think, supported. This being so, all I desire to do on the present occasion is to set forth the results which appear to me to be established. These are—(1) That the machine ordered by the defenders was, according to the terms of the contract, when manufactured, to be put on the rail at the railway station in Birmingham; (2) that the article accordingly was placed on the rail at Birmingham; (3) that it was delivered to the defender at Stirling; (4) that the defender was not satisfied with the machine, because, as he thought, it was in particulars which he specified disconform to contract; (5) that, on the one hand, he did not absolutely reject the article sent, nor, on the other, did the pursuer insist that it had been accepted; (6) that in the end it was agreed that the machine should be returned to Birmingham, that on its return it should be examined, and that if anything should be found defective or imperfect, what was necessary to make the article conformable to contract should be performed, the cost of sending it back to Stirling being to be defrayed by the pursuer; (7) that the machine having been found imperfect, the work necessary to satisfy the contract was performed; (8) that thus finished it was placed on the rail at Birmingham; (9) that it was injured in the course of transit to Stirling; and (10) that when it was offered by the railway company to the defender, he, because the machine was in a broken condition, refused to take delivery. These are the facts according to my reading of the proof, and the question is, whether the machine, when *in transitu* between Birmingham and Stirling, was at the risk of the pursuer or of the defender? In this inquiry the first transmission of the machine to Stirling and its return to Birmingham are material only as suggesting the reason for which the pursuer agreed to pay the cost of the second transmission. The defender had paid that of the first, and if the return to Birmingham was necessary that some imperfection might be remedied, it was reasonable that the cost of carriage to the defender should not be more than it would have been had the machine when first sent been what it was when placed the second time upon the railway. In all other particulars the contract was left untouched. The pursuer remained bound to supply the article ordered, the railway station at Birmingham remained the place of delivery, and from the time when the machine was placed on the rail, it was, according to the common law rule—the contract saying nothing to the contrary—at the risk of the defender, who consequently must, in a question with the pursuer, bear the loss resulting from the injury suffered on the journey, as he was the owner. Had it been shown that the thing put upon the rail, and which was injured *in transitu*, was, from defect or from imperfection in the manufacture, or from any other reason, not the thing which the pursuer was bound to supply and the defender to accept, this rule would have been inapplicable, for by placing on the rail a thing disconform to contract, the property and the risk would have remained with the pursuer, the provision relative to delivery on the rail at Birmingham covering only an article which the defender was bound to accept. But here the proof, as I read it, and as the Sheriff has held, shows that the machine when put on the rail for the journey in the course of which it was injured, was the thing ordered, and the property consequently, by implication of the contract, then passed to the defender. If therefore the loss is to fall on one or other of the parties and not on the railway company, that loss in the circumstances must fall on the defender as owner. *Res perit domino* is the rule by which upon these facts the case is governed.

Lord Rutherfurd Clark—I also think that the Sheriff's judgment should be affirmed.

Lord Justice-Clerk—I concur in the proposed judgment, but on one ground only, and that is, that at the time the machine was inspected by the defender in Birmingham it was found by him to be conform to contract. He accepted the machine as such, and therefore it was sent at his risk. If I were not able to take this view of the evidence I should have great difficulty in deciding the case, for the contract was an English contract, and its incidents and conditions would be governed by the law of England, and it might be a question whether by English law he had a good opportunity of accepting or rejecting the article, but it is needless to go into these nice questions, as the ground I have stated is enough for the decision of the case.

Lord Young was absent.

The Court affirmed the Sheriff's interlocutor.

Counsel for Pursuers—Dickson. Agents—W. & W. Saunders, S.S.C.

Counsel for Defender—Comrie Thomson. Agent—William Duncan, S.S.C.

Saturday, December 20.

FIRST DIVISION.

SPECIAL CASE—KILPATRICK AND OTHERS (FORREST'S TRUSTEES).

Succession—Accretion—Liferent and Fee—Survivors—Whether "Survivor" can mean "Other."

A testator directed his trustees to realise his whole estate, heritable and moveable, on the death of the longest liver of his wife and certain other annuitants, and to divide the annual proceeds of the residue equally among his nine nephews and nieces and one grandniece, for their liferent alimentary use only; on the death of any one of these beneficiaries an equal share of the residue was to become payable to the children of such deceased equally upon their attaining majority. In the event of any of these beneficiaries dying without leaving children, or in the event of the children dying without issue before attaining majority, "then the share of my said estates which would have otherwise fallen to such children shall accresce and belong to the survivors of the parties before named in liferent, and to their children in fee, all in the same manner as the proper shares of these parties themselves, and which shares and profits thereof accrescing as aforesaid shall be subject to the same restrictions" as the original shares. The testator's widow survived the other annuitants, and five of the beneficiaries

predeceased her, two of whom left issue. The widow died in 1878. Another beneficiary, a niece, died after her without leaving issue. *Held* that this beneficiary's share of the residue accresced and belonged in equal shares to the beneficiaries who survived her in liferent, and their children in fee, to the exclusion of the issue of the beneficiaries who had predeceased her.

Observations on *Ramsay's Trustees*, December 21, 1876, 4 R. 243.

By trust-disposition and settlement dated 16th October 1843, and recorded in the Books of Council and Session 7th December 1844, William Forrest, wright and timber merchant, Paisley, gave, granted, assigned, disponed, and conveyed to John Kilpatrick and the other trustees therein named his whole heritable and moveable estate, in trust for the following purposes—*Third*, for payment of a free annuity of £15 to each of his sisters, Marion Wills Forrest, relict of William Russell, tailor in Edinburgh, and Richmond Forrest, relict of John Kilpatrick, mason in Edinburgh, and also of a free annuity of £10 to Jessie Middleton, his grandniece, daughter of Robert Middleton, painter in Edinburgh. . . . . *Fifth*, the trustees were directed immediately after his death to realise his whole stock-in-trade and other moveable estate, and deposit the proceeds in bank, or as soon as possible lend out the same upon such heritable security as to them should seem expedient, and to apply the annual proceeds of the funds thus to be created, together with the rents of his heritable property, in the first place towards payment of the said annuities and trust expenses, and to accumulate the balance from year to year along with the principal fund until the death of the longest liver of his wife and sisters, when the yearly produce of the then accumulated fund should be held by the trustees for division as after mentioned. The last purpose of the trust-disposition and settlement was in these terms:—"Upon the death of the longest liver of my said wife and sisters, my said trustees shall forthwith sell and dispose of my whole heritable property, and sell and recover any part of my other estates which may happen still to remain outstanding, and the proceeds thereof, together with those portions of my estates previously realised, shall form one general accumulated fund, which, in so far as not already invested, my said trustees shall forthwith invest in some chartered bank or upon such heritable securities as to them shall seem proper, the bonds or other securities for which shall be taken in name of my said trustees or the survivors or survivor of them, or of the trustees to be assumed in virtue of the powers hereinafter given, as in trust for behoof of the parties hereinafter pointed out, and the free annual proceeds of the said accumulated fund after payment of all necessary expenses shall be divided equally amongst Ann Middleton, my niece, wife of George Younger, wright, sometime in Paisley, now in America, Margaret Middleton, also my niece, wife of David Rae, wright, also in , the said Jessie Middleton, my grandniece, daughter of Robert Middleton, painter in Edinburgh, Ann Russell, John Russell, James Russell, and Marion Russell, children of the said Marion Wills Forrest or Russell, my sister, and John Kilpatrick, Richmond Kilpatrick, and Mary Kilpatrick, children of the said Richmond Forrest or Kilpatrick, my sister, all share and share alike, and that during the lifetime of my said nephews, nieces, and grandniece respectively, their said several shares being to be held and applied by my said trustees for the liferent alimentary use only of the said several parties, and being declared not to be subject to alienation by them nor to the diligence of their creditors; and immediately upon the death of any one of my said nephews, nieces, or grandniece, an equal share of the accumulated fund produced from my various estates corresponding to the number of my said nephews, nieces, and grandniece, shall become payable and shall be paid over by my said trustees, as soon as the same can conveniently be realised, to the lawful children of such deceaser equally, upon their respectively attaining majority, the interest of said share to be applied towards their maintenance and upbringing until the same become payable; declaring that in the event of any of my said nephews, nieces, and grandniece dying without leaving lawful children, or in the event of such children dying before attaining twenty-one years of age without issue of their bodies, then the share of my said estates which would have otherwise fallen to such children shall accresce and belong to the survivors of the parties before named in liferent, and to their children in fee, all in the same manner as the proper shares of these parties themselves, and which shares and profits thereof, accrescing as aforesaid, shall be subject to the same restrictions and declarations as are imposed upon the original shares, and which are here held as repeated."

The testator died on 15th November 1844, survived by his wife who died on 3d November 1878. The following beneficiaries, being the annuitants, predeceased her, viz., Mrs Marion Wills Forrest or Russell, and Mrs Richmond Forrest or Kilpatrick, and Jessie Middleton, who had married a Mr Donald. Of the ten beneficiaries named in the last purpose of the trust the following five predeceased the truster's widow, viz.—(1) Jessie Middleton or Donald, who left four children; (2) Ann Russell, and (3) Marion Russell (who both died unmarried); (4) Mary Kilpatrick, afterwards wife of Hugh Wallace, who left one child, who also predeceased the truster's widow; and (5) Margaret Middleton or Rae, who left three children. After the death of Mrs Forrest, the truster's widow, the heritable estate was sold, and the residue of the trust-estate was divided into seven shares, and the free annual proceeds of five of these shares were paid to Mrs Ann Middleton or Younger, John Russell, James Russell, John Kilpatrick, and Richmond Kilpatrick, wife of John Macwilliam; another share was retained in trust for behoof of David Donald, Charles Donald, Robert Middleton Donald, and James Burt Donald, the children of the said Jessie Middleton or Donald, who were in minority, and the interest thereof paid to their father for their behoof, and the remaining one-seventh share was paid to Mrs Catherine Forrest Rae or Reid, Ann Eliza Rae, and David Robert Rae, the children of the deceased Mrs Margaret Middleton or Rae, who had all attained minority.

On 31st January 1882 another of the beneficiaries named Mrs Ann Middleton or Younger died without leaving issue, and the one-seventh share liferented by her fell to be dealt

with in terms of the trust-deed. Of the children of Mrs Margaret Middelton or Rae—(Catherine, Ann Eliza, and David Robert)—Catherine, afterwards Mrs Reid, died on 27th June 1881, leaving two children, Annie Middleton Reid and Kate Forrest Reid.

This Special Case was presented to determine the manner in which the share of Mrs Younger should be disposed of. The parties were—(1) John Kilpatrick and others, William Forrest's trustees, of the first part. (2) Ann Eliza Rae and David Robert Rae, children of the said deceased Mrs Margaret Middleton or Rae; and Annie Middleton Reid and Kate Forrest Reid, children of the deceased Mrs Catherine Forrest Rae or Reid, who were both in minority, the only other child of the said deceased Mrs Margaret Middleton or Rae, and the four children of the deceased Mrs Jessie Middleton or Donald, and their administrators-in-law, parties of the second part. (3) John Russell and his issue, James Russell, John Kilpatrick and his issue, and Mrs Richmond Kilpatrick or M'William and her issue, parties of the third part.

The parties of the second part maintained that the one-seventh share of the trust-estate of William Forrest, liferented by Mrs Ann Middleton or Younger, fell at her decease to be divided into six equal shares, and that they were entitled to two-sixths thereof, as in right of Mrs Margaret Middleton or Rae and Mrs Jessie Middleton or Donald, to be divided among them proportionally *per stirpes*.

The parties of the third part maintained that the one-seventh share of the trust-estate fell at the death of Mrs Ann Middleton or Younger to the liferenters named in the trust-deed then surviving in liferent, and to their children in fee, exclusive of the representatives of those liferenters who predeceased Mrs Younger.

The questions of law submitted to the Court were these—"Whether, on a sound construction of the said trust-disposition and settlement, the share of the said trust-estate liferented by Mrs Ann Middleton or Younger, now deceased, accresces and belongs in six equal shares to the parties following, viz.—(1) The issue of the late Mrs Margaret Middleton or Rae, and (2) the issue of the late Mrs Jessie Middleton or Donald, being the parties of the second part; (3) the said John Russell and his issue, (4) the said James Russell, (5) the said John Kilpatrick and his issue, and (6) Mrs Richmond Kilpatrick or M'William and her issue, being the parties of the third part? Or, Whether the said share liferented as aforesaid accresces and belongs in four equal shares to the said parties of the third party respectively, to the exclusion of the parties of the second part?"

Argued for the parties of the second part—The intention of the testator, as gathered from the whole deed, was to divide his estate equally *per stirpes* among his ten nephews, nieces, and grandniece. His intention with regard to a share which lapsed, as in this case, was to be presumed to be the same. The words "all in the same manner," &c., showed that the division was to be the same as in the case of the original shares. The word "survivors" was to be read as meaning "others." If not, then there would be intestacy in the event of the last survivor dying without leaving issue — *Ramsay's Trustees* v. *Ramsay*, December 21, 1876, 4 R. 243; Theobald's Law of Wills (2d ed.), 503; Jarman on Wills (4th ed.), ii. 689, 709; *Waite*, 8 Ch. App. 70; *Badger*, 8 Eq. 78; *Wake*, 2 Ch. Div. 348.

Argued for the third parties—The meaning of the word "survivors" and its context were quite unambiguous. In *Ramsay's* case the Court were of opinion that the meaning of the clause in which the word "survivor" occurred was doubtful, and therefore they looked at the other parts of the deed. Further, they read "survivors" as meaning "others" only to avoid intestacy—*Young* v. *Robertson*, July 20, 1860, 22 D. 1527, *rev.* 4 Macq. 337; *Aitkin's Trustees* v. *Wright*, December 22, 1871, 10 Macph. 275; *M'Nish, &c.* v. *Donald's Trustees*, October 25, 1879, 7 R. 96; Jarman on Wills, p. 690.

At advising—

Lord Shand—In this case the Court are asked to construe the provisions of the settlement of the late William Forrest, who died in December 1844. By his trust-deed he provided for certain annuities, and for a liferent of his estate by his wife and sisters, and there was a provision under head 5 for the accumulation of the surplus funds in these terms, that there should be such accumulation of the balance until the death of the longest liver of his wife and sisters, when the yearly produce of the then accumulated fund should be held by the trustees for division as after mentioned. The question which has arisen relates to the division of the accumulated fund, of the yearly income, and of the fee. In regard to this fund the testator expressly provided that upon the death of the longest liver of his wife and sisters the trustees should sell and dispose of his heritable property, and sell and recover any other part of his estates still outstanding, and that the proceeds of these estates should form one general accumulated fund, which they should invest as therein specified, to be held in trust as therein pointed out.

And then comes the clause, the legal effect of which we have to determine, "and the free annual proceeds of the said accumulated fund, after payment of all necessary expenses, shall be divided equally amongst Ann Middleton, my niece, wife of George Younger, wright, sometime in Paisley, now in America; Margaret Middleton, also my niece, wife of David Rae, wright, sometime also in ; the said Jessie Middleton, my grandniece, daughter of Robert Middleton, painter in Edinburgh; Ann Russell, John Russell, James Russell, and Marion Russell, children of the said Marion Wills Forrest or Russell, my sister; and John Kilpatrick, Richmond Kilpatrick, and Mary Kilpatrick, children of the said Richmond Forrest or Kilpatrick, my sister, all share and share alike, and that during the lifetime of my said nephews, nieces, and grandniece respectively, their said several shares being to be held and applied by my said trustees for the liferent alimentary use only of the said several parties, and being declared not to be subject to alienation by them nor to the diligence of their creditors." The income of the said fund is thus given in liferent to the ten nephews, nieces, and grandniece of the testator. Then comes the provision as regards the fee—"And immediately upon the death of any one of my said nephews, nieces, and grandniece, an equal share of the accumulated fund produced from my various estates, corresponding to the number of my said nephews, nieces, and grandniece, shall

become payable, and shall be paid over by my said trustees as soon as the same can be conveniently realised, to the lawful children of such deceaser equally upon their respectively attaining majority, the interest of said share to be applied towards their maintenance and upbringing until the same become payable." There is here a direct bequest of the fee of the one-tenth share liferented by any of the parties before named in the event of his or her decease to his or her children upon their attaining majority, and the interest meantime being applied for their maintenance. Finally, there is a clause in regard to persons predeceasing, in these terms—"Declaring that in event of any of my said nephews, nieces, and grandniece dying without leaving lawful children, or in the event of such children dying before attaining twenty-one years of age without issue of their bodies, then the share of my said estates, which would have otherwise fallen to such children, shall accresce and belong to the survivors of the parties before named in liferent, and to their children in fee, all in the same manner as the proper shares of the parties themselves, and which shares and profits thereof, accrescing as aforesaid, shall be subject to the same restrictions and declarations as are imposed upon the original shares, and which are here held as repeated."

It is explained in the Case that Mrs Forrest, the widow, survived until 1878, until which date the surplus fund was to be accumulated, and it is further explained that certain of the persons to whom a share of the liferent had been given had predeceased her. These were Mrs Russell, Mrs Kilpatrick, and Mrs Jessie Middleton or Donald. Of the ten beneficiaries named in the last purpose five predeceased the widow, viz., (1) the said Jessie Middleton or Donald, who left four children; (2) the said Ann Russell and (3) Marion Russell (who both died unmarried); (4) the said Mary Kilpatrick, afterwards wife of Hugh Wallace, at present in Australia, who left one child, who also predeceased the truster's widow; and (5) the said Mrs Margaret Middleton or Rae, who left three children. The result seems to be this, that there were five survivors of those to whom a liferent had been given, and there were the issue of one predeceasing niece, and the issue of the grandniece. In these circumstances it is explained that after the death of Mrs Forrest, the truster's widow, the heritable estate was sold, and the residue of the trust-estate was divided into seven shares, and that the free annual proceeds of five of these shares have been paid to each of the said Mrs Younger, John Russell, James Russell, John Kilpatrick, and Richmond L. Kilpatrick, now Mrs M'William; that another share was retained in trust for behoof of the said David Donald, Charles Donald, Robert M. Donald, and James B. Donald, the children of the grandniece, who are in minority, and that the interest thereof has been paid to their father for their behoof, and the remaining one-seventh share was paid to the said Mrs Catherine Forrest Rae or Reid, Ann Eliza Rae, and David Robert Rae, the children of the said deceased Mrs Margaret Middleton or Rae, who had all attained majority. Since the death of the widow other two of the liferenters have died, and one of these, Mrs Younger, died in 1882, without leaving issue. The question arises as to what is to become of her liferented share. The question that arises is stated in these terms—The parties of the second part maintain that the one-seventh share liferented by Mrs Younger fell at her death to be divided into six equal shares, and that they are entitled to two-sixths thereof, as in right of Mrs Rae and Mrs Donald, to be divided among them proportionally *per stirpes*. The parties of the third part maintain that the said one-seventh share fell at the death of Mrs Younger to the liferenters named in the trust-deed then surviving in liferent, and to their children in fee, exclusive of the representatives of those liferenters who predeceased Mrs Younger.

So that the question really is this—the Court having to deal with Mrs Younger's share, and she having died in 1882—On the one hand, the survivors of the liferenters claim that the liferent of Mrs Younger's share belongs to them alone, and their children maintain that the fee of it belongs to them alone. But the parties of the second part maintain that though their parents predeceased Mrs Younger, yet they are entitled each to take a sixth share of the fund liferented by her.

I have come to the conclusion that the contention of the second parties cannot be sustained, and that the right to the share which Mrs Younger liferented is by the provisions of the deed given to those of the liferenters who survived her in liferent, and to them alone, and to their children in fee. The words upon which this question turns relate to the bequest in regard to accrescing shares. It is only necessary to say of what precedes that the testator has given a liferent of a tenth share to each of his nephews, nieces, and grandniece, and the fee to their children on the decease of the parent. This bequest is made under certain conditions. As to the liferent, it is to be alimentary and not subject to alienation, and as regards the fee, it is only to vest on the children's attaining majority. Then occurs the clause as to the share of liferenters dying without issue—"Declaring that in the event of any of my said nephews, nieces, and grandniece dying without leaving lawful children, or in the event of such children dying before attaining twenty-one years of age without issue of their bodies, then the share of my said estates which would have otherwise fallen to such children shall accresce and belong to the survivors of the parties before named in liferent, and to their children in fee, all in the same manner as the proper shares of these parties themselves, and which shares and profits thereof, accrescing as aforesaid, shall be subject to the same restrictions and declarations as are imposed upon the original shares."

I think it cannot be disputed that if the language here used is to be taken in its ordinary and natural signification, the plain result is, that while the original shares are given to persons named and their children in fee, in regard to accrescing shares, these are given, not to the families of the whole ten persons, but to the survivors of the persons named in liferent and to their children in fee. The words are quite unambiguous—"The share of my said estates which would have otherwise fallen to such children shall accresce and belong to the survivors of the parties before named in liferent, and to their children in fee." It is said, however, that the Court is to interpret this word "survivor" as meaning something different from its ordinary signification, and that because

there seems to have been an intention to benefit the families of each of the nephews, nieces, and grandniece equally, the Court are to read the word so as ultimately to have that effect—that the Court must take the liberty of altering the language of this deed, and read in the word "others" of the parties before named. Now, it appears to me that while there have been cases in which the Court have been constrained to read the word "survivor" in some such sense, this is not a case of that sort. The result of giving effect to the contention of the second parties would be, that though the deed declares that the share which would fall to be divided on the death of one of the liferenters without issue should belong to the liferenters who survived, yet the surviving liferenters would not get the whole, but a portion would be taken off for the children of liferenters who had predeceased. That would certainly limit the interest of the surviving liferenters in their liferent of the accrescing fund, and I think it is against the meaning of the testator. In the case we have here there are four survivors, who ask that the fund shall be divided into four parts; on the other hand, the families of two predeceasers contend that the division should be into six parts, and that two of these parts should go to them. I think that is contrary to the meaning of the testator, and I cannot find in the other parts of the deed anything to lead to the inference that by "survivors" the testator meant "others," or that by "their children in fee" he meant anything but children of the survivors. The share being so divided goes to the parties of the third part and to their children. We do not get any help from the words "all in the same manner as the proper shares of these parties themselves," for these words apply to the provisions of liferent and fee made above, and the restrictions merely refer to the alimentary character of the liferent, and to the condition that the fee only vested at majority. It appears to me that the only safe rule in the general case is to take the word "survivors" in its natural and ordinary signification, and if we were to depart from this rule we should be in difficulties in future cases. It is right that I should notice that in support of the argument that was maintained for the second parties we were referred to the case of *Ramsay's Trustees*, and to several English cases. In regard to the case of *Ramsay* there is this important distinction between it and the present, that it was not the case of one liferenter dying when several others survived to take. It was the case of the last of a number of liferenters dying. The question there was whether there was to be intestacy or not. The words there were quite distinguishable from those now before us, for the clause there dealt with the issue of survivors, and was in these terms—The testator directed his trustees (having provided his widow with a liferent provision) on the death of his widow "to make over and settle my whole heritable and moveable means and estate . . . and that in equal shares, upon my said brothers and sisters in liferent for their liferent use allenarly, and the issue of their bodies respectively, whom failing to the issue of the survivors or survivor in fee." The question there arose in regard to the share of the last survivor who left no issue, and Lord Gifford remarked, stating what I conceive to be the true ground of the judgment—"The substitutes called by the deed, failing Isabella's own issue, are the issue of the survivors or survivor, but as Isabella herself was the last survivor, if this were to be read as meaning that no issue should take unless Isabella's brother or sisters should survive her this would produce intestacy. But I think intestacy is excluded by the conception of the deed, and therefore I am compelled to read 'survivors or survivor' as if the words had been 'others or other.' I think it clear that the testator intended, failing the issue of his brothers or sisters, to give the fee to the issue of any others who might leave issue, and as the parties directly substituted are issue, I read the provision just as if it had run in favour of 'my nephews or nieces.' It would come to the same thing as if we were to read the words 'survivors or survivor' as referring to the survivors of the testator himself."

I see no reason to doubt the soundness of that decision. If this had been a question in regard to the last of these liferenters, I should have been disposed to hold that, taking the deed as a whole, intestacy was excluded. And accordingly I think the decision in the case of *Ramsay* is not impugned by what we do here.

As to the English authorities, I think they do not favour the argument of the second parties. There have been a long series of cases in England, many quite irreconcileable with each other, in the earlier of which the Courts, seeking to carry out the supposed intention of the testator, have construed the word "survivor" as meaning "other." But it was found that this was productive of looseness, confusion, and conflicting decisions, and as I read them the cases come to this, that unless there be something in the other parts of the deed to indicate that survivor is to be taken as meaning something else than its natural signification it is to be taken in that signification. I refer to Jarman on Wills, p. 689, and the result of what is there stated is, I think, that when the word "survivor" is unexplained by other parts of the deed it is to receive its literal meaning. That rule, however, has been relaxed in England in one class of cases, of which the cases of *Wake* and *Waite* are very good types. In those cases, following on a gift such as we have here, with a clause providing for the death of any of the liferenters without issue, there comes a gift over providing that in the event of everyone of the legatees dying without issue, then the whole succession is to go to the heirs of the survivor, whom failing to another class of persons named or designed. In that case the Courts in England have held that the effect of the destination-over will be not only to prevent intestacy, but also to read into the deed words sufficient to sustain such a claim as is made here. That result is attained in this class of cases naturally because of the gift over. And if the gift over is not present this result does not take place, and the word "survivor" has its natural meaning. Here there is no gift over, and so we do nothing in conflict with those English decisions. If a case arises in which we have a destination-over, it may be for us to consider whether that must control the destination to survivors. I am not satisfied that even in that case we should be able to read the word "survivors" as

equal to others. While I say so, I think that the gift over would be a strong element in the case as bearing upon the question what was to become of the share of the last of the survivors. I think that in that case the fund should go to those persons specially referred to in the deed, and that it would only be failing them that the gift over would take effect. That question I hold to be entirely open. Here we are not entitled to adopt any strained or secondary interpretation, for the terms of the deed are unambiguous.

I therefore think that the question should be answered in terms of the second alternative, and that the share in dispute accresces and belongs, in four equal shares, to the parties of the third part, all in the same manner as their proper shares, and subject to the same restrictions and declarations.

Lord Adam—This question arises under the trust-disposition and settlement of William Forrest, who died in 1844.

By his trust-disposition and settlement the testator directed his trustees to pay to his widow the liferent provision conceived in her favour by their antenuptial marriage-contract, and to pay certain other small annuities, and then, in the fifth place, the trustees were directed to realise his whole stock-in-trade and moveable estate, and invest the proceeds. The annual proceeds of this fund, together with the rents of his heritable property, were to be applied, in the first place, towards payment of the annuities and trust expenses, and the balance was to be accumulated from year to year, along with the principal fund, until the death of the longest liver of his wife and sisters, when the yearly produce of the accumulated fund was to be held by the trustees for division as after mentioned.

The last purpose of the trust-deed contained a direction to the trustees to sell the whole of the testator's heritable property, and to sell and recover any part of his other estate then outstanding, upon the death of the longest liver of his wife and sisters, and that the proceeds thereof, together with those portions of his estates previously realised, should form one general accumulated fund, and that the annual proceeds of this accumulated fund should be divided equally among his nine nephews and nieces and one grandniece. Then followed this direction—"And immediately upon the death of any one of my nephews, nieces, or grandniece, an equal share of the accumulated fund produced from my various estates, corresponding to the number of my said nephews, nieces, and grandniece, shall become payable and shall be paid over by my said trustees, as soon as the same can conveniently be realised, to the lawful children of such deceaser equally upon their respectively attaining majority, the interest of said share to be applied towards their maintenance and upbringing until the same become payable," &c.

Apparently the state of those interested in the estate is this—The widow died in 1878, predeceased by the other annuitants, and therefore the last purpose of the trust-deed came into operation. At that time, the date of the widow's death, out of the ten beneficiaries mentioned in the deed, three had predeceased without issue, and two had predeceased leaving issue. Then Mrs Younger, another of the beneficiaries, died on 31st January 1882 without issue, so that there were four nephews and nieces left.

The question here is, whether Mrs Younger's share is to go to the surviving nephews and nieces, or whether the issue of the predeceasing niece and grandniece are entitled to part of it?

It appears to me that the construction which is to be put upon the terms of the last purpose of the trust-deed is, in the event which has occurred, quite clear. The words are—"Declaring that in the event," &c.—[*reads as above*]. That is the contingency which has arisen, for Mrs Younger died without leaving issue, and it is apparent from these words that her share must accresce and belong to the third parties, who are the survivors, in liferent and their children in fee. The second parties did not contend that there was any ambiguity in the words themselves, or deny that the word "survivors" meant survivors at the death of Mrs Younger, but they suggested that we were not to give the words their literal and natural meaning, because it was to be presumed that the intention of the testator, which was to be gathered from the general purpose of the deed, was to favour these families equally, and that we must give effect to the general intention of the deed. I quite admit that if there had been any doubt as to the meaning of the word "survivors" it would have been most important to look to other parts of the deed for the general intention of the testator, but I do not see that the meaning of the word is ambiguous.

The testator had before him the contingency which has occurred, and he provided for it. He could not have used more appropriate words to give effect to the contention of the third parties. But in order to give effect to the contention of the second parties it would be necessary to read into the clause, "and to the issue of such of my nephews, nieces, or grandniece as shall have predeceased." When the meaning of the words is so plain I am not disposed to override the meaning on a suggestion of what is said to have been the general intention.

It was also said that if effect was given to the contention of the third parties, then in the event of the last survivor dying without issue intestacy would result. That is not the question before us. There are very weighty reasons given in *Ramsay's* case why intestacy should be prevented. But that is not the question here, and the words having a clear meaning, I think they should receive that meaning.

Lord Shand has already pointed out the distinction between the case of *Ramsay*, the cases of *Wake* and *Waite*, and the case we have here. In the cases of *Waite* and *Wake* the question was as to the effect of an ultimate gift over. In *Ramsay* the question was between intestacy and testate succession. The question here is how to read the word "survivor," and I do not think that in deciding this case as we do that we are at all trenching on the decision in *Ramsay's* case.

The ground of judgment there, as put by Lord Gifford, is, in my opinion, quite sound. The English cases appear to me to proceed upon the same principle. In *Wake's* case the question arose upon the words "in case all of my said children shall die without leaving issue, then in trust for the heirs, executors, and administrators of the survivor," and was whether the issue of the children or the heirs of the survivor

should take. It was clear, then, that the heirs of the survivor were only to take if the children died without issue, so that I do not feel at all pressed by these decisions. On the whole, I concur with your Lordship.

Lord Mure—Unless there are very strong equitable grounds for departing from the meaning of words used in a settlement, I think that the natural meaning should be adhered to. In this case the testator limited the gift, in the event which has happened, to the survivors in liferent and to their children in fee, excluding the children of those who had predeceased. Those who were to take the accrescing share were the survivors and their children, and upon the ordinary construction of these words it cannot be said that they mean that children of persons who did not survive were to take any part of the accrescing share.

The only difficulty is as regards the case of *Ramsay's Trustees* (the English cases I do not enter into), but I think that it was in order to avoid creating intestacy that the Second Division adopted the construction of survivors as meaning others. In this case there is no specialty like that, and I cannot read others into the deed. I therefore agree that the second alternative should be answered in the affirmative.

The Court pronounced this interlocutor:—

"Find and declare that on a sound construction of the trust-disposition and settlement of William Forrest designed in the Special Case, the share of his trust-estate liferented by Mrs Ann Middleton or Younger, designed in the Special Case, now deceased, accresces and belongs in four equal shares to the parties of the third part respectively, to the exclusion of the parties of the second part, and that in liferent and fee, all in the same manner as the proper shares of these parties themselves, and subject in the same restrictions and declarations as are imposed upon the original shares: Find that the expenses of all the parties, as the same may be taxed by the Auditor, shall be paid out of the trust-estate, and decern."

Counsel for First Parties—Fraser. Agent—F. J. Martin, W.S.

Counsel for Second Parties — H. Johnston. Agents—Henderson & Clark, W.S.

Counsel for Third Parties—Lorimer. Agent—F. J. Martin, W.S.

Tuesday, November 4.

OUTER HOUSE.

[Junior Lord Ordinary, Lord Kinnear.

JOHNSTONE, PETITIONER.

Entail—Process—Expenses—Expenses Incurred by Curator ad litem *to Minor Heir.*

A petitioner for warrant to disentail is liable to the curator *ad litem* appointed to a minor heir, for his fee and the expenses necessarily incurred by him in attending to the interest of his ward, and such expenses may, according to the circumstances of the case, include the employment by the curator *ad litem* of an actuary to value his ward's expectancy.

William Johnstone of Harthope, institute of entail in possession of the entailed lands and estate of Harthope and others, in the county of Lanark, presented a petition for the disentail of the said lands and estate under the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), and subsequent entail statutes. The three next heirs of entail were John Anderson Johnstone and his two sons, the youngest of whom, William Gillespie Johnstone, was a minor, and had no legal guardian except his father. A curator *ad litem* was therefore appointed to him. A remit was made in the usual form to an actuary to ascertain the value of the expectant interest of these three next heirs, and he duly reported thereon.

The curator *ad litem* to the minor heir, however, was not satisfied with the value which the actuary to whom the Court had remitted put upon his ward's expectancy, and took the opinion of another actuary as to the value.

The Lord Ordinary, after discussion, approved of the valuation of the actuary to whom his Lordship had remitted the case.

The petitioner refused to pay the curator's charges and the expenses incurred by him. The curator moved the Lord Ordinary to find the petitioner liable to pay these expenses.

The petitioner argued that he was not liable for the curator's expenses, and further that part of the expenses incurred in the particular case were unnecessary and improper, and that the demand was contrary to practice.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel, finds the curator *ad litem* to the respondent William Gillespie Johnstone entitled to expenses, allows an account thereof to be lodged, and remits the same to the Auditor to tax and to report.

"*Opinion.*—I do not find that there is any established rule of practice in this matter, but I have no doubt as to what the rule ought to be. It is necessary to distinguish between the case of a pupil or minor respondent and that of a respondent who *is sui juris*. A respondent who is *sui juris* may determine for himself whether he ought to appear in the process; and if he does not think fit to appear, his non-appearance is a fact in the case upon which the Court will proceed. It is not conclusive of the merits of the petition, but it fixes conclusively that the respondent's interests may safely be left in the hands of the men of business or men of skill to whom the Court may remit, because he himself has been content so to leave them. But the Court cannot proceed upon the same assumption in the case of a pupil or a minor. It is indispensable that his interest should be protected by the appointment of a curator *ad litem*. The expense of that appointment must necessarily be incurred in order to the success of the proceeding; and it ought therefore to fall, not upon the respondent, whose interests are brought into question by no act of his own, but upon the petitioner, who requires that they shall be determined in order to enable him to take the benefit of the Entail Amendment Acts.