company debt, the other partner being in their opinion, and according to their own confession, worth nothing. In this situation of matters it is impossible to maintain that James Lamont is not here through his trustee. I think therefore that the trustee represents the necessary interest, and has a good title.

The other party maintain, however, that this being merely a sequestration there is no convention, and therefore there can be no reconvention. Now, this is a very peculiar plea, for it appears to me that in *Ord* v. *Barton*, 9 D. 541, and other cases, the Court did proceed on the footing that a sequestration and a claim in a sequestration is a good foundation for a plea of reconvention, and the trustee is therefore entitled to sue the creditors; and if ever there was a case where equity required it to be done it is the present. I am therefore clearly for sustaining the jurisdiction. It is another matter altogether as to the merits; we have not heard parties on them yet.

Lord Gifford—I am of the same opinion—(1) A claim in a sequestration is the appropriate judicial proceeding under the Bankrupt Act to bring the parties into Court. (2) On the second point, as to whether the necessary interests are here represented, I think they are.

In England a claim against a partnership is always made against the several partners of the firm, and in Scotland we have the same thing, except that we recognise in addition a separate estate in the partnership itself. I think that he who sues on a company debt one partner of a company lays himself open to be sued by the company on a plea of reconvention.

The Court therefore adhered on the question of jurisdiction, and they then proceeded to consider the case upon the merits, and in the result adhered upon that branch also.

Counsel for Pursuer (Respondent)—Asher—Lang. Agents—Macbrair & Keith, S.S.C.

Counsel for Defenders (Appellants)—Trayner—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S.

Tuesday, November 18.

SECOND DIVISION.

SPECIAL CASE — LAING AND SANSON AND OTHERS, AND EISDALE (LAING'S CURATOR BONIS) AND OTHERS.

Succession—Destination—Whether per stirpes *or* per capita.

A testator directed the residue of his estate to be divided "between my surviving brother and sisters and the lawful issue of those who may be deceased, share and share alike." At the date of the testament one of the testator's brothers had died leaving issue. *Held*, in a question between the testator's brother and sisters and the children of the deceased brother, that the division of the estate must be *per stirpes* and not *per capita*.

The deceased David Laing, LL.D., Librarian to the Society of Writers to the Signet, died on 18th October 1878 unmarried. By holograph trust-disposition and settlement, dated 12th March 1864, the deceased disponed to various parties as his trustees his whole means and estate, heritable and moveable, of whatever nature, presently belonging or which should belong to him at the time of his decease, in trust for various purposes, it being provided in regard to the residue as follows—"The surplus of my said effects and property to be divided between my surviving brother and sisters and the lawful issue of those who may be deceased, share and share alike."

The testator was one of nine children. He had five sisters and three brothers. At the date when the settlement was made two of his brothers were dead, one unmarried, the other leaving eight children; these eight children or their representatives were the second parties to this case. One of the testator's sisters died in 1871 leaving two children; they, along with two of the testator's sisters who survived him, were the parties of the first part. The other sisters predeceased the testator unmarried. The third parties were the testator's trustees.

When Mr Laing's estate fell to be distributed a question arose between the first and second parties as to the construction of the residue clause in the trust-disposition. The first parties maintained that the division there appointed fell to be made *per stirpes*. The second parties contended that the said division should be made *per capita*. The parties therefore presented this Special Case for the opinion of the Court.

The questions for opinion and judgment were—"(1) Does the residue of the deceased's estate fall to be divided *per stirpes?* (2) If the first question be answered in the negative, does said residue fall to be divided *per capita?*"

Authorities—*M'Courtie and Others* v. *Blackie*, Jan. 15, 1812, Hume 270; *M'Dougal* v. *M'Dougal and Others*, Feb. 6, 1866, 4 Macph. 372 (and Lord Cowan, p. 380); *Payne* v. *Webb*, Nov. 11, 1874, L.R., 19 Eq. 26.

At advising—

Lord Justice-Clerk—I have no doubt in questions of this kind that the rule contended for by Mr Kinnear is quite sound, viz., that if you have an original bequest it will not signify that the parties favoured are called or nominated as members of a class. In that case, although others come in, it may be and it is a just rule that the division will be *per capita*. I regard the present case, however, not as an original bequest to the issue of a predeceasing brother as members of the class to be favoured along with the surviving brother and sisters, but on the contrary I think that the issue are treated as a class by themselves, and consequently in a question between them and such surviving brother and sisters the decision is very clearly *per stirpes* and not *per capita*. What the testator says is—"The surplus of my said effects and property to be divided between my surviving brother and sisters and the lawful issue of those who may be deceased, share and share alike." I read that, first, without any reference to the condition of the family at the time, and on the assumption that all the testator's brothers and sisters were alive, and the question is, in the event of any of them predeceasing or

dying before the period when the testament takes effect, what is the result? I cannot doubt that in that case the words "lawful issue of those who may be deceased" mean this, that the lawful issue take the shares that their parent would have taken. I do not think we have to stretch the words to reach this result; it is the only meaning they could have. The ground upon which it is contended that the testator had not in view the issue as a class coming in place of their parent is that one brother had died leaving issue at the date of the settlement, and the word "surviving" gives a colour to this view. If that had been the whole question there might have been something to say for that view; if the bequest had been direct to "the issue of my deceased brother," that would have brought it within the rule of division *per capita*. But when we find that the provision is to the "lawful issue of those who may be deceased," it is the same as if there had been no predeceasing brother at that time, and as if the bequest had been general to the brothers and sisters, in which case if any of them died leaving children then their issue would take the share of their parents. The division is share and share alike between the brothers and sisters who survived and the lawful issue of those who predeceased. That is the result.

In the opposite view it might happen that the share of one of the sisters or of the brother, which if they had all survived would have been of considerable amount, would be reduced to a mere illusory bequest by the fact that others had deceased leaving large families. I do not think that was in the mind of the testator, and I find nothing to justify it. On these grounds I think we must answer the first question to the effect that the residue of the deceased's estate fell to be divided *per stirpes*.

LORD ORMIDALE—I entirely agree with your Lordship. I could understand perfectly that a single word left out or a single word inserted in this bequest might make all the difference in the world. But we must take the bequest exactly as we have it. It appears to me the clear English of what the testator meant was that the issue of any of his brothers and sisters who might be dead at the date of his death were to take *per stirpes*—to come into the place of the deceased parent and to take that parent's share and nothing more. In the bequest itself the brothers and sisters are the only parties to whom direct provisions are made, and it is clearly indicated that it is only failing these that the lawful issue of those who predecease take. It is not "the issue of my deceased brother," but "the issue of those who may be deceased." It puts in the same category brothers and sisters whether predeceasing or not. The point of time is the testator's own death, and then the issue of those predeceasers come into the place of their parents and take their parent's share. The plain intention must be given effect to. The present case is plainly distinguishable from *M'Courtie* and *M'Dougall's* cases. I adopt every word your Lordship has said.

LORD GIFFORD—I am of the same opinion. A great deal depends on the very words used. I look to the words used in the present case and take that as the subject-matter of interpretation. As I read them, the testator intended to refer to the period of his death. A testament is of no effect while the testator lives. It gives his last words. In the present case the testator directs his "surplus estate to be divided between his surviving brother and sisters"—a natural expression, one brother having died leaving issue, the other having died without issue—"and the lawful issue of those who may be deceased." The latter clause applies not only to the surviving brother but to the brother who had died before, and "may be" is a peculiar expression, the effect of which could not be determined till the testator's death, and that enables me to read the "and" as "whom failing." It is a bequest to those who are fit objects of the testator's benefit. He has so much favour for them (his brothers and sisters) that it shall go to their issue if they fail. He was just declaring what the Intestate Succession Act provides, that if any person who would have taken had he survived the testator, shall predecease, his children shall take his share —*i.e.*, *per stirpes*—substituting issue for the person who has died, providing that it does not go further than descendants of brothers and sisters. The meaning of the words is quite consistent without going to the testator's intention. He did not mean to give to his deceased brother's children eight times the share which he gave to his own brother and sisters. I concur with your Lordships.

The Court therefore answered the first question in the affirmative.

Counsel for First and Third Parties—Asher—Guthrie. Agents—Auld & Macdonald, W.S.

Counsel for Second Parties—Kinnear—Wallace. Agents—Macandrew & Wright, W.S.

Saturday, November 22.

SECOND DIVISION.

[Lord Adam, Ordinary.

MACKENZIE *v.* NORTH BRITISH RAILWAY COMPANY.

Process—Sheriff Court—Right to Suspend Sheriff Court Decree where Appeal held to be Abandoned through Failure to Print.

The Court of Session Act of 1868, section 71, enacts that an appellant failing to print within fourteen days shall be held to have abandoned his appeal. The Act of Sederunt of 10th March 1870 provides that on the expiry of eight days after the appeal has been held to be so abandoned, if the appellant has not been reponed, or the respondent does not insist in the appeal, the judgment shall become final and be treated as if no appeal had been taken, and the process forthwith retransmitted to the Inferior Court. Where a process had been so retransmitted, *held* (following the case of *Watt Brothers & Co.* v. *Suead Foyn and Mandatories*, Nov. 1, 1879, *ante*, p. 54) that it was incompetent to bring the case under review by way of suspension.

Counsel for Complainers (Reclaimers)—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondents — Asher — Wallace. Agent—Adam Johnston, Solicitor.