defenders are not due or resting-owing the sums sued for."

Upon 8th November 1893 the Lord Ordinary (WELLWOOD) repelled the defences and decerned in terms of the conclusions of the summons.

"*Opinion.*—No maintainable defence to the pursuer's claim is stated on record, and I am not surprised that no argument was forthcoming for the defenders. I shall therefore content myself with saying that in my opinion the pursuer having offered to assign to the defenders all his rights against the Queensland National Bank, and tendered them his deposit-receipt endorsed, is entitled under his policy to payment of the sum sued for.

"The sum deposited with the Queensland National Bank was repayable on 4th June 1893, and the bank was and is admittedly in default. The pursuer is therefore entitled to call on the defenders to implement their guarantee unconditionally. He has no concern with the steps that have been taken to reconstruct the bank. If they are successful, so much the better for the defenders, who will stand in the pursuer's shoes, as it was intended by the conditions of the policy they should do in the event which has happened. But no reason has been suggested why the present condition of the bank should affect the pursuer's claim against the defenders, and I can see none."

The defenders reclaimed, and argued—Default had not occurred in the meaning of the policy. The bank had been reconstructed and new documents of debt granted to pursuer by the bank equivalent to the deposit-receipt held by pursuer, and equivalent to payment. The pursuer was not able to put the defenders in a position to sue the bank legally, as stipulated in the conditions of the policy, because the bank had been reconstructed by authority of the Australian Court, and all proceedings against it stayed.

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—The Lord Ordinary has informed us that he was not surprised that no argument was offered by the defenders. I must do Mr Grierson the justice to say that a slight advance has been made at this stage. He has said all that could be said, but the record itself contains no foundation for the argument which he has stated or suggested. Such an argument might have been available upon a better and different statement of facts.

It is admitted that the bank stopped payment upon 15th May 1893, and that a deposit due to the pursuer upon 4th June 1893 was not then paid. The bank therefore was manifestly in default. I do not see how, *prima facie*, the defenders have any answer to the pursuer's claim. But they say that the conditions of the policy have not been fulfilled. There is nothing upon record to support that statement, and they cannot say more. They have been offered all the rights the pursuer has against the bank, and they do not say what more they want. They say they suspect that the pursuer cannot put them into the same position towards the bank as he occupied, but such a suspicion will not do.

The third plea-in-law for the defenders that they are not due or resting the sums sued for is plainly contrary to the facts of the case.

LORD ADAM concurred.

LORD KINNEAR—I also agree. I think the defence is irrelevant. It is suggested that by the law of Australia the plan for reconstruction of this bank will make the fulfilment of the conditions in this policy impossible, as the defenders cannot take the position of the insured. How that may be I do not know, but there is no averment on record in support of such an argument. All the defenders say is that they believe, but that is not sufficient.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Ure—M'Clure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defenders and Reclaimers — Dickson — G. G. Grierson. Agents—Simpson & Marwick, W.S.

Saturday, December 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

PATERSON'S TRUSTEES *v.* BRAND.

Succession — Will — Construction — "Survivor."

By his trust-disposition and settlement, dated in 1881, a testator directed his trustees to pay to W. B. and R. B., the sons of his half sister, equally between them, the sum of £2500, "declaring that should both or either of them be at present deceased or should hereafter predecease me leaving lawful issue, such issue shall take the share that would have fallen to their parent if in life, equally *per stirpes*, and in default of such issue the same shall fall and accresce to the survivor of the said W. B. and R. B., and the issue of the survivor, whom all failing the same shall fall into and form part of the residue of my estate."

The testator died in 1889. W. B. died in 1867 leaving issue who survived the testator. R. B. was held, under the Presumption of Life Limitation (Scotland) Act 1891, to have died in 1872 without leaving issue.

Held (*diss.* Lord Rutherfurd Clark) that the children of W. B. were entitled to the whole legacy of £2500.

By his trust-disposition and settlement, dated 2nd May 1881, the late Robert Pater-

son, sometime merchant in Glasgow, and who resided there, conveyed his whole estate to trustees, and directed them, as soon after his decease as convenient, to make payment of his debts and of certain bequests. *Inter alia*, he directed his trustees, "in the seventh place, to pay or apply to or for behoof of William Brand and Robert Brand, children of the late Mrs Janet M'Kay or Brand, who was also a daughter of my mother by her first marriage, equally between them, the sum of £2500, declaring that should both or either of them be at present deceased, or should hereafter predecease me leaving lawful issue, such issue shall take the share that would have fallen to their parent in life equally *per stirpes*, and in default of such issue the same shall fall and accresce to the survivor of the said William Brand and Robert Brand, and the issue of the survivor, whom all failing the same shall fall into and form part of the residue of my estate." The testator left the residue of his estate to twenty-eight different institutions.

William Brand, the testator's nephew, mentioned in the settlement, was drowned off the Irish coast in January 1867, and was survived by two sons—William Christie Brand and Robert Brand.

Robert Brand, also mentioned in the settlement, the other nephew of the testator, was a sailor, and when at home resided in Dumbarton. In or about the year 1862 he went to America to run the blockade during the American Civil War. After leaving Scotland he never communicated with any of his friends or relatives, and on 13th July 1892 William Christie Brand and Robert Brand, the sons of William Brand, presented a petition to the Court of Session under the Presumption of Life Limitation (Scotland) Act 1891, in which petition, after due advertisement and proof, decree was pronounced on 6th December 1892, finding that the said Robert Brand senior had disappeared; that 31st December 1865 was the date on which he was last known to be alive, that there was no sufficient evidence that he died at any definite date, and that he must be presumed to have died on 31st December 1872, exactly seven years after the date on which he was last known to be alive.

The testator Robert Paterson died on 9th March 1889, and his trustees entered upon the possession and administration of the trust-estate. They paid over £1250, the one-half of the legacy conveyed by the seventh purpose of the settlement, to William Christie Brand and Robert Brand, the children of William Brand. Questions having arisen as to how the sum of £1250, being the other half of the said legacy, should be disposed of, the trustees raised an action of multiplepoinding for the decision of the point.

A claim was lodged by William Christie Brand and Robert Brand, the sons of William Brand, who maintained "that they are entitled to the fund *in medio*. They contend that on a sound construction of the seventh purpose of the trust-disposition and settlement in question, it was the testator's intention that the legacy of £2500 should, in the event of the predecease of William Brand and Robert Brand, fall and accresce to their issue or the issue of either of them failing issue of the other. As both William and Robert Brand predeceased the testator, the latter without leaving any issue, the claimants, as the only children of William Brand, are entitled to the balance of said legacy remaining unpaid, and which constitutes the fund *in medio*."

A claim was also lodged by Robert Paterson's trustees, who averred—"The said Robert Brand senior being presumed to have died on 31st December 1872, must be held to have survived the said William Brand, his brother, and having left no issue, or at least no issue having appeared to claim his share, and there being no evidence of the existence of any such issue, his share (one-half) of the said legacy of £2500, with the interest accrued thereon, being the fund *in medio*, falls into residue under the terms of the said trust-disposition and settlement."

On 5th August 1893 the Lord Ordinary (Stormonth Darling) pronounced the following interlocutor:—"Repels the claim for Robert Paterson's trustees, sustains the claim for William Christie Brand and another, and ranks and prefers them to the fund *in medio* in terms of their said claim, &c.

"*Note.*—The testator here, who died on 8th March 1889, was apparently a man possessed of large means, and without a family of his own. The general frame of his settlement was to leave a number of bequests to half-sisters and their children, and to cousins and their children, and the residue to public institutions and charities.

"Among the bequests was one of £2500 to William and Robert Brand, sons of a deceased half-sister, equally between them, and their issue. Both William and Robert predeceased the testator, William having been drowned in January 1867, survived by two sons, and Robert having disappeared in 1865. As nothing was heard of Robert for a number of years, a petition was presented to the Court under the Presumption of Life Act of 1891, the result of which was that decree was pronounced finding that he must be presumed to have died on 31st December 1872, exactly seven years after the date on which he was last known to be alive. Though this date is purely statutory and arbitrary, I take it that for all questions of succession it must be treated as if it were the true date of death. The result therefore is that both the institutes must be held to have been dead before the date not merely of the testator's death, but of his will, which was executed in 1881. Indeed, he seems to have had some suspicion of this himself, because in the declaration appended to the bequest on which the whole question turns, he provides for the case of both or either of the brothers being 'at present deceased.'

"Now, what does he direct in that case? He says that 'should both or either of them be at present deceased, or should

hereafter predecease me, leaving lawful issue, such issue shall take the share that would have fallen to their parent if in life, equally *per stirpes*, and in default of such issue, the same shall fall and accresce to the survivor of the said William Brand and Robert Brand, and the issue of the survivor, whom all failing the same shall fall into and form part of the residue of my estate.' These are the words that have given rise to the present question, the fund *in medio* being the legacy of £1250 which would have fallen to Robert Brand if he had survived the testator, and the competitors being on the one hand the two sons of William Brand, and on the other the trustees on behalf of the residuary legatees of the testator.

"I shall first examine the clause apart from authority. It starts with a declaration that in the event of the predecease of either or both of the institutes leaving issue, 'such issue' are to take what the parent would have taken 'equally *per stirpes*.' I pause there to ask, What did he mean by 'such issue?' Clearly he meant the issue of either or both. If both were dead leaving children, each family were to take the parent's share. If one was dead leaving children and the other survived, then the family of the predeceaser were to take their parent's share, and the survivor was to take his own. Then the testator goes on to deal with the case of there being no 'such issue' but a surviving brother. In that case the surviving brother was to take the whole fund of £2500, which up to that time had been dealt with as two separate legacies of £1250 each. But what about the case of there being no surviving brother? The testator had already provided for that case if both brothers were dead leaving issue. But for the case of both being dead and only one having left issue (which is the actual case) there was no provision except the words 'and the issue of the survivor.'

"Now, are these words to be construed literally, as the trustees for the residuary legatees contend, or does the context of the will compel a wider construction? This part of the clause is introduced and controlled by the words 'in default of such issue.' That plainly means in default of issue to take their parent's share. Then it goes on to say 'the same' (*i.e.*, the share which the brother or his issue would have taken) is to fall and accresce to the survivor and the issue of the survivor. The testator thereby clearly shows his desire, at all events in one event, that the whole sum of £2500 is to remain in the Brand family. If one of the two *stirpes* fails and another survives, either in the person of one of the two brothers or of his issue, the whole is to go to that surviving *stirps*. What possible difference could it make to the testator whether the surviving *stirps* was the family of the brother who died first or second? I can understand the state of mind of a testator who says, 'I shall secure to the issue of each of a number of liferenters their parent's share, but as to accruing shares I prefer that these should go to the families of surviving liferenters.' That was the state of things in *Forrest's Trustees* v. *Rae*, 12 R. 389, and in the recent case (only as yet reported in the Scots Law Times, i. 138), of *Morrison's Trustees* v. *Macgeorge*, July 13, 1893. But it is incredible to me that a testator should desire to say, 'I wish to give a legacy to two brothers and their issue, and in the event of both brothers dying and only one leaving a family, I wish that family to get the whole, provided their father died after his brother, but not if he died before his brother.'

"At the same time I am aware that (apart from some settled rule of law like the *conditio si sine liberis*) it is not permissible to supply words, or take away words, or distort words in a will merely because the construction otherwise would be capricious or even absurd. There must be something in the context of the will itself to warrant, and indeed to compel such a liberty being taken with the ordinary meaning of language.

"In England this question has been very much canvassed, and the tendency latterly has been, I believe, towards a strict construction of the word 'survivors.' But the English courts do still recognise at least one case in which the word must be construed as equivalent to 'others.' It is thus put by Lord Justice James in *Badger* v. *Gregory*, L.R., 8 Eq. 78 (p. 84)—'When, for instance, Blackacre is given to A for life with remainder to his children, and Whiteacre acre to B for life, with remainder to his children, and in case either should die without children, then his acre to go to the survivor and his children, the presumption is almost conclusive that the word 'survivor' is put in contra-distinction to "the one so dying," and means the one that does not die childless. If, in addition to this, the will goes on and says and if both shall die without children, then the whole shall go to C, the conclusion that "survivor" means "other" becomes irresistible.' This was the kind of case which I think Lord Shand had in view in *Forrest's Trustees* v. *Rae*, when he said—'If a case should arise in which there is a gift over, it will be for consideration whether the effect of the terms in which the gift-over is made ought to be to control the destination of accrescing shares to survivors, but in the meantime that question is entirely open.'

"Now, I am of opinion that such a case has arisen here. The gift-over, on the strength of which alone the residuary legatees can take, begins with the words, 'whom all failing.' Who are the 'all?' Clearly I think the issue of both the brothers, because the issue of both have been referred to in the preceding part of the clause. I therefore think I am warranted in adopting the canon of construction which governed the long chain of English authorities of which *Badger* v. *Gregory*; *Waite* v. *Littlewood*, L.R., 8 Ch. App. 70; *Wake* v. *Varah*, L.R., 2 Ch. Div. 348; and *Lucena* v *Lucena*, L.R., 7 Ch. Div. 255, are striking examples. I desire particularly to refer to the very guarded way in which Lord Justice Baggallay puts his

judgment in *Wake* v. *Varah*, limiting the operation of the latitudinarian construction strictly to cases where the context requires it, and sufficiently saving the salutary rule that in all other cases the strict construction shall prevail.

"It is this peculiarity in the present case which enables me to decide it in favour of the claimants William Christie Brand and his brother without infringing to any extent on the authority of the two Scots cases I have mentioned, or of the case of *Hairsten's Judicial Factor* v. *Duncan*, 18 R. 1158, which was held to be ruled by the case of *Forrest's Trustees* v. *Rae*. The contest there was between the issue of predeceasing liferenters and residuary legatees, but the clause of residue contained no words declaring or importing that the fund was to fall into residue only on the failure of all the issue.

"Nor am I obliged to resort to English cases merely as authority for the proposition that, if the context requires it, the word 'survivors' may be read in a non-literal sense. The case of *Ramsay's Trustees* v. *Ramsay*, 4 R. 243, decided that it may be so read in order to avoid intestacy, and it seems to me that that is a less cogent reason for doing so than where, as here, the terms of the gift are positively inconsistent with the literal construction of the word."

The claimants Robert Paterson's trustees reclaimed, and argued—The word "survivor" occurred twice in this clause. The first time it occurred it was used in its strict sense. It must also be read strictly the second time it was used because the same word could not have two different meanings in the same clause. The precise intention of the testator must be held to be expressed by the words he used—Jarman on Wills, p. 1500, *et. seq.*; *Ferguson* v. *Dunbar*, May 7, 1781, 3 B.C.C., 468 note; Ch.-B. Pollock in *Lee* v. *Stone*, January 18, 1848, 1 W. H. and G. Exch. p. 687; *Crowder* v. *Stone*, March 12, 1827, 3 Russell 217; *Dorin* v. *Dorin*, April 16, 1875, L.R., 7 Eng. and Irish App. 568; *Doe* v. *Wainwright*, November 23, 1793, 5 D. & E. 427; *Cumming's Trustees* v. *White*, March 2, 1893, 20 R. 454. Under the precedents of the English cases there must be something in the context showing that the word "survivor" was not to receive its natural meaning—*Hurry* v. *Morgan*, November 16, 1866, L.R., 3 Eq. 152; *Wake* v. *Varah*, March 17, 1875, L.R., 2 Ch. D. 348. There was no precedent in the law of Scotland for the Lord Ordinary's view, which was unsound.

Argued for claimants W. C. Brand and Robert Brand—The interlocutor of the Lord Ordinary should be affirmed. His argument was sound in law. Their claim failed if it was held that survivor must be construed literally, but an equitable rule allowed these words to be construed according to their meaning as shown by the context of the deed. For "issue of survivor" should be read "surviving issue of either." "Whom all failing" included issue of the survivor. The meaning of the will was that this legacy of £2500 was to be applied for the two brothers and their children, whom all failing it was to go to the residuary legatees.

At advising—

LORD JUSTICE-CLERK—[*After stating the circumstances*]—The point of difficulty arises on the words "and the issue of the survivor." If these words are to be read according to their strict meaning, then the children of William must fail, for Robert survived William, therefore they are not the issue of the survivor. If the words are so read, then the intention of the testator as expressed was that if one of his stepsons should leave issue but die after his childless brother, his children should take the whole sum of £2500, but that if the childless brother died last then they should only take half of it. Such a provision in a bequest in which the testator is dealing with the case of both his stepsons having predeceased him, seems upon the face of it so irrational in itself as to make it quite inconceivable that it was intended. To suppose that he meant to give the whole to the same issue of one stepson if he survived his childless brother, but to deprive them of half if he predeceased his childless brother, is impossible. In the words of Vice-Chancellor James in the case of *Badger*—"It is scarcely possible to attribute to an ancestor the intention that the position of his descendants in the second degree is to depend on the accident of whether their parent dies first or second." It seems to me therefore that this case falls within the cases quoted by the Lord Ordinary, in which it has been held possible and right to read such words as we have here according to what it is certain was the intention of the testator, viz., that those should succeed who did survive him whether stepsons or issue of either stepson surviving. And when we have as here a gift over only in the event of "all failing," the conclusion becomes irresistible that what the testator meant was that as long as there were children of either to take, the whole should go to such issue. I think we have here, to use the words of Lord Hatherley in the case of *Corbett*, a case in which "a clear and necessary inference can be drawn from the terms of the will."

I do not think it right that any general rule should be laid down. The only rule which is fixed is that the words of a will must be read according to their strict and natural meaning unless in the particular case it be opposed, as above expressed, to a clear and necessary inference.

Holding it to be so here, I proceed entirely in this case upon the specialties of the case.

I concur with the Lord Ordinary in the very clear views expressed in his opinion, and move your Lordships to adhere to his interlocutor.

LORD RUTHERFURD CLARK—I am very glad that your Lordship has been able to arrive at the opinion which you have ex-

pressed. I daresay it is in accordance with what we may conjecture would have been the intention of the testator in the circumstances which have occurred. I can only say that I cannot concur. In my opinion the judgment is contrary to what I believe to be a settled rule of construction.

LORD TRAYNER—I concur with the Lord Ordinary and agree with his opinion. I am further of opinion that the judgment which we are now pronouncing neither introduces a new rule of construction of such settlements nor interferes with the construction of any existing rule.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuers—Lees—Tait. Agent—F. J. Martin, W.S.

Counsel for Defenders — Salvesen — M'Clure. Agents — Simpson & Marwick, W.S.

Saturday, December 9.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BIGGART & FULTON *v.* STEWART, BROWN, & COMPANY.

Sale—Contract—Principal and Agent—Disclosed Principal—Title to Sue.

Stevenson & Company, merchants in Manila, through their representatives in Liverpool and Glasgow, placed in the hands of Stewart, Brown, & Company, commission merchants, Glasgow, for sale a cargo of sugar on these terms—"We have this day sold to you on account of Stevenson & Company about 700 tons sugar at £10, 12s. 3d. c. i. f. Liverpool." Stewart, Brown, & Company, in disposing of this cargo, sold 100 tons to Biggart & Fulton, Glasgow, on these terms:—"31st March 1892—We have this day sold to you on account of Messrs Stevenson, Manila, about 100 tons sugar at £10, 17s. 3d. c. i. f. Liverpool." Biggart & Fulton authorised Stewart & Brown to finance this transaction, paid them £100 to account, and ordered them to sell the sugar on its arrival. They did so, but the price realised was less than that due to them, and they sued Biggart & Fulton for the difference.

The defenders maintained (1) that the pursuers being represented in the contract as agents for a disclosed principal were not entitled to sue; (2) that no such contract as there expressed was made between Stevenson & Company and the defenders; and (3) that in this contract the pursuers were not acting as agents for Stevenson & Company or with their authority.

Held (*diss.* Lord Rutherfurd Clark) that the contract of 31st March 1892 was at an end when the defenders had paid the contract price through the pursuers and taken delivery, and that the debt sued for arose not out of the contract but out of the agreement entered into subsequent thereto, and that the pursuers were entitled to sue the defenders as their principals in the sale made on their order.

These were cross-actions in the Sheriff Court of Lanarkshire by Stewart, Brown, & Company, commission merchants and produce brokers, Glasgow, with consent of W. F. Stevenson & Company, merchants, of Manila and Iloilo, against Biggart & Fulton, marine insurance brokers, Glasgow, and by Biggart & Fulton against Stewart, Brown & Company.

Stevenson & Company were represented in Liverpool by Horsley, Maclaren, & Company, and in Glasgow by Stevenson & Fleming. After negotiations, which began in the end of 1891, they in March 1892, through their representatives in Liverpool and Glasgow, disposed of a cargo of 700 tons of sugar to Stewart, Brown, & Company, in terms of the following sale-note:—

"*Liverpool, 31st March* 1892.

"Messrs Stewart, Brown, & Co.,
per Messrs Stevenson & Fleming,
Glasgow.

"DEAR SIRS,—We have this day sold to you on account of Messrs W. F. Stevenson & Co. about 700 tons usual American assortment of Iloilo sugar at £10, 12s. 3d. c. & f. Liverpool.

"*Shipment* by steamer and/or steamers from Iloilo during the months of April and/or May and/or June 1892.

"*Payment.*—Buyers to accept shippers' drafts at 3 m/s, with shipping documents attached, deliverable against payment.

"*Insurance.*—Horsley, Kibble, & Co. to insure on their floating policies f. p. a. at buyers' expense.

"*Contingent comn.*—Buyers to return to shippers half the profit (if any), but not exceeding half of first 10% profit.

"*Brokerage* ½% to buyers.—Yours truly,
"HORSLEY, M'LAREN, & Co."

In the course of splitting and re-selling the cargo Stewart, Brown, & Company, on 31st March 1892, sold to Biggart & Fulton 100 tons on these terms—"We have this day sold to you, on account of Messrs W. F. Stevenson & Co., Manila and Iloilo, about 100 tons usual American assortment of Iloilo sugar at £10, 17s. 3d. c. i. f. Liverpool.

"*Shipment* by steamer and/or steamers from Iloilo during the months of April and/or May and/or June 1892.

"*Payment.*—We to accept shippers' drafts at three m/s, with shipping documents attached deliverable against payment.

"*Insurance.*—Horsley, Kibble, & Co. to insure on their floating polices f. p. a. at buyers' expense.

"*Contingent Comn.*—Buyers to return shippers half the profit (if any), but not exceeding half of first 10% profit.—Yours truly, "STEWART, BROWN, & Co."

Stewart, Brown, & Company were afterwards instructed by Biggart & Fulton