in Glasgow; and that the said prize or bursary shall be held for not more than three years by any one holder thereof, but the said trustees and their foresaids shall have the power and liberty of awarding the same for one year or more according to their estimate of the value of the work done, of which they shall be examiners and sole judges."

At advising—

LORD PRESIDENT—The Court have seen the additional report by Mr Maconochie, and are satisfied that the scheme may be settled in accordance with it.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the additional report by Mr Maconochie, and authorised the "John Reid Prize" to be administered in accordance with the conditions proposed in the clause contained therein.

Counsel for the Petitioners — Symi. Agents—M'Gregor & Cochrane, S.S.C.

Thursday, July 13.

FIRST DIVISION.

[Lord Low, Ordinary.

MORRISON'S TRUSTEES *v.* WARD AND OTHERS.

Succession — Settlement — Construction — "Survivors."

A testator, after providing for the payment of certain annuities, directed that the residue of the income of his estate should be paid equally among his children in liferent, and that upon the death of any of his children, leaving lawful issue, the share liferented by such child should be paid to and among his or her issue equally, upon their attaining majority or being married, declaring that in the event of any child dying without issue, "his or her share of the liferent of my means and estate shall thereafter be divisible and payable equally among my surviving children and their issue in liferent and fee respectively, in the same manner, and subject to the same restrictions as are specified in regard to the provisions in favour of my children and their issue generally."

Held (*aff.* Lord Low) that upon the death of a child without issue the share liferented by him fell to be divided equally among the surviving children and their issue in liferent and fee respectively, and that the issue of predeceasing children had no right to participate therein.

Forrest's Trustees v. Rae, &c., December, 20, 1884, 12 R. 389, *followed.*

Alexander Morrison, died on 18th April 1860, leaving a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to trustees. After providing for payment of certain annuities, the testator directed that his trustees should divide among and pay to his children, share and share alike, the remainder of the income arising from his means and estate, during their respective lifetimes, and for their liferent use allenarly. He further provided as follows—"*Seventhly*, Upon the death of any of my children leaving lawful issue, that portion of my means and estate which was liferented by him or her shall be paid, or disponed, or assigned, to his or her children equally among them upon their attaining the age of twenty-one years or being married, whichever of these events shall first happen respectively; and until such event my trustees shall apply the interest or income arising from their respective portions of my estate or such part thereof as my trustees shall consider necessary for their maintenance and education; and declaring that in the event of any of my children dying without leaving lawful issue, his or her share of the liferent of my means and estate shall thereafter be divisible and payable equally among my surviving children and their issue in liferent and fee respectively, in the same manner and subject to the same restrictions as are above specified in regard to the provisions in favour of my children and their issue generally."

The testator was survived by several children. Of these, three daughters—Mrs Janet Morrison or Collins, Mrs Mary Dalgleish Morrison or Ward, and Mrs Annie Campbell Morrison or Lacy—died in 1877, each leaving issue; James died without issue in 1885; Adam, leaving issue, in 1887; Mrs Hannah Morrison or Barr, without issue, in 1890; and Mrs Margaret Morrison or Lang was then left as sole survivor of the testator's children.

In 1892 the trustees under the testator's settlement brought an action of multiplepoinding for the settlement of certain questions which had arisen as to the distribution of his estate. Claims were lodged for the issue of Mrs Collins and of each of the other children of the testator who had deceased leaving issue, and for Mrs Lang and her family.

The following question was raised — "Whether the issue of those children of the testator who had survived him, but had predeceased James Morrison and Hannah Barr respectively, were excluded from participation in the fee of the shares liferented by the said James Morrison and Mrs Barr respectively?"

On 22nd November 1892 the Lord Ordinary (LOW) pronounced an interlocutor wherein he found—"(1) That the said James Morrison died without issue on 25th November 1885, and that of the share of the testator's estate liferented by him one third accrued to Adam Morrison and his issue in liferent and fee respectively, one third accrued in liferent to Mrs Hannah Morrison or Barr, and one third accrued to the claimant Mrs Margaret Morrison or Lang, and her issue in liferent and fee

respectively; (2) that the said Mrs Hannah Morrison or Barr died without issue on 8th January 1890, and that the entire share (both original and accruing) of the testator's estate liferented by her, but under deduction from the original share of advances made by the truster to her, accrued to the claimant Mrs Margaret Morrison or Lang and her issue in liferent and fee respectively." . . .

"*Opinion.*—The first and perhaps the most important question raised in this case is upon the construction of the seventh purpose of Alexander Morrison's trust-disposition and settlement.

"The purpose provides for the event of the death of any of the testator's children who survive him and come into the enjoyment of the liferent provided to them in the settlement. If a child dies and leaves lawful issue, the portion liferented by that child is to be paid to the issue. If a child dies without leaving lawful issue it is declared that 'his or her share of the liferent of my means and estate shall thereafter be divisible and payable equally among my surviving children and their issue in liferent and fee respectively, in the same manner and subject to the same restrictions as are above specified in regard to the provisions in favour of my children and their issue generally.'

"The words there used are quite distinct. The share of a child dying without issue is to be divided between the surviving children and their issue. The issue of a predeceasing child are given no right, and although it may be difficult to understand why the issue of children who survived the death of a child who left no issue should be preferred to the issue of a child or children who predeceasd that event, the words which the testator has used must be given effect to according to their fair and natural meaning. Further, I think that this case is ruled by the judgment of the First Division in *Forrest's Trustees* v. *Rae*, 12 R. p. 389." . . .

The children of Mrs Ward and others reclaimed, and argued—The apparent intention of the testator was that his estate should be equally divided among his children and their issue in liferent and fee respectively. So far as the fee of the accruing shares were concerned, this intention could only be effectuated if "surviving" were read as "other." On the opposite construction there might have been partial intestacy in the event of the last surviving liferenter dying without issue. On the whole the most reasonable construction was to read "surviving" as "other"—*Ramsay's Trustees* v. *Ramsay*, December 21, 1876, 4 R. 243; *Waite* v. *Littlewood*, 1872, L.R., 8 Ch. App. 70; *Wake* v. *Varah*, 1876, L.R., 2 Ch. Div. 348.

Argued for the claimants Mrs Lacy and others—The presumption was that the words "dying" and "surviving" referred to the same period, and so far at all events as the liferent interests were concerned, "surviving" could not be referred to any period but the death of the child which set free the liferent for distribution. In the case of the liferenters therefore "surviving" could not be read as "other," and the inference was that it should not be so read in the case of the fiars either. The plain grammatical construction and natural sense of the words used by the testator were against the reclaimers' interpretation, and the case fell under the rule of *Forrest's Trustees* v. *Rae, &c.*, December 20, 1884, 12 R. 389; and *Hairsten's Judicial Factor* v. *Duncan*, July 14, 1891, 18 R. 1158. The supposed case of intestacy applied only to the event of the last surviving liferenter's death, when the purpose of the clause would be exhausted. Perhaps in that case "surviving" might be read as "other."

At advising—

LORD KINNEAR—[*After reading clause of settlement*]—If the words of the clause I have read are to be construed literally, there can be no question as to their meaning. The word "surviving" must refer to the event on which devolution to survivors is to take place, and the accrescing shares must be given in liferent to those of the testator's children who may survive the predeceasing liferenters, and in fee to the issue of such surviving children. Passing from the form of the expression and going on to the substance of the bequest, it is certain the children who are to take an accrescing share must be those alone who are still in life when accretion takes place, because the interest they are to take is "for their liferent use allenarly," and a gift in liferent to certain persons upon the determination of a predeceasing interest cannot possibly be read except in favour of those persons who are still alive. So far, therefore, as the immediate children of the testator are concerned, the word "surviving" certainly does not admit of construction. It can bear no other meaning than that found by the Lord Ordinary. It is a difficult question whether their issue may not receive a wider interpretation, but here again, if the clause is to be read according to the plain grammatical construction of the words in their sequence, there can be no question. The fee of an accrescing share is given to the issue of those surviving children who are to take the liferent. If the clause is to be taken by itself, it seems to me to raise no implication of any intention to benefit the issue of predeceasing children.

But we have been referred to a series of decisions in England in which it has been held that very similar expressions ought to receive a wider interpretation than the literal meaning of the specific words would bear, and on these it is maintained that "surviving children" means "surviving *stirpes*," so that the grandchildren of the deceased must take the same share of the fee whether their parents have survived to take the corresponding liferent or not. The reasoning on which the cases of *Wake* and *Waite* were decided appears to me, if I may say so, to be very convincing, and if it were applicable to the will we are construing I should have no difficulty in following these

decisions. But in these cases the Court inferred from the whole tenor of the will that a literal interpretation of specific words would not effectuate the testator's intention. In the present case there is nothing in the will to throw any light upon the clause in question except the language which the testator has used in the clause itself. We are asked to disregard the language he has used because it imports a provision which is said to be capricious, and because in certain possible events it may result in a partial intestacy. These considerations have been thought to be very material in construing a will, which, elsewhere than in the clause immediately under construction, which is supposed to raise the difficulty, expresses clear intention to distribute the testator's estates in all possible contingencies, and to preserve entire equality in the ultimate distribution. Taken by themselves in the present case, I am not sure that they are very weighty considerations. The argument in regard to a possible intestacy loses its force when we find that there is no gift over in the event of all the liferenters dying without issue, and therefore on a possible contingency there might be total intestacy—a contingency no doubt which is to be provided for, and I am not satisfied that, taken by itself, there is anything so capricious in an intention to benefit the immediate children of the testator rather than the issue of predeceasing children, as to justify the Court in refusing to accept the plain meaning of words which indicate such an intention. What is probably more material is, that both of these criticisms of the result of a literal interpretation of this clause are entirely negative. They might be of great importance if they could be taken in connection with any positive expression of intention in an opposite direction. But taken by themselves they will not justify the Court in refusing to give effect to the plain meaning of the words which the testator has used. In the case of *Wake* v. *Varah* (March 17, 1876, L.R. 2 Ch. Div. 348.) Lord Justice Baggallay gives the general principle on which he proposes to construe the will there under consideration in this way:—After pointing out the inconsistencies of a very similar kind, indeed altogether similar with those I have referred to, which existed between the presumed intention of the testator and a literal interpretation of the clause of accretion, he goes on to say "But neither the consideration that a literal interpretation of the language used would lead to intestacy in particular events, nor the consideration that such an interpretation would lead to a construction which, if really intended by the testator, would have been capricious, would justify the Court in attributing to the language used by the testator other than its literal interpretation, unless satisfied, upon a consideration of the whole contents of the will, not only that the language used was insufficient to effect his full intention, but that the will itself afforded sufficient evidence of what his intention was," and therefore the ground of construction is, that when the particular clause is subjected to a literal interpretation, it appears to the Court to be imperfect or inadequate as an expression of the testator's will, because they find in other parts of the deed clear indications that he intended to do something different or something more than the clause in question does. In order, therefore, to bring these decisions into operation it is necessary in the first place to find from the indications in the will, apart from the clause immediately under construction, some reason for holding that the literal language of that clause is insufficient, and then to find in the will some clear indication of the intention to do something different from what a literal interpretation of the clause would infer. Now Lord Justice Baggallay goes on to examine other parts of the will, and shows that both these conditions are satisfied, but I find nothing in the present case which enables me to say that either is satisfied, and therefore it appears to me that the decision, which is much more directly in point than either of the two English cases to which I have referred, is that of *Forrest's Trustees* v. *Rae*, 12 R. 389. I think we ought to follow that decision, from which I am really unable to distinguish the present case, and I am therefore of opinion that the Lord Ordinary's judgment is right.

LORD ADAM—I agree with the Lord Ordinary that the meaning of this provision is clear, and that it is a direction to divide the share of a deceasing child among the surviving children and their issue. I also agree with him that the case cannot be distinguished from that of *Forrest's Trustees*, which was followed in the case of *Hairsten's Judicial Factor*, 18 R. 1158.

I am therefore for adhering.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent at the discussion.

The Court adhered.

Counsel for the Claimants John Henry Ward and Others—Sol.-Gen. Asher, Q.C.—Jamieson. Agent — R. Ainslie Brown, S.S.C.

Counsel for the Claimants Mrs Lang and Others—Sir Charles Pearson, Q.C.—Chisholm. Agent—Smith & Mason, S.S.C.