of his death but for all future time. If there be nothing more, therefore, the word "failing" cannot mean "not existing," for a survivor will necessarily exist. It must bear some other meaning, and the meaning, I think, is "failing by death." To escape this the respondents seek to add the words "at my death." If a point of time be added there may, of course, be a failing of any survivor at that point of time by reason of the fact that all may be dead before that time. In this case there will be a failure of any survivor at that time, because the man who was survivor in fact did not survive that point of time. The words "at my death" are not in the deed. The respondents seek to justify their insertion by pointing out that the word "survivor" is used in the last preceding clause in the sense of surviving the testator. The testator is there speaking of children "predeceasing me," and uses the words "survived" and "surviving" in a way which in that clause mean "survive me." *Ergo*, say the respondents, the word survivor in clause 5 means "person surviving me." The argument does not commend itself to me.

This testator by clauses 1 and 2 had provided for a certain event, viz., the event of his three children surviving him; by clauses 3 and 4 he had provided for another event, viz., the event of the children or some or one of them predeceasing him. By clause 5 he directs that which is to happen "failing any survivor of my said son and daughters or issue of any of them." I do not understand the ground on which it can be maintained that clause 5 is addressed only to clauses 3 and 4 and not to clauses 1 and 2. It names an event, and says what is to happen in that event. The event is the failure—that is, the non-existence of a living person — of any survivor of his son and daughters or issue of any of them. From this it is to be inferred that he thought that so long as any son, daughter, or issue was living he had already disposed of the property. But if the respondents are right, and if the last survivor of his son and daughters did not leave issue, he had not disposed of it. The previous language ought to be construed (if it will bear the construction) so as to give effect to this fact, and this results if survivor is read in the sense of stirpital survivorship. Moreover, the construction which the respondents put upon the gift-over is so extravagant as not to be admissible. Inserting after the word "failure" the words "at my death," they say the testator gives to the nearest heirs and representatives in moveables at that time of his children and their issue. But they being all dead that would lead only to a reverter to himself. The view I take is one which attributes to him a sensible meaning, viz., that there shall be no intestacy so long as any child or issue of a child is in existence who can take.

In my judgment upon the words of this will, and upon the principles of *Wake* v. *Varah* (2 Ch. D. 348) and *Waite* v. *Littlewood* (L.R., 8 Ch. D. 70), this appeal succeeds, and one-half of the share of Robert Barclay Curle passed after his death to the children of his sister Mrs Lamont, who had predeceased him.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the costs of all parties here and below be paid out of the fund *in medio*.

Counsel for Appellants—Maughan, K.C.—Christie. Agents — Boyd, Jameson, & Young, W.S., Leith—Stibbard, Gibson, & Company, London.

Counsel for Respondents — Macmillan, K.C.—Tomlin, K.C.—Henderson. Agents — James Gibson, S.S.C., Edinburgh — Church, Rackham, & Company, London.

COURT OF SESSION.

Tuesday, October 18.

SECOND DIVISION.

[Sheriff Court at Stranraer.

DONALDSON *v.* BOWIE.

Process—Appeal—Competency—Summary Cause—"Not exceeding £50 in Value exclusive of Interest"—Meaning of "Interest"—Value of Counter-claim—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *secs.* 3, 7, *and* 28 (1), *as Amended by the Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28).

A landlord brought an action in the Sheriff Court against his tenant for payment of the sum of £50, being the amount of the half-year's rent of a farm, and interest thereon at 5 per cent. per annum from the preceding Martinmas, the term when the half-year's rent fell due. The defender made a counter-claim for £75. The pursuer having obtained decree the defender appealed. The respondent objected to the competency of the appeal on the ground that the cause did not exceed £50 in value exclusive of interest. *Held* that the meaning of the word "interest" was not limited to interest from the date of citation, and objection *sustained*.

Opinion per Lord Salvesen that no counter-claim, however large, could make appealable a cause which judicially satisfied the definition of section 3 of the Act of 1913.

The Sheriff Courts (Scotland) Act 1907, as amended by the Sheriff Courts (Scotland) Act 1913, enacts — Sec. 3 — "In construing this Act (unless where the context is repugnant to such construction)—(*i*) 'Summary cause' includes — (1) Actions . . . for payment of money not exceeding fifty pounds in amount, exclusive of interest and expenses. . . ." Sec. 7—"Subject to the provisions of this Act and of the Small Debt Acts, all causes not exceeding fifty pounds in value exclusive of interest and expenses, competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the

Court of Session. . . ." Sec. 28—"(1) Subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment either of a Sheriff or of a Sheriff-Substitute if the interlocutor appealed against is a final judgment or is an interlocutor. . . . (*d*) Against which the Sheriff or Sheriff-Substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal: Provided that no appeal shall be competent where the cause does not exceed fifty pounds in value exclusive of interest and expenses, or is being tried as a summary cause, unless the Sheriff, after final judgment by him on an appeal on the motion of either party made within seven days of the date of the final interlocutor certifies the cause as suitable for appeal to the Court of Session, . . ."

Thomas Cunningham Bowie, farmer, Galdenoch, Leswalt, Wigtownshire, and another, *pursuers*, brought an action in the Sheriff Court at Stranraer against David Donaldson, farmer, Crailloch, Portpatrick, Wigtownshire, and another, *defenders*, for payment of "the sum of £50 sterling, with interest thereon at the rate of 5 per centum per annum from the term of Martinmas 1920 till payment."

The defenders were joint tenants of the farm of Greenfield, parish of Leswalt, Wigtownshire, under a lease, dated 4th, 8th, and 12th September, and 13th and 15th November 1905, granted in their favour by John Fraser Vans Agnew, sometime captain, afterwards major, in the Royal Artillery, residing at Broomrigg, New Bridge, Dumfries, and others, the testamentary trustees of the late Patrick Alexander Vans Agnew of Sheuchan and Barnbarroch, in the county of Wigtown, the then proprietors of the said farm of Greenfield, for the space of nineteen years from and after the term of Martinmas 1905. The pursuers purchased the said farm of Greenfield from the said testamentary trustees, with entry at the term of Whitsunday 1920.

The pursuers averred, *inter alia*—"(Cond. 3) The rent stipulated for in said lease was £100 a-year, payable at two terms in the year, Whitsunday and Martinmas, and the defenders were therefore due and owing to the pursuers a half-year's rent from Whitsunday to Martinmas 1920, amounting to the sum of £50, being the sum sued for."

The defenders averred, *inter alia*—"(Stat. 1) By the terms of said lease the landlord agreed, and bound and obliged himself, to lay out and expend a sum not exceeding £100 on improvements and alterations to the steading, and the tenants and their heirs bound and obliged themselves jointly and severally to pay termly, along with their rent, interest at the rate of five per centum per annum on the amount so expended on improvements and repairs. (Stat. 2) Although said lease began at Martinmas 1905, not a penny has been expended by the landlord in implement of the obligation set forth in the preceding article. . . . The defenders were always most anxious to have the work carried out, and frequently reminded the proprietors since the commencement of their lease of their obligation. (Stat. 3) In consequence of nothing having been done, the steading has got into a very dilapidated and unsatisfactory state, and defenders have not had the full use and enjoyment thereof. (Stat. 4) Through the landlord's failure to implement his obligation as before narrated, the pursuers have been put to great inconvenience and suffered loss and damage, which are moderately estimated at £5 per annum for fifteen years = £75, for which they counter claim."

The pursuers pleaded, *inter alia*—"3. The pursuers having been always ready and willing, and not having unduly delayed to fulfil the proprietors' obligations under the lease, the defenders are not entitled to retain the rent, 4. The defenders having got full possession of the subjects for which the rent sued for is exigible, are not entitled to retain the rent."

The defenders pleaded, *inter alia*—"4. The pursuer is not entitled to ask payment of the reut until he fulfils the obligations undertaken by the proprietor, wherefore the defenders are entitled to absolvitor with expenses- 5. The defenders having through pursuers' failure to implement his obligation under the lease suffered loss and damage as condescended on, are entitled to decree for their counter-claim with expenses."

On 12th April 1921 the Sheriff-Substitute (WATSON) pronounced this interlocutor—". . . Finds that the defenders having enjoyed full possession of the subjects for which the rent sued for is exigible, are not entitled to withhold the rent: Finds that the defenders' averments are not relevant to infer any valid counter-claim for loss or damage: Therefore repels the defences; dismisses the counter-claim; decerns against the defenders in terms of the crave of the writ," &c.

The defenders appealed to the Sheriff (MORTON), who on 10th September 1921 adhered.

In a note appended to his interlocutor the Sheriff, *inter alia*, stated—"I should perhaps mention that at the debate before me the agent for the defenders stated that the only question to be determined was that raised by his fourth plea-in-law."

The defenders craved leave to appeal to the Court of Session, which on 19th September 1921 the Sheriff refused.

The defenders appealed to the Second Division of the Court of Session.

When the case appeared in the Single Bills on 18th October 1921 the respondents (pursuers) objected to the competency of the appeal, and argued—This was a summary cause within the meaning of section 3 (1) of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), and the appeal was rendered incompetent by sections 7 and 28 (as amended by the Sheriff Courts (Scotland) Act 1913) (2 and 3 Geo. V, cap. 28), section 9). The pursuers' claim did not import a continuing obligation, and the value of the cause, exclusive of interest and expenses, did not exceed £50, because (1) the meaning of the word "interest" was not limited to interest from the date of citation, but covered interest such as that

claimed in the present case, viz., interest from Martinmas 1920—Fyfe's Sheriff Court Practice, section 286; (2) the amount of the counter-claim should not be taken into account in estimating the value of the cause. The right to state a counter-claim was a privilege accorded to a defender. It could not alter the character of the cause—Fyfe's Sheriff Court Practice, sec. 290; Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 55. In any event since the defenders had not insisted in the counter-claim in their appeal before the Sheriff, they must be held to have abandoned it—*Manchester and County Bank, Limited* v. *Moore*, 1909 S.C. 246, 46 S.L.R. 222; *Aird* v. *School Board of Tarbert*, 1907 S.C. 22, 44 S.L.R. 26; *Sutherland* v. *Thomson*, (1905) 8 F. (H.L.) 1, 43 S.L.R. 145.

Argued for the appellants—The appeal was competent. The present action was not a summary cause within the meaning of section 3 (1) of the Act of 1907, and the appeal was not rendered incompetent by sections 7 and 28 (as amended), because (1) the pursuers' claim imported a continuing obligation, and the word "interest" meant interest from the date of citation. It did not mean interest such as that claimed in the present case, viz., interest from Martinmas 1920—*Stevenson* v. *Sharp*, 1910 S.C. 580, 47 S.L.R. 511, *per* Lord Johnston at 1910 S.C. 583, 47 S.L.R. 513; *Martin & Sons* v. *Robertson, Ferguson, & Company*, (1872) 10 Macph. 949, 9 S.L.R. 605, *per* Lord President (Inglis) and Lord Deas at 10 Macph. 951, 9 S.L.R. 607; Maclaren's Court of Session Practice, page 972 (2). The amount claimed in the counter-claim ought to be taken into account in estimating the value of the cause.

LORD JUSTICE-CLERK—This case raises quite a sharp point upon the question of the competence of appeals from the Sheriff Court. There is no doubt that the purpose of the Act was to prevent the appeal from the Sheriff to this Court of cases involving small amounts of money, because they were unsuitable for what might be a very costly litigation in the Supreme Court. Whether or not the Act effected its purpose with sufficient clarity is a question to be determined upon the construction of the Act.

In this case the landlords, who had purchased the farm at Whitsunday 1920, sued the tenants in the Sheriff Court for the Martinmas rent and the tenants refused to pay. They founded on an obligation in the lease, which was executed in 1905 by the pursuers' predecessors, by which they became bound to spend £100 for meliorations of the steading and the tenants to pay interest at 5 per cent. on the money so expended. The tenants never asked the landlords to implement this obligation, and paid rent termly from 1905 until the new landlords came into possession. They accordingly escaped liability for payment of the 5 per cent. interest in respect that the £100 never had been spent. They now counter-claim for £75 in name of damages in respect of the landlords' failure to implement their obligations, being £5 per annum for fifteen years.

The question for decision turns on the meaning to be attached to the words "a summary cause"; and the definition in section 3 of the Sheriff Courts (Scotland) Act 1907, as amended by the Act of 1913, is that "summary cause" includes actions for payment of money not exceeding £50 in amount, exclusive of interest and expenses. For my part I think that this action was an action for payment of a sum not exceeding £50 exclusive of interest. I think Mr Paton's observation had a good deal of force in it; that if Mr Scott's contention had been sound the statute, instead of "exclusive of interest," would have said "inclusive of interest." The result is that on the construction of the statute I am against the appellant.

In my opinion therefore the Sheriff's final judgment was one for a sum not exceeding £50 exclusive of interest, and accordingly I am of opinion that the appeal is incompetent.

LORD DUNDAS—I concur.

LORD SALVESEN—This case raises rather an interesting question. Having listened very carefully to the argument on both sides I have come to be of opinion, with your Lordship in the chair, that the appeal is incompetent.

Under the old law undoubtedly the only test was whether the conclusions of the summons exceeded the sum of £25, which was the limit below which actions were then unappealable from the Sheriff Court to the Court of Session, and it was often decided that a mere crave for interest from the date of citation in addition to the sum of £25 was sufficient to make the appeal competent. Now I think one of the objects of this new Sheriff Court Act was to get rid of that principle on which the Court had acted in the past, and in fixing a new limit of £50 the Legislature said that the £50 shall be exclusive of interest and expenses. If the Act had intended that interest, which was a mere accessory upon the principal sum sued for, and which necessarily followed the fate of the principal sum, was to be permitted to swell the amount sued for so as to bring it in certain cases beyond the limit, then I think the proper expression would have been "inclusive" and not "exclusive." I am unable to hold—as Mr Scott asked us very forcibly to do—that we should construe the word "interest" so as to make it mean "interest from the date of citation." I see no reason why such a limited interpretation should be put upon it. And I am not moved by the view that in certain cases the only conclusion in the summons may be for a certain sum of arrears of interest under an obligation the principal of which had already been satisfied. In that case the sum sued for is the principal sum; it is not an accessory; and although it may be due in respect of arrears of interest, it does not cease to be the principal sum sued for. There is no reason whatever to hold that this case is in any way exceptional, or one which is not expressly provided for by section 3 of the 1913 Act. It is a mere trifle of interest

that is sued for, and it is interest which necessarily follows upon the decree for the principal, and is strictly accessory to the principal, just as the expenses of an action are an accessory depending upon the success of the pursuer in the Court below.

I am therefore of opinion with your Lordship that the appeal is incompetent. As regards the other question, I hold that no counter-claim, however large, could make appealable a cause which judicially satisfies the definition of section 3. A pursuer who brings his action into Court on the footing that it falls normally to be decided finally in the Sheriff Court cannot be subjected to an appeal to this Court because the defender chooses to put in a counter-claim of an amount exceeding the statutory limit. The defender can of course obtain a decision in this Court if he raises a substantive action to constitute his counter-claim, so that he is not without his remedy if he genuinely considers his counter-claim to be of a value exceeding £50,

LORD ORMIDALE — I concur with your Lordship.

The Court sustained the objection, dismissed the appeal as incompetent, and remitted the cause back to the Sheriff-Substitute to proceed as accords.

Counsel for the Appellants (Defenders)—Scott. Agents—Armstrong & Hay, S.S.C.

Counsel for the Respondents (Pursuers)—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Thursday, November 3.

FIRST DIVISION.

(SINGLE BILLS.)

CLYDESDALE MOTOR TRANSPORT COMPANY, PETITIONERS.

Statute — Registration of Business Names Act 1916 (6 *and* 7 *Geo. V, cap.* 58), *sec.* 8—*Failure to Register Business Name — Consequent Disability to Enforce Contractual Rights—Application for Relief.*

A firm and its individual partners presented a petition under the Registration of Business Names Act 1916 for relief against the disability imposed upon them by section 8 of the Act in respect of their failure to furnish the Registrar with the particulars necessary for registration. The petitioners, who had formed a copartnery business in 1920 under a business name, stated that they had through inadvertence and ignorance of the existence of the Act omitted to register their business name, that thereafter having in the course of business raised an action in the Sheriff Court for rescission of a certain contract the defenders had pled that they, the petitioners, were barred from insisting in the action in respect that they had not registered, and that the Sheriff-Substitute had accordingly sisted procedure in order that an application for relief might be made. The Court in respect that the failure to comply with the Act had been satisfactorily explained *granted* the application.

Observed (*per* the Lord President) that it must not be assumed in relation to petitions of this kind that the Court will grant relief merely in reliance upon the statements made in the petition and on the explanations with regard to them given by counsel.

The Registration of Business Names Act 1916 (6 and 7 Geo. V, cap. 58) enacts—"8. . . . *Disability of Persons in Default.*—(1) Where any firm or person by this Act required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise: Provided always as follows:—(*a*) The defaulter may apply to the Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was accidental, or due to inadvertence or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter unless the Court otherwise orders, and on such other conditions (if any) as the Court may impose, but such relief shall not be granted except on such service and such publication of notice of the application as the Court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the Court that if this Act had been complied with he would not have entered into the contract; (*b*) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid.; (*c*) If any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counter-claim, set off, or otherwise, such rights as he may have against that party in respect of such contract. (2) In this section the expression 'court' means the 'High Court' or a judge thereof: Provided that, without prejudice to the power of the High Court or a judge thereof to grant such relief as aforesaid, if any proceeding to enforce any contract is commenced by a defaulter in a county court, the county court may, as respects that contract, grant such relief as aforesaid." And by section 23 of said Act it is enacted—"*Application to Scotland.*—(1) In the application of this Act to Scotland 'Court of Session' shall be substituted for 'High Court; 'Sheriff