"pay to the executors or administrators of said deceased partner, for the benefit of the widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived." The amount of the fund payable under this article is, we are told, about £800, and the question is how it is to be dealt with. Is it to fall into executry, or to be disposed of in a particular manner? It appears to me, that looking to the terms of the clause in the contract of copartnery, it comes into the hands of the deceased partner's executors for the benefit of his widow and child, and falls to be divided into two equal portions, and that one of these portions must be paid to the widow and the other to the child.

The last question is, whether the widow's share of the sum to be paid under the clause of the contract of copartnery is to be impounded by the executors in order to be added to the fund out of which the annuity provided to her by the will is payable, or whether she is entitled to her share of this sum in addition to that annuity? I am of opinion that the latter is the true answer, and that the widow is entitled to have her share of this sum paid over to her, and that it does not fall to be impounded by the executors to form part of the fund out of which her annuity is payable.

LORD YOUNG—I agree in regard to the answer to be given to the first question. I think the will is not revoked either as to the increased annuity thereby given to the testator's wife or as to the provisions to the mother.

With respect to the second question, my view is that the widow is entitled to the annuity of £200, increased to £400 absolutely, and that the whole estate, income and capital, must go to meet that in the first instance.

In regard to the annuity provided to the testator's mother, I see nothing to limit that provision and make it payable only out of the income of the estate. The words "if my estate permit" mean that the annuity to the widow is to be paid first, and that till it is paid the estate can afford nothing; but if after meeting the widow's annuity and the testator's debts, there is enough left to provide an annuity of £100 to the testator's mother, she is entitled to have it, and we are informed that there will be no difficulty about it, the estate being sufficient to meet both annuities.

On the other questions I agree with your Lordship.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER was absent.

The Court answered the first question in the negative: Found, in answer to the second, that the third party's annuity was not liable to be diminished should there not be sufficient funds to meet both the annuities to the third and the fourth parties; also that payment of the annuities was not limited to the income of the estate, but might, to the extent to which that might be necessary, be paid out of capital: Answered the first alternative of the third question in the negative, and the second alternative in the affirmative, and found that the profits in question fell to be divided equally between the third and fifth parties: Answered the fourth question in the negative.

Counsel for the First, Second, and Fifth Parties — Macfarlane — Graham Stewart. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Third Party—Guthrie—Wilson. Agents—Duncan & Black, W.S.

Counsel for the Fourth Party—Shaw—Salvesen. Agents—Cairns, M'Intosh, & Morton, W.S.

Tuesday, July 14.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

DARLING *v.* GRAY & SONS.

Reparation—Title to Sue—Two Actions for Same Injury.

A workman died during the progress of an action of damages which he had brought against his employers for injuries sustained in their service, and his mother, as his executrix, was sisted as pursuer in the action. The mother afterwards brought an action of damages as an individual against her son's employers for the loss caused to herself by the death of her son. *Held* that this second action was incompetent.

Alexander Darling, a mason in the employment of Messrs William Gray & Sons, builders, raised an action against his employers in the Court of Session to recover damages in respect of injuries which he had received while in their employment, and, as he alleged, through their carelessness. He died on 6th January 1891, during the progress of the action, after issues had been adjusted, and his mother, as his executrix, lodged a minute sisting herself as the pursuer in the action.

On 30th April 1891 she raised another action in the Sheriff Court at Edinburgh as an individual against the same defenders, in which she sought to recover damages from them as *solatium* to herself and as reparation for the loss which she had sustained by the death of her son.

The defenders pleaded, *inter alia*, that the action was incompetent.

The pursuer having mentioned that she intended to appeal the case to the Court of Session with the view of having it conjoined with the action brought against the defenders by Alexander Darling before his death, the Sheriff-Substitute (HAMILTON) on 6th June 1891 pronounced an interlocutor allowing a proof before answer without disposing of the defenders' pleas in so far as preliminary.

The pursuer appealed to the Second Division of the Court of Session, and argued—In the first action the executrix could only recover damages for injuries done to the dead man himself, while in the present one she claimed for injuries done to her through his death. She had suffered pecuniary loss for which she demanded recompense, as well as *solatium* for her wounded feelings. Even if her son's claim for damages had been settled in full, and he had subsequently died of his injuries, she would not have been barred from suing for damages for her loss. This case should therefore be conjoined with the first action, and remitted to the Lord Ordinary to be tried conjointly with it—*Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980.

The defenders argued—The present action was incompetent and unnecessary. It was enough for the defenders to have to meet one action for the one injury. There was no authority for allowing a second action to be raised to obtain further damages for the same injury as was covered by the first. This was clearly established in England by Lord Campbell's Act—*Stevenson* v. *Pontifex & Wood*, December 7, 1887, 15 R. 125; *Macmaster* v. *Caledonian Railway Company*, November 27, 1885, 13 R. 252; Addison on Torts, 454.

At advising—

LORD YOUNG — The question argued before us in this case was represented as being one of interest and importance, and also of a novel character. I quite allow that it is so; I cannot, however, allow that it presents any difficulty. The facts are quite clear. Alexander Darling, a workman employed by Messrs William Gray & Son, builders, raised an action of damages against them for injuries sustained by him in their service, and, as he alleged, through their fault. He died in the course of the action—after the serving of the summons—and his mother, *qua* his executrix, sisted herself as pursuer, a proceeding quite within her rights. Thinking, however, it was a favourable opportunity, she brought a second action as an individual, on the view that she was a separate sufferer by her son's death, and as such was entitled to damages for her loss and her injuries apart from his. I am not considering the special facts of this case, but will take a general view. The question is quite a novel one, and I am clearly of opinion that the course adopted by the mother was incompetent, and that the action should be dismissed as incompetent, with expenses in both Courts.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

The Court dismissed the action as incompetent.

Counsel for the Appellant—Rhind. Agent—D. Howard Smith, Solicitor.

Counsel for the Respondent—C. N. Johnstone. Agents—T. & W. A. M'Laren, W.S

Tuesday, July 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

M'KETTRICK (HAIRSTEN'S JUDICIAL FACTOR) *v.* M'GOWAN AND OTHERS.

Succession—Construction—"Survivors" as Equivalent to "Others."

A testator directed his trustees upon his decease to secure and lend out upon good and sufficient bonds payable to themselves the sum of £700 for behoof of each of his five daughters in liferent allenarly, and the lawful issue of each in fee, and provided that "in case any one or more of my said daughters shall die before me or without leaving lawful issue of her or their bodies, the sum or sums provided and intended for them and theirs as aforesaid, not only the original sum so provided, but the sum or sums accrescing to her or them by virtue of the present clause, shall appertain and accresce to the survivor or survivors of my said daughters in liferent, . . . and to their issue and children, share and share alike, in fee." He further provided that, if any of his daughters desired it, his trustees should invest her £700 in the purchase of lands or houses, and should take the titles to his said daughter in liferent allenarly and her issue in fee, "whom failing to my said other daughters in liferent, and their respective issue in fee, in case of their death or their dying without leaving such issue in manner before mentioned."

The last two survivors of the testator's daughters died unmarried, and the fee of the original and accrescing shares liferented by them was claimed by the issue of predeceasing daughters, and also by representatives of the residuary legatees named in the settlement.

Held (*following Forrest's Trustees* v. *Rae, &c.*, 12 R. 389) that the words "survivor or survivors" in the clause of accretion were to be taken in their natural meaning, and consequently that the issue of predeceasing daughters were not entitled to share in the fund in dispute.

Thomas Hairstens, tanner in Maxwelltown, Kirkcudbright, died 29th July 1827 leaving a trust-disposition and settlement dated December 22, 1822, and codicil thereto dated September 22, 1823.

By his trust-disposition and settlement he disponed to certain trustees his whole estate, heritable and moveable, for payment of his debts, sickbed and funeral expenses, annuities to his widow and a brother. In the fourth place he made certain provisions in favour of his five daughters by name, payable to them on their attaining majority, and in the sixth place he appointed his trustees, so soon