be asked to interfere and carry out to its completion a fraud which Sturrock would probably have perpetrated on the defenders in time. But then he has not done so. The position in which he has left matters is this, that their bond stands upon record, and they have not got the money. In these circumstances I am unable to see any ground for altering the position of the defenders to their prejudice by relieving the pursuer of his obligation to them, or by depriving them of their security over his bond. I do not think it necessary to go further into a consideration of the facts of the case, because I entirely agree with Lord Adam, and accept his view that the crucial point is the perpetration of the fraud upon Currie by the embezzlement of his money.

LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—Kemp. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—J. Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Friday, November 25.

FIRST DIVISION.

WOOD (MENZIES' JUDICIAL FACTOR) *v.* WOOD AND OTHERS.

Succession — Joint Bequest or Separate Bequests—Accretion.

Terms of a bequest to a plurality of persons named which *held* (*dub.* Lord Kinnear) to import an intention that there should be accretion, and to displace the rule of construction laid down in *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191.

The circumstances which gave rise to this special case are thus stated in the opinion of Lord Adam—"The late Captain William Menzies left a trust-disposition and settlement and relative codicil dated respectively 4th February 1856 and 12th November 1858, by which he left his whole estate, heritable and moveable, to trustees. The judicial factor on his estate is the party of the first part. By the thirteenth purpose of the trust he directed his trustees, after the death of the longest liver of his wife and his daughter Emily, afterwards Mrs Simpson, to hold a sum of £10,000, which was liferented by them, in trust for the child or children of his daughter, but in the event, which happened, of his daughter dying without issue, he declared that it should be lawful for her to bequeath the sum of £1000 out of such fund to such person or persons, or for such purposes, as she should by will or codicil direct, and that in the same event the remainder of said fund should be held on the same terms and conditions as the residue of his means and estate. This sum of £1000 which his daughter was thus entitled to bequeath was, by codicil dated 12th November 1858, increased to the sum of £3000.

"The daughter, Mrs Simpson, died without leaving issue, on 8th August 1897. She left a trust-disposition and settlement dated 21st July 1891, by which she conveyed her whole estate to trustees, who are the parties of the second part. By the second purpose of the trust she bequeathed various legacies, and, *inter alia*, one in these terms—'To the grandchilden of my brother William Menzies, who are William Bradford Hardinge Campbell Menzies, merchant and farmer at Old Fort, M'Dowall County, North Carolina, United States, America; Miss Sarah Catherine Menzies, Kenneth Campbell Menzies, Henry Charles Menzies, Edward Bruce Menzies, and Annie Beatrice Menzies, all residing at Hickory, North Carolina aforesaid, the sum of two thousand pounds equally among them, share and share alike.'

"She further bequeathed legacies to the amount of £1000 to the grandchildren of her brother Kenneth Menzies in the following terms—'for payment to Miss Jessie Louise Menzies, only child of my nephew Bruce Hardinge Menzies, the sum of £330; and to Frederick James Furlong and William Leo Furlong, sons of my niece who was the daughter of my brother Kenneth Menzies . . . equally between them, and to the survivor of them after the death of either, the sum of £670.'

"After bequeathing a variety of other legacies the deed proceeds—'That whereas by the settlement or last will and codicil executed by my late father Captain William Menzies, he directed that the sum of three thousand pounds Consols should be at my disposal after my death and be paid to any one I might appoint, therefore in pursuance of that power I direct and appoint that the said sum of three thousand pounds Consols, or the value thereof, shall form part of the fund to be applied in paying the legacies of two thousand pounds and one thousand pounds bequeathed to the grandchildren of William Menzies and the grandchildren of Kenneth Menzies.'

"The residue of her estate she directed to be divided equally among the daughters of her aunt Emily, Lady Hardinge, who are the parties of the fourth part.

"Miss Sarah Catherine Menzies, one of the six grandchildren of William Menzies above named, predeceased Mrs Simpson, having died unmarried on 22nd May 1896. It is admitted that the legacy of two thousand pounds did not vest until the testatrix's death."

The opinion of the Court was desired on the following questions, *inter alia*:—"(1) Did the one-sixth equal share of the said legacy of £2000, which the said late Miss Sarah Catherine Menzies would have taken had she survived the testatrix, lapse by her predecease? or (2) Did said share of legacy accresce to the surviving grandchildren of William Menzies *secundus?*"

Argued for the first parties—Miss Sarah Catherine Menzies' share of the legacy lapsed into residue, and accretion did not

take place. The present case was ruled by the decision in *Paxton's Trustees* v. *Cowie*, July 18, 1888, 13 R. 1191, where Lord President Inglis (p. 1197) laid down the principles applicable to a bequest to a plurality of persons sufficiently described for identification. Here the persons to whom the legacy was given were all named, and there was nothing to take the case out of the general rule. The absence of a survivorship clause was significant, especially in view of its presence in the bequest of £670 to Kenneth's grandchildren—*Wilson's Trustees* v. *Wilson's Trustees*, November 10, 1894, 22 R. 62, also referred to.

Argued for the third parties—This was a bequest to a class, and accretion had taken place. The scheme of the settlement as regarded the legacies was to benefit the grandchildren of her brothers William and Kenneth *per stirpes*. The Menzies children were named parenthetically, as it were, and not with a view to apportioning the legacy among cartain definite individuals. These considerations were sufficient to distinguish the case from that of *Paxton's Trustees*, *ut sup.*

At advising—

Lord Adam— . . . . [*After narrating the circumstances of the case as above, his Lordship continued*]—The law on this subjectis thus authoritatively stated in the case of *Paxton's Trustees*, 13 R. 1191, by the late Lord President Inglis—"When a legacy is given to a plurality of persons named or sufficiently described for identification, 'equally among them' or in 'equal shares,' or 'share and share alike,' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The application of this rule (he goes on to say) may of course be controlled or avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees."

The question therefore seems to me to be whether on a sound construction of Mrs Simpson's settlement she intended that the whole of the £2000 legacy should go to the surviving grandchildren of William. And in considering that question we must have regard not only to the particular terms in which the gift of the legacy is expressed, but we must also see whether the *prima facie* inference to be drawn from these terms is not "controlled or avoided" by the other provisions of the deed.

Now, the gift of the legacy is thus expressed, "to the grandchildren of my brother William, who are William Bradford Hardinge Menzies" (and so on, the six grandchildren being specifically named) "the sum of two thousand pounds equally among them, share and share alike." Had there been nothing else in the deed to control these words, I should have held that this was a legacy to a plurality of persons named, equally among them, and therefore that there was no accretion. It was argued, however, that it was a legacy to the grandchildren as a class, to be ascertained at the testator's death, and that the sentence beginning "Who are William," and so on, was merely parenthetical and descriptive of the grandchildren as they then existed.

Standing alone, I should have thought that rather a forced construction of the clause. When we consider, however, the other clauses of the deed, it seems to me that the testatrix did in fact intend that the whole of the £3000 should be divided between the grandchildren of William and the grandchildren of Kenneth in the ratio of £2000 to the one class and £1000 to the other, and that therefore there should be accretion. She directs that the £3000 is to be applied in paying the legacies of £2000 and £1000 bequeathed to the grandchildren of William Menzies and the grandchildren of Kenneth Menzies. There is no other direction as to the disposal of the £3000. I do not see how this direction is to be fulfilled if we are to assume that the share of a predeceasing grandchild lapsed and did not accresce to the survivors.

It is true that in the case of the legacy of £670, part of the £1000, to Frederick and William Furlong, two of Kenneth's grandchildren, it is given equally between them and the "survivor of them," and had the testatrix used these words as regards the legacy to William's grandchildren, that would have removed all difficulty. No doubt the inference is strong that, having instituted survivors in the one case and not in the other, she did not intend survivorship in the case of William's grandchildren. Nevertheless I think that the testatrix has so clearly expressed her intention that the whole of the £2000 should go to William's grandchildren, that she could not have intended to exclude accretion in the event of the predecease of any of the grandchildren, as otherwise her intention would not be accomplished.

If that be so, then the first question must be answered in the negative, and the second in the affirmative, and it is unnecessary to answer the third and fourth questions.

Lord M'Laren—The case of *Paxton's Trustees* to which we were referred is doubtless of high authority, being a decision of the whole Court—and the opinion of the Lord President is important as stating accurately and with the necessary qualifications, the application of the well-known rule as to the effect of a legacy given in shares. If a testator gives £5000 to five persons by name, adding the words "share and share alike," according to the ordinary use of language, it is the same thing as if he said "I give £1000 to A and £1000 to B," and so on, the only difference being that in the case supposed, the testator begins by using words descriptive of the entire sum which he means to bequeath, and then adds words explaining that he does not intend a joint bequest, but a series of separate bequests. But, as was pointed out by the Lord President in the case of *Paxton's Trustees*, in a passage to which Lord Adam referred, this rule of construction is not an arbitrary rule. It may be displaced by

plain indications furnished by the context that the testator meant a joint bequest, in which case of course the survivors will take the whole by accretion. A familiar example is the case of a legacy to a family, the individuals not being named, in which case the words "share and share alike," which are very often added, have absolutely no meaning, because if the gift is to the family as at the date of the testator's death there can be no room for a lapse of any part of the gift. Here then are these indications, all pointing in the same direction, which make it clear to my mind that the testator contemplated a joint bequest. In the first place, she begins by describing the legatees as a family, and only introduces their names and addresses parenthetically, apparently for the purpose of enabling the trustees to trace them. In the second place, there is the distinction to which Lord Adam referred, depending on the expression of a right of survivorship in certain events. Thirdly—and this is the most important indication—when the testator comes to exercise her power of disposal of the money inherited from her father, and directs that the bequest to the American family shall be paid out of this fund. She does not repeat the words "share and share alike," but disposes of the money in terms which amount to a gift to the family jointly. For these reasons I think the rule of *Paxton's Trustees* is displaced by contrary indications, and that there is no lapse.

Lord Kinnear—I have found this question of considerable difficulty, and am unable for myself to distinguish the case from those in which it has been found that a legacy to a plurality of persons named or sufficiently described for identification, equally among them, or share and share alike, separates the bequest in favour of each of the legatees so definitely and completely from the bequests in favour of the others that there is no room for accretion. In this case the parenthetical sentence, if it is properly so described, beginning with the words "who are William" appears to me, as to your Lordships, to be inserted for the purpose of enabling the trustees under the settlement to discover who the legatees are, and that is just another form of words for expressing what is explained by the late Lord President in *Paxtons' Trustees*, where he speaks of a legacy to a plurality of persons "named or sufficiently described for identification," and I confess that I should not myself have been able to distinguish that case from the present. But I agree that the rule of that case, like other rules for the construction of wills, must be subject to this qualification, that if the testator has expressed an intention to the contrary, his intention must receive effect, and that rules of construction are not to be so rigorously applied as to defeat the intentions of the testator. Your Lordships are both of opinion that the intention of the testatrix in this case to make a joint bequest, and not a number of separate bequests, is clearly expressed in the will, and if so, it is clear that we must give effect to it. On that question of construction I am not inclined to set up my own view, which I confess is not entirely the same, in opposition to that of your Lordships, and I am content to express the serious difficulty I have in concurring in the conclusion at which your Lordships have arrived.

The Lord President was absent.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the First and Second Parties—Johnston, Q.C.—W. C. Smith. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Third Parties—Guthrie, Q.C.—J. D. Millar. Agents—Duncan & Black, W.S.

Counsel for the Fourth Parties—Napier. Agents—J. A. Campbell & Lamond, C.S.

Friday, November 25.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

SMITH & SONS *v.* SPENCE.

Process—Appeal—Competency—Debts Recovery (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 96), *sec.* 13.

There is no appeal under the Debts Recovery Act 1867, direct from the Sheriff-Substitute to the Court of Session.

In an appeal from the Sheriff-Substitute under the Debts Recovery Act 1867, the sheriff, while practically disposing of the merits of the case, remitted the question of expenses to the Sheriff-Substitute, thereby precluding appeal to the Court of Session in respect that his interlocutor was not final. *Held* (under the above rule) that an appeal to the Court of Session from the Sheriff-Substitute's interlocutor disposing of the expenses under the remit was incompetent.

Richard Smith & Sons raised an action in the Sheriff Court of the Lothians and Peebles against William Spence for payment of £37, 19s. 6d. The action was brought under the Debts Recovery Act 1867. After a proof, the Sheriff-Substitute (Hamilton) on 10th March 1898 pronounced the following interlocutor:—"Repels the defences, and decerns against the defender in terms of the libel: Finds the pursuers entitled to expenses: Appoints an account thereof to be made up, and remits the same when lodged to the Auditor of Court to tax and report."

The defender appealed to the Sheriff (Rutherfurd), who on 10th June recalled the Sheriff-Substitute's interlocutor in so far as it decerned against the defender in terms of the libel, "and in lieu thereof