in the second degree was to depend on the accident of whether their parent died first or second"—*Badger* v. *Gregory*, L.R., 8 Eq. 78, *per* Vice-Chancellor James, p. 84, cited in *Paterson's Trustees* v. *Brand*, December 9, 1893, 31 S.L.R. 200. The result was that the term "survivors" used in the deed must be held to mean "others," and therefore the children of the sister who had predeceased Mrs Stenhouse would take a part of her share—*Ramsay's Trustees* v. *Ramsay*, December 21, 1876, 4 R. 243.

At advising—

LORD JUSTICE-CLERK—In this case counsel for the third and fifth parties referred us to a case of *Ward* v. *Lang* which seems to me to be quite undistinguishable from this. I think, therefore, that our decision must be to the same effect.

LORD YOUNG—There may be some difficulty in distinguishing *Paterson's Trustees* from *Ward* v. *Lang*, but I think that it is impossible to distinguish this. I think, therefore, that we must follow *Ward* v. *Lang*, which, as Lord Rutherfurd Clark observed, expresses the settled rule of construction.

LORD RUTHERFURD CLARK—I also think that we must follow *Ward* v. *Lang*, and give the word "survivor" its ordinary meaning.

LORD TRAYNER—I agree. If necessary I do not think it would be impossible to distinguish this case and *Ward* v. *Lang* from *Paterson's Trustees*.

The Court answered the first half of the first question and the second alternative of the second question in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First, Third, and Fifth Parties—Macfarlane.

Counsel for the Second Parties—Sym. Agents—W. & J. Burness, W.S.

Counsel for the Fourth Party—Burnet. Agent—James F. Mackay, W.S.

Wednesday, March 7.

FIRST DIVISION.

STEVENSON *v.* STEVENSON.

(Sequel to case reported *supra*, p. 350).

Husband and Wife—Custody of Children—Execution pending Appeal to House of Lords—Warrant to Messengers-at-Arms to Take Children into Custody.

A wife having presented an appeal to the House of Lords against an interlocutor ordering her to deliver up the children of the marriage whom she had surreptitiously removed from their father's house, the husband presented a petition craving the Court "to allow execution to proceed notwithstanding the appeal," and also "to grant warrant to messengers-at-arms to take into their custody the persons of the said children."

Held that execution should be allowed to proceed, but that the latter part of the prayer of the petition was inappropriate, the wife not being in contempt of Court.

Colonel James Stevenson of Braidwood, Lanarkshire, presented a petition to the First Division of the Court of Session on March 3, 1894, in which he stated that his wife had presented a petition of appeal to the House of Lords against the judgment pronounced by their Lordships on January 30, 1894, (*supra*, p. 350), and prayed the Court "to allow execution to proceed upon the said judgment notwithstanding the appeal, to the effect of enabling the petitioner to obtain the custody of his children, the said Samuel Delano Stevenson, Adela Florence Victoria Stevenson, and Laura Janetta Stevenson, in terms thereof; and also to grant warrant to messengers-at-arms and other officers of the law to take into their custody the persons of the said children, wherever they may be found, and deliver them into the custody of the petitioner, or any person or persons he may appoint to have and keep their custody, and authorise and require all judges-ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of this warrant, and recommend to all magistrates in England and elsewhere to give their aid and concurrence in carrying this warrant into effect: Or to do otherwise as to your Lordships shall seem proper."

Argued for petitioner—In the case of *Symington*, June 11, 1874, 1 R. 1006, a prayer "to allow execution to proceed on the foresaid decrees notwithstanding the appeal (to the House of Lords), to the effect of enabling the petitioner to obtain the custody of the children of the marriage" was granted. That case did not support the latter part of the prayer here, which, however, was in terms similar to those used in the cases of the *Earl of Buchan* v. *Lady Cardross*, May 27, 1842, 4 D. 1268; *Leys* v. *Leys*, July 20, 1886, 13 R. 1223; *Hutchison* v. *Hutchison*, December 13, 1890, 18 R. 237.

Argued for respondent—(1) The *status quo* should be maintained pending the appeal—*Gray* v. *Low*, March 12, 1859, 21 D. 723; *Kirkcaldy District Committee of the County Council of Fife* v. *Howard*, July 20, 1893, 20 R. 1123. There was no suggestion that the mother was about to remove the children out of the country, or that there would be undue delay in prosecuting the appeal. (2) The health of the children, according to a letter from a qualified medical man, made it very undesirable that they should leave St Leonards-on-Sea, where they were living, and travel north in winter. (3) The latter part of the prayer was quite inappropriate to the present circumstances and unwarranted. Such a prayer was only granted where the respondent was defying the orders of the Court.

This being so, it vitiated the whole petition.

At advising—

LORD PRESIDENT — In determining the question before us we must have regard to the circumstances under which our order of 30th January ordering Mrs Stevenson to deliver up the children became necessary. In her answers to the petition for delivery presented by her husband she admitted that the reason why the children were in England, and not in their father's house, was because she by trick had removed them, alleging the purpose of taking them on a visit while meaning to keep them away permanently.

We are now asked by the father to put the children, pending the appeal, into his house, where they would have been but for their mother's surreptitious removal of them.

I am in favour of granting the prayer of the petition. I should certainly not have acceded to the request if I had had reason to believe the interests of the children would suffer thereby, but all we are told, and that somewhat vaguely, is that they are in delicate health, and are not in a fit state to come to Scotland for what is called "the winter." Colonel Stevenson will no doubt have due regard to his children's health, and will not take them to a climate injurious to it. I do not think we need do more than state what is his manifest duty, and which I have no doubt he will perform.

I have heard no adequate reason against granting this petition, and I think we best respect the *status quo* by restoring the children to the house from which they were surreptitiously removed.

As to the form of the petition, I think the petitioner has adopted a wrong style, and that the latter part of the prayer is only appropriate where search has to be made. This is evident from the reference to judges-ordinary in Scotland and their procurators-fiscal, and to magistrates in England, which indicates that extraordinary measures have to be resorted to. I think the proper course for us to adopt here is simply to follow out our previous order, which it is the defender's duty to obtemper, by granting the first part of the petition, and allowing execution to proceed pending appeal.

LORD ADAM—I think the prayer of the petition is in an unusual form. It professes to be a prayer for execution pending appeal, and is truly so as regards the first portion of it, which I concur in thinking we should grant. We are dealing with a lady who has herself told us that she removed the children from their father's house apparently for a temporary visit but really intending to keep them away permanently.

I have heard nothing satisfying me that it would be prejudicial to the interests of the children to grant the prayer of the petition. I think *ante omnia* they should be restored to their father's house. It is suggested that their health will suffer by bringing them to Scotland, but doubtless the petitioner will take proper care of them if he gets this order, and it does not necessarily follow that he will bring them down here.

The rest of the petition is not appropriate. The lady should have an opportunity of obtempering the order of the Court. If she should unfortunately refuse to obey our order, she would then be in contempt, and it would be for the petitioner to take any other proceedings he might deem necessary. The remaining part of the petition might in such circumstances be more or less appropriate, but at present we should, I think, only grant the first part, and I hope she will obey the order.

I am of opinion we should grant the first part of this petition and refuse the second part.

LORD M'LAREN—I agree with your Lordship in the chair both as to granting the petition in general and as to the limitations of the order to be pronounced. The only step we can at present take is to allow execution pending appeal to the House of Lords. I think it is incompetent for us at present to go beyond our original order, apart from the undesirableness of granting, unless absolutely necessary, such a prayer as that contended in the latter part of the petition.

LORD KINNEAR concurred.

The Court granted the prayer of the petition so far as it craved execution pending appeal, and *quoad ultra* refused the prayer of the petition as incompetent.

Counsel for the Petitioner—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for the Respondent — Ure — M'Lennan. Agent—J. Murray Lawson, S.S.C.

Thursday, March 8.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

SINCLAIR *v.* PROVIDENT ASSOCIATION OF LONDON, LIMITED.

Contract—Breach of Contract—Illegal Contract — Claim for Repayment — Lottery Acts.

A person became a member of a provident society under a contract whereby he agreed to pay certain monthly instalments in consideration of receiving a bond for £500 payable at the end of thirty years. The contract provided that ballots should be held monthly, and that a bondholder whose bond was drawn should be entitled to receive an advance equal to the amount secured in the bond without having to pay interest upon it; and further, that in the event of the bond-