal language of that clause is inadequate to express the full meaning of the testator, and then to find in the will some clear indication of an intention to do something different from what a literal interpretation of the clause would infer." I am therefore of opinion that the reasoning of Lord Stormonth Darling in the case of *Paterson's Trustees* (1893, 21 R. 253, 31 S.L.R. 200) does not apply to the present case.

I am accordingly of opinion that the argument advanced on behalf of Mrs Millar is entitled to prevail.

LORD SKERRINGTON—The Lord Ordinary has decided that a clause of accretion expressed to be in favour of the survivors or survivor of the testator's children, but which makes no mention of the issue of predeceasing children, ought in respect of the context of the bequest to be construed so as to give one-half only of an accruing share to the last survivor of the testator's children and her family, and so as to give the other half to the issue of a child of the testator who was dead at the time when the clause of accretion came into operation. The testator had only three children (a son and two daughters), all of whom survived him. To each by name he bequeathed an equal share of the residue of his estate, but he directed the shares, both original and accrescing, to be retained and invested by his trustees for behoof of his children in liferent only and of their issue respectively in fee. The dispute relates to the share liferented by the testator's son, who died unmarried.

In the absence of some cogent reason to the contrary, the word "survivor" must be held to bear what Lord Macnaghten—*King* v. *Frost*, 15 App. Cas. 548, at p. 553—describes as its "obvious ordinary and natural meaning." On the other hand, in referring to a settled share where the interests of the *stirps* are of course predominant, it is not unnatural that a testator should slip into inaccurate language, and should include within the description of children who survive a particular event a child who though dead at that date has left a family to represent him. In every case of this kind the question is whether the context of a bequest to "survivors" and the general scheme of the will, or either of them, afford conclusive evidence that the bequest was intended to benefit every child of the testator who should survive a particular event either in his own person or in that of a descendant.

The Lord Ordinary bases his judgment upon the implication to be derived from the fact that the will contains a destination-over of the residue in the following terms, viz.—"And failing any survivor of my said son and daughters or issue of any of them, I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables." If these words had followed immediately after the clause which we have to construe and which gives an accrescing share to the survivors or survivor of the testator's children, or if the language of the gift-over had made it certain that it was intended to be read in connection with that clause, I should have seen much force in the Lord Ordinary's reasoning, though I have not thought it necessary to form a definite opinion upon the question whether the implication would have been so clear and certain as to justify his conclusion. It seems to me, however, to be plain both from its position in the will and from the language employed that while the gift-over was certainly and admittedly intended to take effect in the event of the testator being survived by none of his descendants, it was not intended that it should also operate in the event of his being survived by descendants who afterwards became extinct. In short, the destination-over is the continuation and completion of the clause which immediately precedes it, in which the testator provides for the contingency of one or more of his children dying during his own lifetime, and in which he makes it quite clear by the use of appropriate and umambiguous language that if any of his children should predecease him leaving issue, such issue were to receive the capital of the share, both original and accrescing, which the parent would have liferented if he or she had survived the testator. It would be idle to speculate as to why it was that the testator provided in very different language for the consequences of a child predeceasing him and for the consequences of a child surviving him and then dying. It is enough for me that he has chosen to make his will in this way, and that it is the merest conjecture to argue that two clauses essentially different in their language were intended to be identical in their operation. It was suggested in the course of the debate that a gift-over to heirs *in mobilibus* was inappropriate and unnecessary in the case of any child of the testator who survived him, seeing that each such child had an "original gift" which conferred upon him a vested right to his share if the settlement thereof should prove ineffective, but I express no opinion as to this, the point not having been argued.

The Lord Ordinary holds that the destination-over which I have quoted "must be treated as one of general application both on account of the punctuation, which appears to me to introduce it as a separate clause, and because the destination-over is to the heirs and representatives of the testator's own children, which appears to me to be more consistent with the case contemplated being that of their surviving him than of their predecease." I have difficulty in appreciating this reasoning in either of its branches. Assuming that the gift-over should be regarded as a separate clause, it must still, on the Lord Ordinary's view, be construed as one "of general application"; in other words, it must be read in

connection with each of two other separate and independent clauses in which words of survivorship are used with reference to different events—the death of the testator in the second clause, and the death of a child of the testator in the first clause. Accordingly it would be necessary to attribute to the word "survivor" in the third or gift-over clause two entirely different meanings according as one reads it in connection with the one or the other of the two clauses which precede it. Moreover, the Lord Ordinary's view sins against the sound rule that the various parts of a will ought, if possible, to be read so as to harmonise and not so as to conflict with each other. He regards the destination-over as inconsistent with the plain and natural meaning of the accretion clause which has to be construed, and I assume that he is right in this opinion. None the less he proceeds quite unnecessarily to link together these two clauses and to use their supposed connection as an argument for putting a strained construction upon one of them, disregarding the fact that if the destination-over is read in connection with the clause which immediately precedes it and no other, there is complete harmony between every part of the will.

For these reasons I agree with your Lordships that the interlocutor reclaimed against should be recalled and that the claim for Mrs Millar and others, and the first alternative of the claim for the trustees, should be sustained.

LORD CULLEN—The words of the clause in the settlement on which the present question immediately arises are not, taken by themselves, ambiguous, and they exclude the claim of the respondents, in respect that Mrs Millar was the only one of the testator's children who survived the son Robert.

It is suggested by the respondents that the clause, if read by itself, would lead to intestacy in the event of the longest liver of the children dying without issue. This may or may not be. The matter was not made the subject of debate. There may be room for an argument to the effect that there was an original gift to each child of the fee of his or her share subject to defeasance which, in the event figured, would have left the longest liver undivested. But, on the contrary assumption, I should be unable to find in such defect of completeness in the scheme of testamentary disposition any sufficient ground for reading the clause otherwise than in accordance with the ordinary and plain meaning of the words used in it.

There is a very marked contrast between the terms of the clause in question and that immediately succeeding it, which deals with the case of children predeceasing the testator, as regards rights conferred on their issue. The latter clause goes about, clearly and unmistakably, to give to issue of an earlier predeceasing child the kind of right in the share of a child predeceasing later without issue which the respondents seek to import into the clause in question although it is not expressed therein. The difference between the two clauses, standing side by side in the deed, is very striking. As a matter of construction, one must take it that the difference was considered and deliberate on the part of the testator. The argument for the respondents afforded no answer to the question why the two clauses should have been expressed so differently if their view is well founded. It is to be observed, further, that the clause in question, so far as it does refer to the rights of issue of a child, differs from the clause following it in adjecting survivance till majority or marriage as a condition of the right to take in fee.

The whole case for the respondents in these circumstances is based on the clause which runs, "and failing any survivor of my said son and daughters or issue of any of them, I direct my trustees to pay over the said shares of my said son and daughters to their nearest heirs and representatives in moveables." Now this clause, regarded both as to its collocation and the language used in it, is plainly the concluding part of the scheme of disposition relating to the case of children of the testator predeceasing him. Immediately before, the testator has provided for the case of some of his children predeceasing him. He then goes on in the clause under notice to provide for the case of their all predeceasing him without issue, and he directs what is to be done with the whole residue in that event. The respondents allow that the clause under notice does so form part of the said scheme of disposition relating to predecease of the testator. They contend, however, that such is not the sole application of the clause. They say it has two applications, and that in the other of these it forms such an addition to the earlier clause here directly in question as to produce the result for which they contend. The respondents were at some difficulty in giving the verbal rendering of the clause under notice which would so serve their purpose. As I understand their view, however, they read it as including a direction that in the event of the testator being survived by children and of the longest liver of these dying without issue and not survived by any issue of any other child dying earlier, the share of such longest liver should be paid to his nearest heirs and representatives. And so read, it gives rise, they say, to the implication that if there should be issue of an earlier dying child surviving such longest liver they should take the share so destined over only on their failure. I am unable to assent to this view. It seems to me to do unjustifiable violence as matter of construction to the terms of the clause under notice. It involves reading the words "and failing any survivor of my said son and daughters" in two quite different senses. In one, survivance of the testator by his children is meant. In the other, survivance among his children after his death is meant. Again, what is expressly subjected to destination-over by the actual words of the clause in the event of the failure of survivance contemplated in it is the whole residue—"the said shares of my son and daughters"—while the respondents' proposed application of it to the clause here

directly in question would subject to destination-over so much only of the residue as had been taken by the said longest liver. It appears to me clearly enough that the respondents' double application of the clause under notice is not tenable, and that the clause is properly exhausted in its application as part of the scheme of disposition relating to the case of the testator's children predeceasing him.

One is thus thrown back on the terms of the clause on which the question immediately arises, and as the terms of that clause are unambiguous the reclaimers are, in my opinion, entitled to succeed in their claim.

The Court recalled the interlocutor of the Lord Ordinary and sustained the claim of Mrs Millar and her children.

Counsel for the Claimants, Mrs Millar and her Children—Macmillan, K.C.—R. C. Henderson. Agent—James Gibson, S.S.C.

Counsel for the Claimants, Mrs Lamont's Children—Constable, K.C.—J. A. Christie. Agents—Boyd, Jameson, & Young, W.S.

Saturday, June 19.

FIRST DIVISION.

[Sheriff Court at Airdrie.

SINNERTONS *v.* ROBERT ADDIE & SONS (COLLIERIES), LIMITED.

Master and Servant—Workmen's Compensation — Compensation — Dependency, Wholly or in Part—Common Fund for Family—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule.*

A workman was killed by accident arising out of and in the course of his employment. At the date of his death he lived in family with his two brothers, his three sons, and his daughter. One brother and the daughter did not earn wages. The three sons paid their wages to their father each week and received pocket money. The father's wages, plus the sons' less the pocket money, amounted to £8, 17s. 6d. a week, out of which the father paid £4 to his non-earning brother, who did the housekeeping; the other brother paid him £1, 10s. Out of that fund of £5, 10s., food and other necessities for the family as a unit were paid, but the contribution of £1, 10s. from the brother did no more than support the contributor. Out of the balance of the £8, 17s. 6d. the father paid for clothes and other personal necessaries for his non-earning brother, his sons, and his daughter. It was admitted that the non-earning brother and the youngest son were in part dependent on the father. An arbitrator having found that the daughter was partially, not wholly, dependent on the father, *held* there was evidence upon which he could competently so find.

William Sinnerton senior, retired miner, Jane Sinnerton, and George Sinnerton, *appellants*, being dissatisfied with a decision of the Sheriff-Substitute (MACDIARMID) at Airdrie in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by them against Robert Addie & Sons (Collieries), Limited, *respondents*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted or proved:—1. That on 39th September 1919 Joseph Sinnerton met his death by accident arising out of and in the course of his employment with the defenders and respondents. 2. That at the date of his death there lived with him in family his two brothers William and George Sinnerton, his sons Joseph, William, and George, and his daughter Jane. 3. That neither his brother William nor his daughter Jane were working and earning wages. 4. That the deceased, his two elder sons, and his brother George all worked as miners, and his youngest son at another trade. 5. That it was agreed between parties that the average weekly earnings of the deceased at said date were £3, 16s. 6d. per week. 6. That his two elder sons Joseph and William earned 62s. per week, and his youngest son George 20s. per week. 7. That the said sons of the deceased each week paid over their earnings to their father, who allowed the two elder 20s. per week respectively, and the youngest 3s. per week as pocket-money. 8. That after the deduction of said pocket-money there accordingly was in the hands of the deceased each week a sum of £8, 17s. 6d. 9. That out of this amount the deceased paid each week into a common fund held by his brother William Sinnerton the sum of 80s. 10. That into the said common fund the deceased's brother George paid 30s., but that the evidence for the pursuers and appellants, uncontradicted by the defenders and respondents, was that said sum was sufficient only for the said George's maintenance. 11. That the said William Sinnerton used said common fund, amounting to £5, 10s., and of which he was the holder, to provide food and other the like necessaries for the said family as a unit. 12. That in addition to the above-mentioned payment of 80s. the deceased paid for clothes and other personal necessaries when needed by his brother William or his sons or daughter, and that admittedly such payments were made by him out of the accumulation of the balance of said sum of £8, 17s. 6d. 13. That it was matter of agreement between parties that the deceased's brother William and his youngest son George were in part dependent upon his earnings at the date of his death. 14. That the said Jane Sinnerton was accordingly maintained out of the said sum of £8, 17s. 6d.

"In those circumstances I *found* that the said Jane Sinnerton was only in part dependent upon the earnings of her father the said deceased Joseph Sinnerton at the date of his death; and I assessed the dependency as follows—In the case of the said Jane Sinnerton at 18s. per week; of the said George Sinnerton, youngest son of the deceased, at 10s. per week; and of the said William Sinnerton, brother of the deceased, at 5s. per week; and awarded the said Jane